LF 5011 adv (9/12)

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF WASHINGTON

In re: ASTRIA HEALTH, et al., Debtor(s) ASTRIA HEALTH, et al., Plaintiff(s) UNITED STATES SMALL BUSINESS ADMINISTRATION, et al. Defendant	)	Case No. 19-01189-WLH11 Adv. Proc. No. 20-80016-WLH **TRANSMITTAL OF MOTION FOR WITHDRAWAL OF REFERENCE**

To: United States District Court
Eastern District of Washington
PO Box 1493
Spokane, WA 99210-1493

Case Name:	Astria Health et al, v United States Small Business Administration, et al.
Bankruptcy Case #:	19-01189-WLH11
Adversary #:	20-80016-WLH
Bankruptcy Judge:	Whitman L. Holt

From: United States Bankruptcy Court
Eastern District of Washington
PO Box 2164
Spokane, WA 99210-2164

Comments: Please see attached comments from Judge Holt.

Attachments: Case Docket, Party List, Proceeding Documents

Dated: July 17, 2020

Clerk, U.S. Bankruptcy Court

by: /s/ Kathleen Chamberlin
Deputy Clerk

APLDIST, APPEAL

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF WASHINGTON (Spokane/Yakima)
Adversary Proceeding #: 20-80016-WLH

Assigned to: Whitman L Holt
Lead BK Case: 19-01189
Lead BK Title: Astria Health
Lead BK Chapter: 11
Demand: $3299000

Date Filed: 05/15/20

Nature[s] of Suit: 91 Declaratory judgment
72 Injunctive relief - other
21 Validity, priority or extent of lien or other interest in property
02 Other (e.g. other actions that would have been brought in state court if unrelated to bankruptcy)

Plaintiff

Astria Health
900 W Chestnut Ave
Yakima, WA 98902
Tax ID / EIN: 81-3979675

represented by **Sam Alberts**
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(See above for address)

Plaintiff

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Plaintiff

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represented by **Sam Alberts**
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Plaintiff

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Tax ID / EIN: 91-1286274

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Plaintiff

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Plaintiff

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Tax ID / EIN: 47-5499567

represented by **Sam Alberts**
(See above for address)

Plaintiff

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represented by **Sam Alberts**
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Plaintiff

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Tax ID / EIN: 27-0173556

represented by **Sam Alberts**
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V.

Defendant

United States Small Business Administration and Jovita Carranza, in her capacity as Administrator for the United States Small Business Administration

represented by **Brian M Donovan**
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Filing Date	#	Docket Text
05/15/2020	1	Adversary case 20-80016. COMPLAINT. Fee Amount $350. Nature of Suit: (91 (Declaratory judgment)) (72 (Injunctive relief - other)) (21 (Validity, priority or extent of lien or other interest in property)) (02 (Other (e.g. other actions that would have been brought in state court if unrelated to bankruptcy))) (Alberts, Sam) (Entered: 05/15/2020)
05/15/2020		RECEIPT of Complaint(20-80016) [cmp,cmp] (350.00) Filing Fee. Receipt number A7614312. Fee amount 350.00 (RE: Complaint1). (U.S. Treasury) (Entered: 05/15/2020)
05/15/2020	2	MOTION for Temporary Restraining Order and Request for Hearing and Briefing Schedule With Respect for a Preliminary Injunction. Filed by Sam Alberts on behalf of Astria Health, Glacier Canyon, LLC, Kitchen and Bath Furnishings, LLC, Oxbow Summit, LLC, SHC Holdco, LLC, SHC Medical Center - Toppenish, SHC Medical Center - Yakima, Sunnyside Community Hospital Association, Sunnyside Community Hospital Home Medical Supply, LLC, Sunnyside Home Health, Sunnyside Professional Services, LLC, Yakima HMA Home Health, LLC, Yakima Home Care Holdings, LLC (Attachments: # 1 Exhibits A through F) (Alberts, Sam) Hearing scheduled 5/19/2020 at 11:00 AM at (877) 402-9757, Access 7036041 - Yakima. DEPUTY Clerk Note: Hearing information added and entry clarified. Modified on 5/18/2020 (CMR). (Entered:

		05/15/2020)
05/15/2020		Judge Whitman L Holt added to case. (CMR) (Entered: 05/15/2020)
05/15/2020	3	ORDER Uploaded. Filed by Alberts, Sam. (RE: 2) (Entered: 05/15/2020)
05/15/2020	4	NOTICE of Scheduling Conference. Written Report due: 6/18/2020. Scheduling Conference scheduled 6/24/2020 at 01:30 PM at (877) 402-9757, Access 7036041 - Yakima. (CMR) (Entered: 05/15/2020)
05/15/2020	5	SUMMONS Issued. (CMR) (Entered: 05/15/2020)
05/18/2020	6	ORDER Setting Emergency Hearing Regarding Debtors' Motion for Temporary Restraining Order (RE: Motion for Temporary Restraining Order2). Hearing scheduled 5/19/2020 at 11:00 AM at (877) 402-9757, Access 7036041 - Yakima. (CMR) (Entered: 05/18/2020)
05/18/2020	7	CERTIFICATE of Service. Filed by Kurtzman Carson Consultants LLC (RE: Complaint1, Motion for Temporary Restraining Order2, Notice of Scheduling Conference4, Summons Issued5, Order6). (Nguyen, Angela) (Entered: 05/18/2020)
05/19/2020	8	ORDER Uploaded. Filed by Alberts, Sam. (RE: 2) (Entered: 05/19/2020)
05/19/2020	9	PDF with attached Audio File. Court Date & Time [5/19/2020 11:15:17 AM]. File Size [3756 KB]. Run Time [00:15:39]. (NydiaUrlacher). (Entered: 05/19/2020)
05/19/2020	10	NOTICE of Appearance. Filed by Brian M Donovan on behalf of United States Small Business Administration and Jovita Carranza, in her capacity as Administrator for the United States Small Business Administration. (Donovan, Brian) (Entered: 05/19/2020)
05/19/2020	11	CERTIFICATE of Service.. Filed by Brian M Donovan on behalf of United States Small Business Administration and Jovita Carranza, in her capacity as Administrator for the United States Small Business Administration (RE: Notice of Appearance10). (Donovan, Brian) (Entered: 05/19/2020)
05/19/2020	12	MINUTE Entry Re: Motion for Temporary Restraining Order. HELD. The parties reached an agreement and submitted a proposed agreed order. Court finds the schedule outlined is appropriate and will sign/enter order (RE: 2 Motion for Temporary Restraining Order) Appearances: Samuel Maizel, Thomas Buford, Sarah Schrag, Attorneys for Plaintiff; Brian Donovan, Attorney for Defendant United States Small Business Administration. Other parties: John Gallagher with Astria Health; Michael Lane with Astria Health; Gary Dyer, Attorney for US Trustee; Ryan Jareck, Attorney for Lapis Advisers; William Kannel, Attorney for UMB Bank, Lapis Advisers; David Leigh, Attorney for Med One Capital Funding LLC; Richard Hyatt, Attorney for TIAA Commercial Finance Inc; Boris Mankovetskiy, Jane Pearson and Andrew Sherman, Attorneys for the Unsecured Creditors Committee; Darin Dalmat, Attorney for Washington State Nurses Assc; Michael Siderius, Attorney for GE Precision Healthcare LLC (NNU) (Entered: 05/19/2020)

05/20/2020	13	AGREED ORDER Regarding Scheduling and Reservation of PPP Funds (RE: Motion for Temporary Restraining Order2). Hearing scheduled 6/3/2020 at 11:00 AM at (877) 402-9757, Access 7036041 - Yakima. (CMR) (Entered: 05/20/2020)
05/26/2020	14	BRIEF signed by Brian M. Donovan. Filed by Brian M Donovan on behalf of United States Small Business Administration and Jovita Carranza, in her capacity as Administrator for the United States Small Business Administration (RE: Motion for Temporary Restraining Order2). (Attachments: # 1 Exhibit A # 2 Exhibit 1 # 3 Exhibit 2 # 4 Exhibit 3 # 5 Exhibit 4 # 6 Exhibit 5 # 7 Exhibit 6 # 8 Exhibit 7 # 9 Exhibit 8 # 10 Exhibit 9 # 11 Exhibit 10 # 12 Exhibit 11 # 13 Exhibit 12 # 14 Exhibit 13)(Donovan, Brian) (Entered: 05/26/2020)
05/26/2020	15	CERTIFICATE of Service.. Filed by Brian M Donovan on behalf of United States Small Business Administration and Jovita Carranza, in her capacity as Administrator for the United States Small Business Administration (RE: Brief14). (Donovan, Brian) (Entered: 05/26/2020)
06/01/2020	16	REPLY signed by Samuel R. Maizel (RE: Brief14). Filed by Sam Alberts on behalf of Astria Health, Glacier Canyon, LLC, Kitchen and Bath Furnishings, LLC, Oxbow Summit, LLC, SHC Holdco, LLC, SHC Medical Center - Toppenish, SHC Medical Center - Yakima, Sunnyside Community Hospital Association, Sunnyside Community Hospital Home Medical Supply, LLC, Sunnyside Home Health, Sunnyside Professional Services, LLC, Yakima HMA Home Health, LLC, Yakima Home Care Holdings, LLC (Alberts, Sam) (Entered: 06/01/2020)
06/03/2020	17	PDF with attached Audio File. Court Date & Time [6/3/2020 11:24:37 AM]. File Size [36135 KB]. Run Time [02:30:34]. (NydiaUrlacher). (Entered: 06/03/2020)
06/03/2020	19	MINUTE Entry Re: Motion for Temporary Restraining Order and Use of PPP Funds. HELD. The court heard argument of counsel and for the reasons stated on the record, the court grants motion and delivers oral ruling. Proposed form of order to be circulated and submitted to the court for signature. (related document(s): 2 Motion for Temporary Restraining Order filed by Astria Health, Glacier Canyon, LLC, Kitchen and Bath Furnishings, LLC, Oxbow Summit, LLC, SHC Holdco, LLC, SHC Medical Center - Toppenish, SHC Medical Center - Yakima, Sunnyside Community Hospital Association, Sunnyside Community Hospital Home Medical Supply, LLC, Sunnyside Home Health, Sunnyside Professional Services, LLC, Yakima HMA Home Health, LLC, Yakima Home Care Holdings, LLC) Appearances: Sam Alberts, James Day, Samuel Maizel, Geoffrey Miller, Sarah Schrag, Attorneys for Astria/Plaintiff; Mark Sacks and Brian Donovan, Attorneys for US Small Business Administration/Defendant. Other Attendees: William Kannel, Attorney for UMB Bank, N.A., Lapis Advisers; Jane Pearson, Boris Mankovetskiy and Andrew Sherman, Attorneys for Unsecured Creditors Committee; Gary Dyer, Attorney for US Trustee; John Gallagher, CEO of Astria Health; Michael Lane, CRO of Astria Health.(NNU) (Entered: 06/08/2020)
06/08/2020	18	STIPULATION. Signed by Samuel R. Maizel for the Debtors, William W. Kannel, Attorneys for UMB Bank, N.A., as Trustee and Lapis Advisers, L.P. and Ryan T. Jareck Attorneys for Lapis Advisers, L.P. and the filer.. Filed by Sam Alberts on behalf of Astria Health, Glacier Canyon, LLC, Kitchen and Bath Furnishings, LLC, Oxbow Summit, LLC, SHC Holdco, LLC, SHC Medical

		Center - Toppenish, SHC Medical Center - Yakima, Sunnyside Community Hospital Association, Sunnyside Community Hospital Home Medical Supply, LLC, Sunnyside Home Health, Sunnyside Professional Services, LLC, Yakima HMA Home Health, LLC, Yakima Home Care Holdings, LLC (Alberts, Sam) (Entered: 06/08/2020)
06/09/2020	20	ORDER Uploaded. Filed by Alberts, Sam. (RE: 2) (Entered: 06/09/2020)
06/09/2020	21	CERTIFICATE of Service. Filed by Kurtzman Carson Consultants LLC (RE: Reply16). (Nguyen, Angela) (Entered: 06/09/2020)
06/10/2020	22	ORDER Granting Preliminary Injunction, Denying Stay Pending Appeal, and Certifying Issues to the Ninth Circuit Court of Appeals (Related Doc # 2). (CMR) (Entered: 06/10/2020)
06/12/2020	23	CERTIFICATE of Service. Filed by Kurtzman Carson Consultants LLC (RE: Stipulation18). (Nguyen, Angela) (Entered: 06/12/2020)
06/22/2020	24	CERTIFICATE of Service. Filed by Kurtzman Carson Consultants LLC (RE: Temporary Restraining Order22). (Nguyen, Angela) (Entered: 06/22/2020)
06/23/2020	25	ORDER Uploaded. Filed by Alberts, Sam. (RE: 4) (Entered: 06/23/2020)
06/23/2020	26	MOTION to Withdraw Reference . Filed by Brian M Donovan on behalf of United States Small Business Administration and Jovita Carranza, in her capacity as Administrator for the United States Small Business Administration (Donovan, Brian) DEPUTY Clerk Note: Fee amount removed from docket text - not applicable for US Attorney's Office. Modified on 6/24/2020 (CMR). (Entered: 06/23/2020)
06/23/2020	27	CERTIFICATE of Service.. Filed by Brian M Donovan on behalf of United States Small Business Administration and Jovita Carranza, in her capacity as Administrator for the United States Small Business Administration (RE: Motion to Withdraw Reference26). (Donovan, Brian) (Entered: 06/23/2020)
06/23/2020	28	NOTICE of Appeal and Statement of Election to District Court. Filed by Brian M Donovan on behalf of United States Small Business Administration and Jovita Carranza, in her capacity as Administrator for the United States Small Business Administration (RE: 22 Temporary Restraining Order). (Donovan, Brian) DEPUTY Clerk Note: Fee amount removed from docket text - not applicable for US Attorney's Office. Modified on 6/24/2020 (CMR). (Entered: 06/23/2020)
06/23/2020	29	CERTIFICATE of Service.. Filed by Brian M Donovan on behalf of United States Small Business Administration and Jovita Carranza, in her capacity as Administrator for the United States Small Business Administration (RE: Notice of Appeal and Statement of Election28). (Donovan, Brian) (Entered: 06/23/2020)
06/24/2020	30	PDF with attached Audio File. Court Date & Time [6/24/2020 1:36:08 AM]. File Size [2320 KB]. Run Time [00:09:40]. (NydiaUrlacher). (Entered: 06/24/2020)

06/24/2020	31	MINUTE Entry Re: Scheduling Conference. HELD. Court will sign the proposed joint stipulated order submitted by counsel staying the adversary proceeding pending appeal in District Court. (RE: 4 Notice of Scheduling Conference) Appearances: Samuel Maizel, and Sarah Schrag, Attorneys for Plaintiff; Brian Donovan, Attorney for Defendant (NNU) (Entered: 06/24/2020)
06/24/2020	32	APPEAL Transmittal to District Court. Appellant(s): United States Small Business Administration and Jovita Carranza, in her capacity as Administrator for the United States Small Business Administration. Appellee(s): Astria Health, et al (See Exhibit A of ECF 28). Case County: YAKIMA. Date Notice of Appeal Filed: 06/23/2020. Date of Entry of Order on Appeal: 06/10/2020. Date Bankruptcy Case Filed: 05/15/2020. Fee Paid: N/A. Notice of Appeal mailed N/A to N/A. All other parties, including the US Trustee, were electronically served. (RE: Temporary Restraining Order22, Notice of Appeal and Statement of Election28). Certificate of Record due by 8/13/2020. (CMR) (Entered: 06/24/2020)
06/25/2020		CASE Number from Appellate Court, District Court, Case Number: 20-cv-03089-RMP (RE: Notice of Appeal and Statement of Election28). (CMR) (Entered: 06/25/2020)
06/26/2020	33	STIPULATED Order (RE: Notice of Scheduling Conference4). Status Hearing scheduled 8/25/2020 at 01:30 PM at (877) 402-9757, Access 7036041 - Yakima. (CMR) (Entered: 06/26/2020)
07/07/2020	34	NOTICE of Cross Appeal *and Statement of Election*. Fee Amount $298. Filed by Sam Alberts on behalf of Astria Health, SHC Medical Center - Toppenish, Yakima HMA Home Health, LLC (RE: 19 Minutes of Proceedings, 22 Temporary Restraining Order). Appellant Designation due by 07/21/2020. (Alberts, Sam) (Entered: 07/07/2020)
07/07/2020	35	OBJECTION (RE: Motion to Withdraw Reference26). Filed by Sam Alberts on behalf of Astria Health (Alberts, Sam) (Entered: 07/07/2020)
07/08/2020	36	APPEAL Transmittal to District Court. Appellant(s): Astria Health, SHC Medical Center - Toppenish, and Yakima HMA Home Health Care, LLC. Appellee(s): United States Small Business Administration and Jovita Carranza, in her capacity as Administrator for the United States Small Business Administration. Case County: YAKIMA. Date Notice of Appeal Filed: 7/7/2020. Date of Entry of Order on Appeal: 6/10/2020. Date Bankruptcy Case Filed: 05/15/2020. Fee Paid: No. Transmittal of Notice of Appeal mailed N/A to N/A. All other parties, including the US Trustee, were electronically served. (RE: Temporary Restraining Order22, Notice of Cross Appeal34). Certificate of Record due by 8/27/2020. (CMR) (Entered: 07/08/2020)
07/09/2020		CASE Number from Appellate Court, District Court, Case Number: 20-cv-03098-RMP (RE: Notice of Cross Appeal34). (CMR) (Entered: 07/09/2020)
07/09/2020		RECEIPT of Notice of Cross Appeal(20-80016-WLH) [appeal,crssapl] (298.00) Filing Fee. Receipt number A7648026. Fee amount 298.00 (RE: Notice of Cross Appeal34). (U.S. Treasury) (Entered: 07/09/2020)
07/10/2020	37	STATUS Report to Appellate Court Regarding Payment of Appeal Filing Fee. Please be advised the filing fee in District Court Case Number 20-cv-03098-RMP

		was paid on 7/9/2020 (RE: Notice of Cross Appeal34). (CMR) (Entered: 07/10/2020)
07/10/2020	38	APPELLANT Designation of Contents For Inclusion in Record On Appeal, STATEMENT of Issues. Filed by Brian M Donovan on behalf of United States Small Business Administration and Jovita Carranza, in her capacity as Administrator for the United States Small Business Administration (RE: 28 Notice of Appeal and Statement of Election, 32 Appeal Transmittal). (Donovan, Brian) DEPUTY Clerk Note: APPELLANT Designation of Contents For Inclusion in Record On Appeal added to docket text. Modified on 7/13/2020 (CMR). (Entered: 07/10/2020)
07/10/2020	39	CERTIFICATE of Service.. Filed by Brian M Donovan on behalf of United States Small Business Administration and Jovita Carranza, in her capacity as Administrator for the United States Small Business Administration (RE: Statement of Issues38). (Donovan, Brian) (Entered: 07/10/2020)
07/14/2020	40	REPLY signed by Brian M. Donovan (RE: Motion to Withdraw Reference26). Filed by Brian M Donovan on behalf of United States Small Business Administration and Jovita Carranza, in her capacity as Administrator for the United States Small Business Administration (Donovan, Brian) (Entered: 07/14/2020)
07/17/2020	41	JUDGE Comments (RE: Motion to Withdraw Reference26). (KAC) (Entered: 07/17/2020)

20-80016-WLH Astria Health et al v. United States Small Business Administration and Jo
Case type: ap **Related bankruptcy:** 19-01189-WLH11 **Judge:** Whitman L Holt
Date filed: 05/15/2020 **Date of last filing:** 07/17/2020

Parties

Astria Health
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Yakima, WA 98902
Tax ID / EIN: 81-3979675
Added: 05/15/2020
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represented by

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Glacier Canyon, LLC 900 W. Chestnut Ave. Yakima, WA 98902 *Added: 05/15/2020* *(Plaintiff)*	represented by	**Sam Alberts** Dentons US LLP 1900 K Street, NW Washington, DC 20006 202-408-7004 sam.alberts@dentons.com *Assigned: 05/15/20*
Kitchen and Bath Furnishings, LLC 900 W Chestnut Ave Yakima, WA 98902 Tax ID / EIN: 30-0888892 *Added: 05/15/2020* *(Plaintiff)*	represented by	**Sam Alberts** Dentons US LLP 1900 K Street, NW Washington, DC 20006 202-408-7004 sam.alberts@dentons.com *Assigned: 05/15/20*
Kurtzman Carson Consultants LLC 222 N Pacific Coast Highway Suite 300 El Segundo, CA 90245 310-823-9000 *Added: 05/18/2020* *(Claims Agent)*		
Oxbow Summit, LLC 900 W Chestnut Ave Yakima, WA 98902 Tax ID / EIN: 47-4281366 *Added: 05/15/2020* *(Plaintiff)*	represented by	**Sam Alberts** Dentons US LLP 1900 K Street, NW Washington, DC 20006 202-408-7004 sam.alberts@dentons.com *Assigned: 05/15/20*
SHC Holdco, LLC 900 W Chestnut Ave Yakima, WA 98902 Tax ID / EIN: 82-2369193 *Added: 05/15/2020* *(Plaintiff)*	represented by	**Sam Alberts** Dentons US LLP 1900 K Street, NW Washington, DC 20006 202-408-7004 sam.alberts@dentons.com *Assigned: 05/15/20*

SHC Medical Center - Toppenish 900 W Chestnut Ave Yakima, WA 98902 Tax ID / EIN: 81-4670687 *Added: 05/15/2020* *(Plaintiff)*	represented by	**Sam Alberts** Dentons US LLP 1900 K Street, NW Washington, DC 20006 202-408-7004 sam.alberts@dentons.com *Assigned: 05/15/20*
SHC Medical Center - Yakima 900 W Chestnut Ave Yakima, WA 98902 Tax ID / EIN: 81-4653630 *Added: 05/15/2020* *(Plaintiff)*	represented by	**Sam Alberts** Dentons US LLP 1900 K Street, NW Washington, DC 20006 202-408-7004 sam.alberts@dentons.com *Assigned: 05/15/20*
Sunnyside Community Hospital Association 900 W Chestnut Ave Yakima, WA 98902 Tax ID / EIN: 91-1286274 *Added: 05/15/2020* *(Plaintiff)*	represented by	**Sam Alberts** Dentons US LLP 1900 K Street, NW Washington, DC 20006 202-408-7004 sam.alberts@dentons.com *Assigned: 05/15/20*
Sunnyside Community Hospital Home Medical Supply, LLC 900 W Chestnut Ave Yakima, WA 98902 Tax ID / EIN: 47-1344645 *Added: 05/15/2020* *(Plaintiff)*	represented by	**Sam Alberts** Dentons US LLP 1900 K Street, NW Washington, DC 20006 202-408-7004 sam.alberts@dentons.com *Assigned: 05/15/20*
Sunnyside Home Health 900 W Chestnut Ave Yakima, WA 98902 Tax ID / EIN: 81-4552945 *Added: 05/15/2020* *(Plaintiff)*	represented by	**Sam Alberts** Dentons US LLP 1900 K Street, NW Washington, DC 20006 202-408-7004 sam.alberts@dentons.com *Assigned: 05/15/20*
Sunnyside Professional Services, LLC 900 W Chestnut Ave Yakima, WA 98902 Tax ID / EIN: 47-5499567 *Added: 05/15/2020* *(Plaintiff)*	represented by	**Sam Alberts** Dentons US LLP 1900 K Street, NW Washington, DC 20006 202-408-7004 sam.alberts@dentons.com *Assigned: 05/15/20*
United States Small Business Administration and Jovita Carranza, in her capacity as Administrator for the United	represented by	**Brian M Donovan** United States Attorney's

States Small Business Administration *Added: 05/15/2020* *(Defendant)*		Office PO Box 1494 Spokane, WA 99210 509-353-2767 Brian.Donovan@usdoj.gov *Assigned: 05/19/20*
Yakima HMA Home Health, LLC 7 S. 10th Ave. Yakima, WA 98902 Tax ID / EIN: 27-0173556 *Added: 05/15/2020* *(Plaintiff)*	represented by	**Sam Alberts** Dentons US LLP 1900 K Street, NW Washington, DC 20006 202-408-7004 sam.alberts@dentons.com *Assigned: 05/15/20*
Yakima Home Care Holdings, LLC 7 S. 10th Ave., Suite 400 Yakima, WA 98902 Tax ID / EIN: 81-3825537 *Added: 05/15/2020* *(Plaintiff)*	represented by	**Sam Alberts** Dentons US LLP 1900 K Street, NW Washington, DC 20006 202-408-7004 sam.alberts@dentons.com *Assigned: 05/15/20*

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF WASHINGTON (Spokane/Yakima)
Adversary Proceeding #: 20−80016−WLH

Assigned to: Whitman L Holt
Lead BK Case: 19−01189
Lead BK Title: Astria Health
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represented by **Sam Alberts**
(See above for address)

Plaintiff
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Tax ID / EIN: 30−0888892

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(See above for address)

Plaintiff
Oxbow Summit, LLC
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Plaintiff
SHC Holdco, LLC
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Plaintiff
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Plaintiff
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Plaintiff
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V.

Defendant
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United States Small Business Administration and Jovita Carranza, in her capacity as Administrator for the United States Small Business Administration

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Filing Date	#		Docket Text
05/15/2020		1	

			Adversary case 20−80016. COMPLAINT. Fee Amount $350. Nature of Suit: (91 (Declaratory judgment)) (72 (Injunctive relief − other)) (21 (Validity, priority or extent of lien or other interest in property)) (02 (Other (e.g. other actions that would have been brought in state court if unrelated to bankruptcy))) (Alberts, Sam) (Entered: 05/15/2020)
06/23/2020		26	MOTION to Withdraw Reference . Filed by Brian M Donovan on behalf of United States Small Business Administration and Jovita Carranza, in her capacity as Administrator for the United States Small Business Administration (Donovan, Brian) DEPUTY Clerk Note: Fee amount removed from docket text − not applicable for US Attorney's Office. Modified on 6/24/2020 (CMR). (Entered: 06/23/2020)
06/23/2020		27	CERTIFICATE of Service.. Filed by Brian M Donovan on behalf of United States Small Business Administration and Jovita Carranza, in her capacity as Administrator for the United States Small Business Administration (RE: Motion to Withdraw Reference26). (Donovan, Brian) (Entered: 06/23/2020)
07/07/2020		35	OBJECTION (RE: Motion to Withdraw Reference26). Filed by Sam Alberts on behalf of Astria Health (Alberts, Sam) (Entered: 07/07/2020)
07/14/2020		40	REPLY signed by Brian M. Donovan (RE: Motion to Withdraw Reference26). Filed by Brian M Donovan on behalf of United States Small Business Administration and Jovita Carranza, in her capacity as Administrator for the United States Small Business Administration (Donovan, Brian) (Entered: 07/14/2020)
07/17/2020		41	JUDGE Comments (RE: Motion to Withdraw Reference26). (KAC) (Entered: 07/17/2020)

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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,	**Adv. Proc. Case No. 20-_____-WLH** **VERIFIED COMPLAINT**

[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).

v.

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

Defendants.

Debtor Astria Health ("Astria"), Debtor SHC Medical Center - Toppenish, doing business as Astria Toppenish Hospital ("Toppenish"), both Washington nonprofit corporations under § 501(c)(3) of title 26 of the United States Code, and Debtor Yakima HMA Home Health LLC doing business as Astria Home Health & Hospice-Yakima ("Astria Home Health"), also a Washington corporation, along with the above-referenced affiliated debtors (collectively, the "Debtors"), the debtors and debtors in possession in the above-captioned chapter 11 bankruptcy cases (collectively, the "Chapter 11 Cases"), hereby file this complaint (the "Complaint") against Defendant United States Small Business Administration (the "SBA") acting through Defendant Jovita Carranza in her capacity as the Administrator of the SBA (the "Administrator", and together with the SBA, the "Defendants"), as follows:

I. JURISDICTION AND VENUE

1. The Court has jurisdiction over this adversary proceeding pursuant to 28 U.S.C. §§ 157, 1331, 1334, 1361, and 2201, and 15 U.S.C. § 634(b). Jurisdiction is

also proper under the judicial review provisions of the Administrative Procedure Act (the "APA"), 5 U.S.C. § 702.

2. Declaratory and injunctive relief is sought consistent with 5 U.S.C. § 706 and as authorized by 28 U.S.C. § 2201 and 2202. The award of costs and attorneys' fees against the United States ("U.S.") generally or against the SBA specifically is sought pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412.

3. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2).

4. The venue is proper pursuant to 28 U.S.C. §§ 1391, 1408, and 1409.

5. The Court has the power to grant the relief requested based on §§ 105, 106, and 525 of title 11 of the United States Code, §§ 101 *et seq.* (the "Bankruptcy Code").

6. The Debtors consent to entry of final orders by this Court in this adversary proceeding.

II. PARTIES

7. Debtor Astria, a Washington nonprofit corporation, is the direct or indirect corporate member of several entities that make it the largest non-profit healthcare system based in Eastern Washington. The Astria system is headquartered in the heart of Yakima Valley, Washington. The Debtors continue to operate Sunnyside Community Hospital Association ("Sunnyside"), a 38-bed critical access hospital in Sunnyside, Washington, and Toppenish, a 63-bed hospital in Toppenish,

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Washington, as well as several related clinics and related healthcare businesses such as Astria Home Health.

8. The SBA is an agency of the United States of America whose central office is located at 409 Third Street, SE Washington, D.C. 20416. The SBA can sue and be sued in a court of competent jurisdiction, including for declaratory relief and damages. *Mar v. Kleppe*, 520 F.2d 867, 869 (10th Cir. 1975).

9. The Administrator can sue and be sued on behalf of the SBA in any court of general jurisdiction under § 106(a)[2] of the Bankruptcy Code and 15 U.S.C. § 634(b),[3] and can be served with process pursuant to Rule 7004(b)(4) and (5) of the Federal Rules of Bankruptcy Procedure by United States First Class Mail as follows:

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[2] As explained in the legislative history of § 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).

[3] Courts have expressly found that the SBA Administrator can be enjoined when she acts beyond the scope of her authority. *Ulstein Mar., Ltd. v. United States*, 833 F.2d 1052, 1057 (1st Cir. 1987) ("The no injunction language protects the agency from interference with its internal workings . . . but . . . should not be interpreted as a bar

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Additionally, a copy can be served by e-mail to the following individuals:

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to judicial review of agency actions that exceed agency authority where the remedies would not interfere with internal agency operations.").

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Mark Costello
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III. SUMMARY OF RELIEF REQUESTED

10. This adversary proceeding arises out of Banner Bank's denial, at the direction of the SBA acting through the Administrator, of two of the Debtors' applications for loans under the Paycheck Protection Program ("PPP") because the applicants are debtors in bankruptcy. The Debtors seek to have the SBA and the Administrator enjoined from their improper and unlawful administration of PPP, which Congress enacted and the President signed as part of the Coronavirus Aid, Relief, and Economic Security Act (the "CARES Act"), Public Law 116-136.[4] The CARES Act included stimulus funds designed to assist businesses, including for-profits and 501(c)(3) nonprofits, and to ensure that American workers continue to be

[4] A full text of the CARES Act can be found at https://www.govtrack.us/congress/bills/116/hr748/text (last visited on May 14, 2020).

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paid despite the economic impact of the Novel Coronavirus ("Covid-19") and social distancing measures. Section 1102 of the CARES Act establishes PPP as a convertible loan program under § 7(a) of the Small Business Act, codified in 15 U.S.C § 636. While nominally called a "loan,"[5] PPP disbursements are treated as grants—and there are no repayment obligations—if, among other things, a certain percentage of PPP funds are used for payroll and wage expenses, interest on mortgages, rent, or utilities. Importantly, neither the CARES Act, the Small Business Act, nor any other applicable law or regulation prohibits the granting of PPP funds to bankruptcy debtors, with the exception of an SBA rule issued and published after the Debtors submitted their PPP Applications (defined herein). Nevertheless, the Defendants denied the Debtors access to PPP disbursements on the sole basis that the Debtors are in bankruptcy, and in so doing have exceeded their statutory authority and improperly, unfairly, arbitrarily, capriciously, and unlawfully discriminated against the Debtors.

11. If the goal of the PPP is to help small businesses survive economic hardships caused by the Covid-19 pandemic through funding payroll costs, rent, interest and utilities during the initial shelter-in-place period, then it is illogical to require those businesses—particularly hospitals on the "frront lines" of treating

[5] The Debtors' use of the term "loan" or "loans" herein is not intended to waive or diminish its contention that PPP is in reality a support/grant program.

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patients—to be excluded because they are in bankruptcy. In the words of Bankruptcy Judge Jones from the United States Bankruptcy Court for the Southern District of Texas on April 24, 2020: "But this can't be what Congress intended. This can't be the way we are supposed to treat our fellow man in this time. It's inconceivable to me that this distinction [between a borrower in bankruptcy and one not in bankruptcy] could be drawn." *See Hildago Country Emergency Service Foundation v. Carranza*, hearing transcript, attached hereto as **Exhibit 1**, at p. 32, lines 14-17.

12. Therefore, the Debtors seek, among other relief more fully described herein, an order requiring the Defendants and all agents, servants, employees, and any parties acting in concert with any of the foregoing (the "Restrained Parties") to consider the Debtors' Applications (defined herein) and any related forms, applications, or other documents[6] without any consideration of the involvement of the Debtors or any owner of the Debtors in any bankruptcy. The Debtors also seek an order requiring the Restrained Parties to refrain from making or conditioning the approval of any PPP funds to the Debtors contingent on the Debtors or any owner of the Debtors not being "presently involved in any bankruptcy." In addition, the Debtors seek declaratory relief relating to the Defendants' violations of the APA and § 525(a) of the Bankruptcy Code. The Debtors also seek damages and an award of

[6] This includes the Lender Application (defined below).

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their costs and attorneys' fees against the United States generally, or against the Defendants specifically, pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412, among other things.

IV. BACKGROUND

A. General Background.

13. The Debtors filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code on May 6, 2019 (the "Petition Date"). These Chapter 11 Cases are currently being jointly administered before the Court. [Lead Docket No. 10]. Since the Petition Date, the Debtors have been operating their businesses as debtors in possession pursuant to §§1107 and 1108.

14. On May 24, 2019, the Office of the United States Trustee (the "U.S. Trustee") appointed an Official Committee of Unsecured Creditors (the "Committee") in these Chapter 11 Cases. [Lead Docket No. 135]. No trustee or examiner has been appointed.

15. Additional background facts on the Debtors, including an overview of the Debtors' business, information on the Debtors' capital structure, and events leading up to these Chapter 11 Cases, are contained in the Declaration of John M. Gallagher [Lead Docket No. 21] (the "Gallagher Declaration") and the Declaration of Michael Lane [Lead Docket No. 16] (the "Lane Declaration," and together with the Gallagher Declaration, the "First Day Declarations").

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B. Impact of the Novel Coronavirus on the Debtors' Operations.

16. The world is currently experiencing a global pandemic brought on by widespread transmission of the Covid-19. Since early 2020, the U.S., including the State of Washington, has been taking steps to mitigate Covid-19's impact on the health of U.S. citizens and to "flatten the curve." Specifically, governments and local communities are working to employ strategies of quarantine and social distancing among residents in an attempt to slow the spread of the virus and give health care providers time to prepare resources for acute patients suffering from the disease. *See, e.g.*, Washington State, "*Coronavirus Response*," https://coronavirus.wa.gov/what-you-need-know/whats-open-and-closed (last visited on May 12, 2020).

17. Flattening the curve will allow volumes of patient care to be more manageable for the healthcare system. A spike in patient volume could overwhelm the healthcare system. The Debtors, as providers with acute care facilities, are among the providers being called on to serve and treat patients during the crisis.

18. A significant portion of the Debtors' revenue is derived from outpatient procedures offering a wide range of medical services to patients.

19. Nevertheless, based on recommendations from the federal Centers for

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Disease Control (the "CDC")[7] and an order by the Governor of the State of Washington,[8] the Debtors have postponed nonessential elective medical procedures. Only essential urgent and emergency procedures that if delayed would cause harm are still being provided. At this time, the Debtors continue to implement procedures in response to Covid-19 and state and federal directives such as: restricting staff and visitor access to the hospital; screening all patients, visitors, and staff before entry into the facility; and providing both in person and telehealth visits to patients. This has

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[7] *See, e.g.*, CDC, "Coronavirus Disease 2019 (COVID-19) Healthcare Facility Guidance," *available at* https://www.cdc.gov/coronavirus/2019-ncov/hcp/guidance-hcf.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fhealthcare-facilities%2Fguidance-hcf.html (last visited May 14, 2020.)

[8] *See* Proclamation by the Governor of the State of Washington 20-24 entitled Restrictions on Non Urgent Medical Proceedings, *available at* https://www.governor.wa.gov/sites/default/files/proclamations/20-24%20COVID-19%20non-urgent%20medical%20procedures%20(tmp).pdf, (last visited on May 14, 2020) (prohibiting all hospitals from "providing health care services, procedures and surgeries that, if delayed, are not anticipated to cause harm to the patient within the next three months").

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and continues to have a significant negative impact on the Debtors' cash position.[9] A true and correct copy of the Debtors' most current weekly cash flow budget is attached hereto as **Exhibit A**.

C. The CARES Act and the SBA's Denial of the Debtors' PPP Applications.

20. Prior to the enactment of the CARES Act, the "SBA 7(a) Loan" was the SBA's primary loan program for providing financial assistance to small businesses. Under typical circumstances, the SBA 7(a) Loan (under the pre-CARES Act requirement) required that the applicant meet, among other things, the credit

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[9] The Debtors are not alone in suffering significant financial impact from foregoing elective surgeries and other repercussions of the pandemic. "Hospitals across the U.S. are losing more than $1 billion in daily revenue as they experience significant declines in patient volume during the COVID-19 pandemic, according to a report from Crowe, a public accounting, consulting and technology company." Ayla Ellison, *US hospitals losing $1.4B in revenue per day, Becker's Hospital CFO Report*, (May 4, 2020), *available at* https://www.beckershospitalreview.com/finance/us-hospitals-losing-1-4b-in-revenue-per-day.html?origin=CIOE&utm_source=CIOE&utm_medium=email&oly_enc_id=2004C5404478F9G.

requirements detailed in 13 CFR § 120.150. In that regard, 13 CFR § 120.150 lists the following criterion:

> The applicant (including an Operating Company) must be creditworthy. Loans must be so sound as to reasonably assure repayment. SBA will consider:
>
> (a) Character, reputation, and credit history of the applicant (and the Operating Company, if applicable), its Associates, and guarantors;
> (b) Experience and depth of management;
> (c) Strength of the business;
> (d) Past earnings, projected cash flow, and future prospects;
> (e) Ability to repay the loan with earnings from the business;
> (f) Sufficient invested equity to operate on a sound financial basis;
> (g) Potential for long-term success;
> (h) Nature and value of collateral (although inadequate collateral will not be the sole reason for denial of a loan request); and
> (i) The effect any affiliates (as defined in part 121 of this chapter) may have on the ultimate repayment ability of the applicant.

21. While there is no *per se* listed exclusion of a bankruptcy debtor participating in the prior SBA 7(a) Loan program, when these criteria are coupled with the requirements that the associated lending institution practice appropriate diligence and credit assessment, the effect was *de facto* exclusion of any bankruptcy debtors from securing an SBA 7(a) Loan.

22. On or about March 27, 2020, Congress enacted and the President signed the CARES Act.

23. The CARES Act included stimulus funds designed to assist businesses, including 501(c)(3) nonprofits, and to ensure that American workers continue to be

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paid despite the economic impact of Covid-19 and social distancing measures.

24. Section 1102 of the CARES Act establishes PPP as a convertible loan program under § 7(a) of the Small Business Act, codified at 15 U.S.C § 636. While nominally called a "loan," PPP disbursements are treated as grants—and there are no repayment obligations—if, among other things, seventy-five percent (75%) of PPP funds are used for payroll and wage expenses, interest on mortgages, rent, or utilities.[10]

25. A qualified borrower may receive PPP funds equal to two and a half (2.5) times its average monthly payroll, up to a limit of $10 million. A borrower need not exhaust its other credit options prior to receiving PPP funds.

26. A borrower can obtain funds under PPP by applying with any federally insured participating lender using an application form created by the SBA, and the SBA guarantees the loan.

27. The entire purpose of the program is to provide grants to companies in order to ensure that workers can be paid. The CARES Act specifically waives all underwriting considerations under § 7(a) of the Small Business Act, including but not

[10] Funds not used in conformity with this ratio would be required to be repaid, but at a low, fixed interest rate, with payments deferred for up to a year. *See* § 1102(g) of the CARES Act.

limited to, underwriting requirements, collateral review, or loan covenants. There is no evaluation of risk because there is no expectation of repayment, provided funds are used for permitted purposes. All small businesses have a right to apply for PPP funds.

28. Section 1114 of the CARES Act grants the SBA emergency rule making authority and charges the SBA to issue regulations to carry out certain of the programs contemplated in the CARES Act, including PPP.

29. On April 2, 2020, the SBA and the Administrator issued an interim final rule (the "First Interim Rule") providing guidance on, *inter alia*, the eligibility requirements to receive funds under PPP. The First Interim Rule adopts the eligibility standards contained in 13 CFR § 120.110, as further described in the SBA's Standard Operating Procedure 50-10, subpart B, Chapter 2 (the "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 described further in SBA's Standard Operating Procedure").

30. The SOP 50-10 provides that in order to be eligible for a small business loan, an applicant must: "be an operating business;" "be organized for profit;"[11] "be located in the United States (including its territories and possessions);" "be small

[11] The CARES Act has been extended to 501(c)(3) nonprofits.

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under SBA size requirements;" and "demonstrate the need for desired credit." *See* SOP 50-10, pp. 91-104.

31. The SOP-50-10 expressly states that the types of businesses listed as ineligible in 13 CFR § 120-110 are not eligible for an SBA loan. Importantly, bankruptcy debtors are not listed as ineligible businesses in 13 CFR § CFR 120-110 and the SOP 50-10. *See* SOP 50-10, pp. 104-117.

32. The First Interim Rule also states that "[t]he program requirements of PPP identified in this rule temporarily supersede any conflicting Loan Program Requirement (as defined in 13 CFR 120.10)."

33. The First Interim Rule contains no explicit or implicit exclusion for debtors. The SBA and the Administrator published the First Interim Rule on April 15, 2020. A true and correct copy of the First Interim Rule is attached here to as **Exhibit B**.

34. On April 2, 2020, in conjunction with issuing the First Interim Rule, the SBA and the Administrator released Official SBA Form 2483, titled "Paycheck Protection Program Borrower Application Form," which is the SBA's official form that borrowers must submit in connection with a PPP funds request. Other than filling out the official form of application, there is no underwriting, and the Administrator is relying upon assistance of commercial lenders acting in concert with the SBA to administer PPP.

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35. Even though no law, regulation, or rule of any kind (including § 1102 of the CARES Act or the First Interim Rule) disqualified or authorized the SBA or the Administrator to disqualify bankruptcy debtors from participating in PPP, Official SBA Form 2483 asks whether "the Applicant . . . [is] presently involved in any bankruptcy" and then goes on to state that answering "yes" to that question means a request for PPP funds will not be approved.[12]

36. In addition, the SBA and the Administrator released Official SBA Form 2484, titled "Lender Application Form–Paycheck Protection Program Loan Guaranty," which is the SBA's official form that lenders must submit to the SBA in connection with a PPP funds request (the "Lender Application" and, together with the PPP application, the "PPP Applications"). A copy of the Lender Application is attached to this Complaint as **Exhibit D**.

[12] Notably, Senator Susan Collins, who drafted PPP, sent a letter to the Administrator stating her disagreement with the Administrator's position that hospital-debtors cannot participate in PPP. Senators Angus King, Patrick Leahy, and Bernard Sanders, along with Congressman Peter Welch, have also submitted letters to the Administrator echoing the Debtor's position. A copy of these letters are attached as **Exhibit C**. The Collins letter refers to a possible waiver by the SBA of certain requirements. Upon information and belief, this is unavailable.

37. The Lender Application asks the lender whether "[t]he Applicant has certified to the Lender that neither the Applicant nor any owner (as defined in the Applicant's SBA Form 2483) is . . . presently involved in any bankruptcy." The Lender Application states that if the lender answers "no" to this question, "the loan cannot be approved."

38. On or about April 4, 2020, the SBA and the Administrator issued a supplemental interim final rule (the "Second Interim Rule") providing further guidance on PPP. Like the First Interim Rule, the Second Interim Rule does not state that bankruptcy debtors are ineligible for PPP funds. On April 15, 2020, the SBA and the Administrator published the Second Interim Rule. A true and correct copy of the Second Interim Rule is attached here to as **Exhibit E**.

39. On April 14, 2020, the SBA issued a third interim final rule (the "Third Interim Rule"). Not only does the Third Interim Rule make no mention of bankruptcy debtors, but it specifically states, "The Administrator recognizes that, unlike other SBA loan programs, the financial terms for PPP Loans are uniform for all borrowers, and the standard underwriting process does not apply because no creditworthiness assessment is required for PPP Loans." This disavowal by the SBA and the Administrator of any concern for creditworthiness cuts directly against any argument they might make that their exclusion of bankruptcy debtors is motivated by this concern. On April 20, 2020, the SBA and the Administrator published the Third

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Interim Rule. A true and correct copy of the Third Interim Rule is attached here to as **Exhibit F**.

40. The Debtors are precisely the sort of business PPP was enacted to protect–they are a small business (as defined by the SBA) in one of the industries hardest hit by the pandemic and are attempting to obtain funding to meet payroll for their employees, among other permitted uses. PPP funds would allow the Debtors to endure the pandemic without having to make further layoffs. However, due to what appears to be a completely arbitrary, baseless, and discriminatory requirement imposed by the SBA and the Administrator, the Debtors are ineligible to participate based solely on their status as a debtor under the Bankruptcy Code. The Debtors otherwise meet the criteria for eligibility to participate in PPP.

41. As early as April 3, 2020, the Debtors considered submitting an application for PPP funds; however, they were informed such application would be denied because of their status as debtors in bankruptcy.

42. PPP funds are available on a first come, first served basis. The first tranche of PPP funding was completely exhausted on April 16, 2020. Congress subsequently provided more funds, but PPP ends June 30, 2020 or when PPP funds

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are exhausted, whichever comes first.[13]

43. In anticipation of additional PPP funding, on April 17, 2020, Debtors Toppenish and Astria Home Health submitted PPP applications (the "Toppenish Application" and the "Astria Home Health Application", respectively, and together the "Applications") to their commercial lender, Banner Bank. A copy of the Applications are attached as **Exhibits G and H**.

44. Based on an average monthly payroll of $1,130,622.00 for its 318 employees, the Toppenish Application requests a total of $2,826,556.00, to be used for solely for payroll, lease and/or mortgage interest, and utilities. **Exhibit G**.

45. Based on an average monthly payroll of $188,790.00 for its twenty-four (24) employees, the Astria Home Health Application requests a total of $471,975.00, to be used solely for payroll purposes. **Exhibit H**.

46. The Debtors sized their request for PPP funds to ensure that the funds would be treated as a grant and be forgivable. To the extent any portion of the funds

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[13] *See* Robin Saks Frankel, *Congress Passed Another Coronavirus Relief Bill. What's In It For Small Businesses?*, FORBES (April 22, 2020, 9:37 AM), *available at* https://www.forbes.com/sites/advisor/2020/04/22/the-senate-passed-another-coronavirus-relief-bill-whats-in-it-for-small-businesses/#19ba34c0114a.

requested by the Debtors would exceed the amount to be forgiven, the Debtors intend to immediately repay that amount. The Debtors also intend to use the PPP funds in such a manner that they would be eligible for forgiveness under the PPP.

47. The Debtors truthfully answered "yes" to question 1 on the Applications.

48. Upon information and belief, the SBA directed Banner Bank not to process the Applications because the Debtors answered "yes" to question 1 on the Applications.

49. On April 21, 2020, Banner Bank's Vice President and Sunnyside Branch Manager, Cece Ibarra ("Ms. Ibarra"), contacted the Debtors' Controller, Sandra Cortez, via electronic mail regarding the Applications. A true and correct copy of Ms. Ibarra's correspondence is attached hereto as **Exhibit I**. In this e-mail, Ms. Ibarra, explaining that the Debtors are not eligible for PPP funds, informs the Debtors that it is "an SBA rule" that "the bankruptcy is going to prevent you [the Debtors'] from qualify[ing] for the loans" and that this rule "appl[ies] to any entity that was included in the bankruptcy." Ms. Ibarra further writes, "Sorry[,] I personally think that if someone deserves this loan [it] is the Hospitals. But that's an SBA rule."

50. On or about April 23, 2020, Congress enacted legislation making additional funds available for PPP. This second tranche of funding has not yet been exhausted.

51. On April 24, 2020, the SBA and the Administrator proposed another

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interim final rule (the "Fourth Interim Rule") with respect to PPP that states "[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." The stated basis for this rule is that the Administrator "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." A copy of this Fourth Interim Rule is attached hereto as **Exhibit J**. The SBA and the Administrator published the Fourth Interim Rule on April 28, 2020.

52. After receiving no official denial from Banner Bank or the SBA, on or about April 30, 2020, the Debtors' President and Chief Executive Officer, John Gallagher ("Mr. Gallagher"), spoke to Ms. Ibarra, who again stated that it was the SBA's rule that entities like the Debtors who were in bankruptcy were ineligible for PPP funds. Ms. Ibarra also informed Mr. Gallagher that denial letters were not being sent because the focus was on processing eligible applications.

53. On May 6, 2020, the Debtors received official notice (the "May 6, 2020 Notice") that Banner Bank was unable to approve the Debtors Applications because

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the Debtors "do[] not meet SBA eligibility criteria."[14] A true and correct copy of the May 6, 2020 Notice is attached hereto as **Exhibit K**.

54. The Debtors understand that Banner Bank is willing to advance funds through PPP if the Applications (or a subsequently amended applications) can be processed and approved as meeting the SBA's criteria.

55. The Fourth Interim Rule had not been proposed at the time the Debtors submitted their Applications or when the SBA and the Administrator directed Banner Bank not to process the Applications. One of the interim final rules in effect at the time the Debtors submitted their Applications, the First Interim Rule, states that "[t]he program requirements of PPP identified in this rule temporarily supersede any conflicting Loan Program Requirement (as defined in 13 CFR 120.10)." The CARES

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[14] The Debtors actually received two identical notices, both for Toppenish. The Debtors believe this was in error and that Banner Bank intended that one of the notices be in regards to Astria Home Health. The Debtors have asked for confirmation from Banner Bank that the second notice was intended for Astria Home Health, but as of the date of filing have received no answer. Nevertheless, the Debtors were informed orally that the Astria Home Health Application was denied. The Debtors will supplement this filing with an exhibit of the notice as soon as they receive it.

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Act, the Small Business Act, the First Interim Rule, the Second Interim Rule, and the Third Interim Rule contained no exclusion against debtors receiving PPP funds.

56. The PPP funds are critical to the Debtors' ability to continue to operate their businesses. These funds are vital to maintaining healthcare offerings to the surrounding community. Lack of funding under this program would impair the Debtors' ability to reorganize in the anticipated timeframe.

57. The Debtors already missed out on the first tranche of PPP funding, and the second tranche is expected to be depleted quickly.[15]

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[15] *See, e.g.*, Robin Saks Frankel, *The Paycheck Protection Program Ran Out Of Funding. What's Next For Small Business Owners?*, FORBES, (April 16, 2020, 5:44 PM) (noting that the first tranche of PPP funding ran out in 14 days), *available at* https://www.forbes.com/sites/advisor/2020/04/16/the-paycheck-protection-program-ran-out-of-funding-whats-next-for-small-business-owners/#1b5be58c7440; Stephen Gandel, *Round 2 Of Paycheck Protection Program Starts. Better Hurry*, CBS News (April 28, 2020, 6:43 AM), *available at* https://www.cbsnews.com/news/paycheck-protection-programsmall-business-lending-round-2/.

58. The Debtors are eligible borrowers under PPP and seek to ensure adequate funds are available under this second tranche of PPP funding once their discrimination claims are resolved.

COUNT I

(Preliminary and Permanent Injunction)

59. The Debtors incorporate the allegations of Paragraphs 1 through 58 as if set forth fully herein.

60. The Debtors are entitled to seek relief against the SBA, the Administrator, and the Restrained Parties acting in concert with the Defendants under Rule 65 of the Federal Rules of Civil Procedure, which is applicable to this action pursuant to Rule 7065 of the Federal Rules of Bankruptcy Procedure.

61. There is no prohibition in the CARES Act or under § 7(a) of the Small Business Act prohibiting lending to debtors.

62. Moreover, the CARES Act specifically waives all underwriting considerations under § 7(a) of the Small Business Act.

63. The Debtors are likely to prevail on the merits of their claim for an injunction as well as for declaratory relief.

64. The balance of hardships favors issuance of preliminary injunctive relief. The inability to obtain PPP funds would cause the Debtors to suffer immediate and irreparable harm. In this case, the Debtors Toppenish and Astria Home Health have

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had their cash flow negatively impacted by the Covid-19 pandemic and, therefore, access to the PPP funds will allow the Debtors to continue in operation providing medical care to the community in general and COVID-19 patients in particular. The current PPP funds are part of a second tranche of funds that is expected to be exhausted quickly (the first tranche lasted less than two weeks) and may not be replenished once exhausted. Thus, if the Court does not grant the Debtors a temporary restraining order pending resolution of the adversary proceeding, the PPP funds most likely will no longer available to the Debtors. Absent a temporary restraining order, there are no monetary damages that will be available, because the second tranche of PPP funds will be exhausted. Hence, the injury is real, imminent and incapable of being remedied by monetary damages. Moreover, preliminary and permanent injunctive relief while this matter is pending will not harm the SBA, the Administrator, or the Restrained Parties.

65. The Debtors seek an order enjoining the SBA, the Administrator, the Restrained Parties, including any commercial lender provided notice of the Court's order, *see* Fed. R. Civ. P. 65(d)(2)(C), from denying any application under PPP on the basis that the applicant is a debtor in bankruptcy and requiring that any application of the Debtors to participate in PPP be considered without the words "presently involved in any bankruptcy" being considered.

66. Due to the "first come, first served" nature of PPP appropriations, the

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Debtors further seek an order enjoining the SBA, the Administrator, and the Restrained Parties from issuing loan guaranties or approving PPP Applications in an amount that would leave insufficient funds for the Debtors' funding pursuant to the Applications (or any subsequent applications filed shortly hereafter) until the Debtors' claims in this Complaint are resolved.

COUNT II

(Declaratory Relief)

67. The Debtors incorporate each of Paragraphs 1 through 58 as if set forth fully herein.

68. The Debtors are entitled to seek declaratory relief pursuant to 28 U.S.C. § 2201 and Rule 7001(9) of the Federal Rules of Bankruptcy Procedure.

69. Neither the CARES Act nor the Small Business Act prohibit disbursements under PPP to the Debtors based on their status as debtors under chapter 11 of the Bankruptcy Code.

70. The Debtors have a legal right to apply for funds under PPP and to have their Applications (or any amended applications) considered on the same terms as other applicants without regard to their status as debtors under chapter 11 of the Bankruptcy Code.

71. By prohibiting Banner Bank from processing the Applications, and by prohibiting disbursements to debtors under PPP, the SBA and the Administrator have

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exceeded their statutory authority.

72. The Debtors are entitled to a declaratory judgment that the CARES Act requires their Applications to be considered on the same terms as other qualified businesses that are not presently debtors in cases arising under the Bankruptcy Code.

COUNT III

(Violation of 11 U.S.C. § 525(a) – Discriminatory Treatment)

73. The Debtors incorporate each of Paragraphs 1 through 58 as if set forth fully herein.

74. Section 525(a) of the Bankruptcy Code prohibits the federal government from discriminating against a person based on that person's status as a debtor with respect to a "license, permit, charter, franchise, or other similar grant[.]" Section 525(a)'s list is illustrative, and not exhaustive. Courts have applied § 525(a) to matters involving government contracts, student loan applications, public housing, insurance, public mortgage financing, utility service, building permits, employment termination, and agricultural subsidies. *See generally Rees v. Employment Security Commission of Wyoming* (*In re Rees*), 61 B.R. 114, 120 (Bankr. D. Utah 1986)(collecting cases).

75. The Debtors are debtors under chapter 11 of the Bankruptcy Code.

76. PPP constitutes a federal program within the meaning of § 525(a) of the Bankruptcy Code in that the program is designed to provide forgivable loans to

qualified businesses that are akin to grants.

77. The Debtors are each a small business within the meaning of the CARES Act and are eligible to participate in the funding of forgivable loans, which are functionally grants, under PPP.

78. The Debtors have, in fact, sized their PPP funding request to be forgivable and, to the extent any funds would not qualify for forgiveness, intend to immediately repay (and there is no prepayment penalty under PPP).

79. The April 21, 2020 e-mail from Ms. Ibarra, the bankruptcy-related question on the PPP Applications, the communication between Mr. Gallagher and Ms. Ibarra, the May 6, 2020 Notice, and the Fourth Interim Rule demonstrate that the SBA and the Administrator have violated § 525(a) of the Bankruptcy Code with respect to the Debtors.

80. Importantly, the Debtors are not being denied access to PPP because of their creditworthiness. In fact, PPP was enacted precisely to provide relief to struggling small businesses such as the Debtors in industries hard hit by the pandemic, without regard to their creditworthiness. The Third Interim Rule states as much, "The Administrator recognizes that, unlike other SBA loan programs, the financial terms for PPP Loans are uniform for all borrowers, and the standard underwriting process does not apply because no creditworthiness assessment is required for PPP Loans."

81. This disavowal by the SBA and the Administrator of any concern for

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creditworthiness cuts directly against any argument they might make that their exclusion of bankruptcy debtors is motivated by a concern regarding creditworthiness.

82. But for their status as debtors in bankruptcy, the Debtors are otherwise qualified for PPP funds. Having disclaimed any concern for creditworthiness, the SBA's sole basis for denying the Debtors the ability to participate in PPP appears to be simply the Debtors' label as "bankruptcy debtors." The SBA, therefore, has clearly violated, and continues to violate, § 525(a) of the Bankruptcy Code by discriminating against debtors in bankruptcy.

83. Any argument in the Fourth Interim Rule regarding risk are not based on any facts and arbitrarily presumes all debtors either mismanage estate funds or are fraudsters. Moreover, this argument is belied by that fact that the Debtors, like all Chapter 11 debtors, are subjected to substantial reporting requirements and are under significant oversight from this Court; the U.S. Trustee; the Committee; the general creditor body; and even the press.

84. Accordingly, the "bankruptcy disqualification" provisions of PPP Applications are denying the Debtors an opportunity to reorganize and to retain their employees, many of whom are crucial to the Debtors' ability to maintain business operations.

85. The SBA's violation of § 525(a) is causing ongoing harm to the Debtors.

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COUNT IV

(Administrative Procedure Act – Exceeding Statutory Authority)

86. The Debtors incorporate each of Paragraphs 1 through 58 as if set forth fully herein.

87. 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(c)(2).

88. The SBA and the Administrator may only exercise the authority conferred upon them by statute.

89. No law, regulation, or rule of any kind disqualifies, or authorizes the SBA or the Administrator to disqualify, bankruptcy debtors from participating in PPP.

90. However, the SBA and the Administrator issued PPP Applications, which state that PPP funds will not be approved if the applicant is "presently involved in any bankruptcy." The SBA and the Administrator's implementation of PPP in a manner that causes debtors in bankruptcy, including the Debtors, to be automatically ineligible is "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right," in violation of the APA. 5 U.S.C. §706(2)(C).

91. The SBA and the Administrator have made a final determination with respect to the issuance of PPP Applications and the arbitrary exclusion of bankruptcy debtors from the benefits and protections of PPP.

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92. No administrative appeals or remedies are available to the Debtors to seek review of the SBA and the Administrator's determination to issue PPP Applications and their exclusion of bankruptcy debtors.

93. The SBA and the Administrator's violation of the APA is causing ongoing harm to the Debtors.

94. The Debtors are entitled to a declaratory judgment that the SBA and the Administrator's implementation of PPP in a manner that causes debtors in bankruptcy, including the Debtors, to be ineligible is "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right," in violation of the APA.

95. The Debtors have no adequate remedy at law.

COUNT V

(Administrative Procedure Act – Arbitrary and Capricious)

96. The Debtors incorporate each of Paragraphs 1 through 58 as if set forth fully herein.

97. The APA provides that 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).

98. The SBA has adopted a policy of automatically disqualifying bankruptcy debtors from participating in PPP, and has designed PPP Applications to carry out this policy.

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99. As described above, no law, regulation, or rule of any kind disqualifies, or authorizes the SBA or the Administrator to disqualify, bankruptcy debtors from participating in PPP.

100. Moreover, the Debtors are precisely the sort of business targeted by PPP–a small business in a hard hit area of the economy struggling to meet their payroll obligations and remain operational. The SBA and the Administrator's automatic disqualification of the Debtors runs completely counter to the mandate of PPP.

101. The SBA and the Administrator's implementation of PPP in a manner that causes debtors in bankruptcy, including the Debtors, to be ineligible is therefore "arbitrary, capricious, [or] an abuse of discretion" in violation of the APA. 5 U.S.C. §706(2)(A).

102. The SBA and the Administrator have made a final determination with respect to the issuance of PPP Applications and their arbitrary and unjustifiable exclusion of bankruptcy debtors from participating in PPP.

103. No administrative appeals or remedies are available to the Debtors to seek review of the SBA and the Administrator's determination to issue PPP Applications and their arbitrary exclusion of bankruptcy debtors.

104. The SBA and the Administrator's violation of the APA is causing ongoing harm to the Debtors.

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105. The Debtors are entitled to a declaratory judgment that the SBA and the Administrator's implementation of PPP in a manner that causes debtors in bankruptcy, including the Debtors, to be ineligible is "arbitrary, capricious, [or] an abuse of discretion" in violation of the APA.

106. The Debtors have no adequate remedy at law.

COUNT VI

(Mandamus – 28 U.S.C. § 1361)

107. The Debtor incorporates each of Paragraphs 1 through 58 as if set forth fully herein.

108. The SBA and the Administrator have a duty to implement the laws enacted by Congress. The SBA and the Administrator have a non-discretionary duty to comply with the CARES Act and the provisions of PPP, to apply criteria to PPP that are substantively and procedurally valid, to avoid imposing criteria to PPP that are substantively and procedurally *ultra vires*, and to implement PPP in a manner that does not violate § 525(a) of the Bankruptcy Code

109. The SBA and the Administrator breached this duty.

110. The Debtors have the right to have an application for funds pursuant to PPP considered without discrimination based on the Debtors' status as bankruptcy debtors.

111. The SBA and the Administrator have no discretion to discriminate

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against the Debtors based on their status as debtors in bankruptcy.

112. Upon information and belief, there are no administrative remedies available to the Debtors at this time. The Debtors have based this belief upon communications by staff for certain members of Congress who advised that the SBA and the Administrator have taken the position that there is no administrative waiver process with respect to PPP.

113. The Debtors are entitled to a writ of mandamus under 28 U.S.C. § 1361 to compel the SBA and the Administrator to remove from all PPP Applications all prohibitions against debtors in bankruptcy participating in PPP, because the SBA and the Administrator acted illegally and beyond their statutory authority in instituting this disqualifying factor.

114. Accordingly, the Debtors respectfully request: a writ of mandamus under 28 U.S.C. § 1361 to compel the SBA and the Administrator to remove from all PPP Applications all purported prohibitions against debtors in bankruptcy participating in PPP.

COUNT VII

(Declaration Regarding Interpretation of Ambiguous Language)

115. The Debtors incorporate each of Paragraphs 1 through 58 as if set forth fully herein.

116. PPP Applications state that any applicant "presently involved in any

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bankruptcy" is ineligible to participate in PPP.

117. The phrase "involved in any bankruptcy" is overly broad, vague, and difficult to apply. If given its plain meaning, this phrase would disqualify any applicant who is a creditor or vendor to a debtor in a bankruptcy case, or even just a party in interest of any kind. This interpretation would be nonsensical, and should be avoided. *See, e.g.*, *In re Kaiser Aluminum Corp.*, 456 F.3d 328, 338 (3d Cir. 2006) ("A basic tenet of statutory construction is that courts should interpret a law to avoid absurd or bizarre results.").

118. The phrase "involved in any bankruptcy" is therefore ambiguous, as its intended scope is unclear. *See, e.g.*, *In re Idleaire Technologies Corp.*, No. 08-10960, 2009 WL 4131117, *8 (Bankr. D. Del. Feb. 18, 2009) (stating that language can be considered ambiguous when applying plain meaning would lead to absurd result).

119. Where language in a statute is ambiguous, a court may look to legislative intent to determine the meaning. *See, e.g.*, *Kaiser Aluminum*, 456 F.3d at 338 ("It is true that interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available.") (quoting *Griffin v. Oceanic Contractors, Inc.*, 548 U.S. 564, 575, 102 S.Ct. 3245, 3252 (1982)).

120. In a press release accompanying the unveiling of PPP, the SBA itself described the purpose of the program:

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> These loans will bring immediate economic relief and eight weeks of financial certainty to millions of small businesses and their employees," SBA Administrator Carranza said. "We urge every struggling small business to take advantage of this unprecedented federal resource – their viability is critically important to their employees, their community, and the country.[16]

121. The goal of making PPP funds available to "every struggling small business" would best be achieved by applying as narrow an interpretation as possible of the phrase "involved in any bankruptcy." Interpreting this phrase as an across-the-board disqualification of struggling–but–potentially–viable–businesses such as debtors in possession under the Bankruptcy Code would be demonstrably at odds with the intent of PPP as expressed by the Administrator.

122. Instead, the Debtors submit that of the possible interpretations of the phrase "involved in any bankruptcy," the one most consistent with the purpose of PPP would apply the phrase only to *chapter 7* debtors. These businesses, by definition, have already ceased operations, are in the process of liquidation, and are beyond

[16] SBA, "*SBA's Paycheck Protection Program for Small Businesses Affected by the Coronavirus Pandemic Launches*," (April 3, 2020) available at https://www.sba.gov/about-sba/sba-newsroom/press-releases-media-advisories/sbas-paycheck-protection-program-small-businesses-affected-coronavirus-pandemic-launches.

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rescue.

123. On the other hand, no principled distinction can be made between a chapter 11 debtor in possession and any other "struggling small business." In fact, businesses having the characteristics of most debtors in possession are among the core targets of PPP.

124. Accordingly, the best-fit interpretation of the phrase "involved in any bankruptcy," should not disqualify chapter 11 debtors in possession from PPP.

V. NO BOND IS REQUIRED

125. Due to the nature of this request, no bond is required for the enforcement of an injunction, and under these circumstances, no bond should be required for the temporary emergency relief sought by way of Rule 7065 of the Federal Rules of Bankruptcy Procedure. *See, e.g.*, *Mississippi Power & Light Co. v. United Gas Pipe Line Co.*, 760 F.2d 618 (5th Cir 1985); 7 MOORE'S FEDERAL PRACTICE ¶ 65.04[1] at 65-38.

VI. RELIEF REQUESTED

With respect to **Count I**, the Debtors seek the following relief:

(A) That the Court enter a preliminary injunction enjoining the SBA, the Administrator, the Restrained Parties, or any commercial lender from denying an application under PPP funds on the basis that the applicant is a debtor in bankruptcy or because of the words "presently involved in

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any bankruptcy" on the PPP Application. The Debtors request that this relief be granted until such time as a final judgment is entered on their claims in **Count II**, **Count III**, **Count IV**, **Count V**, **Count VI**, and **Count VII**;

(B) That the Court enter a preliminary injunction enjoining the SBA and the Administrator from issuing loan guaranties or approving PPP Applications in an amount that would leave insufficient funds for the Debtors' funding pursuant to the Applications (or any amended applications) until entry of final judgment on the Debtors' claims in **Count II**, **Count III**, **Count IV**, **Count V**, **Count VI**, and **Count VII**; and

(C) That the Court enter permanent injunctive relief with respect to the relief in the two immediately preceding sub-paragraphs.

With respect to **Count II**, the Debtors seek the following relief:

(A) That the Court enter a declaratory judgment that the CARES Act does not prohibit the Applications (or any amended applications) from being considered on the same terms as other qualified businesses that are not debtors in cases arising under the Bankruptcy Code and which are also seeking PPP funding.

With respect to **Count III**, the Debtor seeks the following relief:

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(A) That the Court make a determination that the SBA and the Administrator have violated § 525(a) of the Bankruptcy Code with respect to the Debtors' Applications;

(B) That the Court make a determination that the SBA and the Administrator have violated § 525(a) of the Bankruptcy Code by issuing its Fourth Interim Rule and promulgating PPP Applications excluding debtors; and

(C) That the Court award damages in an amount not less than $3,298,531.00 in the event that the Court does not grant the relief requested in **Count I** on a temporary or preliminary basis and it is later determined that the Debtors were eligible for PPP funds but none remain available.

With respect to **Count IV**, the Debtors seek the following relief:

(A) That the Court enter a declaratory judgment that the SBA and the Administrator's implementation of PPP in a manner that causes debtors in bankruptcy, including the Debtors, to be ineligible is "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right," in violation of the APA.

With respect to **Count V**, the Debtors seek the following relief:

(A) That the Court enter a declaratory judgment that the SBA and the Administrator's implementation of PPP in a manner that causes debtors in bankruptcy, including the Debtors, to be ineligible is "arbitrary, capricious,

[or] an abuse of discretion" in violation of the APA.

With respect to **Count VI**, the Debtors seek the following relief:

(A) That the Court issue a writ of mandamus under 28 U.S.C. § 1361 to compel the SBA and the Administrator to remove from all PPP Applications all purported prohibitions against debtors in bankruptcy participating in PPP and to process the Debtors' Applications without regard to their status as debtors in bankruptcy; and

(B) That the Court award damages in an amount not less than $3,298,531.00 in the event that the Court does not grant the relief requested in **Count I** on a temporary or preliminary basis and it is later determined that the Debtors were eligible for PPP funds but none remain available.

With respect to **Count VII**, the Debtors seek the following relief:

(A) That the Court make a determination that the SBA and the Administrator's use of the phrase "involved in any bankruptcy" in the Fourth Interim Rule and the PPP Applications is overly broad, vague, and difficult to apply, and therefore ambiguous;

(B) That the Court enter a declaratory judgment stating that the questions in the PPP Applications that ask whether the applicant is "presently involved in any bankruptcy" shall be interpreted as asking only whether the applicant is a debtor in a case under chapter 7 of the Bankruptcy Code; and

(C) That the Court award damages in an amount not less than $3,298,531.00 in the event that the Court does not grant the relief requested in **Count I** on a temporary or preliminary basis and it is later determined that the Debtors were eligible for PPP funds but none remain available.

With respect to **Count I**, **Count II**, **Count III**, **Count IV**, **Count V**, **Count VI**, and **Count VII**, the Debtors request that they be awarded attorneys' fees and costs pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412(b). *See Murkeldove v. Astrue*, 635 F.3d 784 (5th Cir. 2011); *In re Transcon Lines*, 178 B.R. 228, 232 (Bankr. C.D. Cal. 1995) ("bankruptcy court has jurisdiction to award fees" under EAJA).

The Debtors also request any other and further relief be granted that may be appropriate.

Dated: May 15, 2020

/s/ Samuel R. Maizel

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VERIFICATION OF JOHN M. GALLAGHER

I, John M. Gallagher, submit this Verification in support of the complaint (the "Complaint") the Debtors file against Defendant United States Small Business Administration (the "SBA") acting through Defendant Jovita Carranza in her capacity as the Administrator of the SBA (the "Administrator", and together with the SBA, the "Defendants"), and hereby state and declare as follows:

1. I am the President and Chief Executive Officer for Astria Health ("CEO").

2. I declare under penalty of perjury under the laws of the United States of America that the allegations in the foregoing Verified Complaint are true and accurate, to the best of my knowledge and belief, and, if not based on my own personal knowledge, that I believe such allegations to be true and correct.

Dated: May 15, 2020

ASTRIA HEALTH

By: _____

John M. Gallagher

President and Chief Executive Officer

Exhibit 1

(***Hildago Country Emergency Service Foundation*** **Hearing Transcript)**

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

HIDALGO COUNTY EMERGENCY SERVICE FOUNDATION,	)	CASE NO: 20-02006
	)	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. Jordan Holzer & Ortiz 500 N. Shoreline Drive Suite 900 Corpus Christi, TX 78401
Also present:	DAVID ELLIOTT
For Defendant:	RICHARD A. KINCHELOE, ESQ. United States Attorney's Office 1000 Louisiana Street Suite 2300 Houston, TX 77002
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.

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

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

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

MR. ELLIOTT: Good morning (indisc.)

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

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

MR. HOLZER: No, your Honor.

MR. KINCHELOE: No, your Honor.

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

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

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

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

MR. HOLZER: Mr. Ponce.

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

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

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

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

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

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

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

THE COURT: (Indisc.)

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

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

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

THE COURT: (Indisc.)

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

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

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

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

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

MR. HOLZER: Could they --

THE COURT: (Indisc.)

MR. HOLZER: Could they?

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

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

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

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

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

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

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

THE COURT: (Indisc.)

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

THE COURT: Read the language --

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

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

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

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

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

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

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

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

the Court should grant an injunction.

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

MR. KINCHELOE: Yes, your Honor, Rick Kincheloe. (Indisc.) start with Mr. Holzer's discussion of he -- the reasons for the exclusion. And I will say I really appreciate Mr. Holzer sending me the cases he was going to discuss before today. It certainly was an extreme professional courtesy.

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

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

MR. KINCHELOE: Okay.

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

MR. KINCHELOE: Oh, I --

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

MR. KINCHELOE: The second page --

MR. HOLZER: (Indisc.)

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

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

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

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

MR. KINCHELOE: From the interim rule I've read, yes. But from the --

THE COURT: (Indisc.)

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

THE COURT: Got it.

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

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

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

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

THE COURT: Right.

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

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

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

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

MR. KINCHELOE: (No audible response)

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

MR. KINCHELOE: So, your Honor, --

THE COURT: (Indisc.)

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

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

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

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

THE COURT: Let's take a practical example. Mr. Holzer comes into his local financial institution for a PPE

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

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

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

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

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

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

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

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

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

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

THE COURT: Are they?

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

THE COURT: Okay.

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

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

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

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

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

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

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

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

MR. HOLZER: Yes, your Honor.

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

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

THE COURT: (Indisc.)

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

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

MR. KINCHELOE: No, your Honor.

THE COURT: Is that it?

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

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

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

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

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

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

THE COURT: Got it, okay. Anything else?

MR. HOLZER: Your Honor, briefly.

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

MR. HOLZER: Okay (indisc.)

THE COURT: Anything else, Mr. Kincheloe?

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

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

MR. KINCHELOE: Your Honor, I mean --

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

do anything other than to not discriminate.

(Pause)

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

THE COURT: I got it. Anything else?

MR. KINCHELOE: No, your Honor.

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

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

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

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

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

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

I also have found but I've not been cited to any legitimate basis for including that language in the form. I take umbrage of the fact that if I look at question one and I look at the list and I think just rules of normal construction, and I realize that this is not a statute but it's a form that is derived from a statute, it says if a business or owner is presently suspended, debarred, proposed to be debarred declared ineligible, voluntarily excluded from participation in this transaction by any (indisc.) department or agency all conduct which society frowns upon, involves potentially wrongful acts, involves potentially criminal conduct. And then as an add-on, it says: "Or presently involved in any bankruptcy." Plain meaning: as a creditor, as a landlord, as a partner in another business, as a shareholder in another business. It's entirely inappropriate that those words were added into that form in that list in that manner. And I see no authority anywhere for including those words in that form. It serves no purpose. 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.

I am worried about the argument that I cannot enjoin the administrator of the SBA. I agree I can't tell the SBA administrator what loans to guarantee, what loans to grant. I simply do not accept that when I have evidence of bankruptcy discrimination that I can do nothing about it. And if I am wrong about that, I am very certain that my Article Three colleagues will tell me that I am wrong, and I will accept that criticism. But this can't be what Congress intended. This can't be the way that we are supposed to treat our fellow man in this time. It's inconceivable to me that this distinction could be drawn. 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; can't possibly be.

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

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

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

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

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

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

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

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

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

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

MR. HOLZER: It does, your Honor.

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

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

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

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

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

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

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

(Automated telephone recording played)

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

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

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

MR. KINCHELOE: One issue, your Honor.

THE COURT: Certainly.

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

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

MR. KINCHELOE: Thank you, your Honor.

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

MR. KINCHELOE: Thank you, your Honor.

THE COURT: Thank you, gentlemen.

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

THE COURT: (Indisc.)

MR. KINCHELOE: You, too, your Honor.

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

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 A

(Weekly Cash Flow Budget)

DENTONS US LLP
601 South Figueroa Street, Suite 2500
Los Angeles, CA 90017-5704
Phone: (213) 623-9300
Fax: (213) 623-9924

BUSH KORNFELD LLP
LAW OFFICES
601 Union St., Suite 5000
Seattle, Washington 98101-2373
Telephone (206) 292-2110
Facsimile (206) 292-2104

($ in thousands)

Astria Health
Weekly Cash Flow Budget

Preliminary Draft - Subject to Change
Privileged and Confidential

Week	52 (A)			53 (P)	54 (P)	55 (P)	56 (P)	57 (P)	58 (P)	59 (P)	60 (P)	61 (P)	62 (P)	63 (P)
Week-ending date	5/1	Actual	+ / -	5/8	5/15	5/22	5/29	6/5	6/12	6/19	6/26	7/3	7/10	7/17
Beginning operating cash balance	**9,979**	**9,979**		**8,913**	**17,406**	**18,283**	**18,749**	**17,515**	**17,769**	**17,330**	**19,125**	**19,630**	**20,140**	**20,058**
Collections														
Yakima / Toppenish	935	691	(244)	775	775	775	935	775	775	775	775	925	775	775
Topp Behavioral Adjustment		-	-											
Sunnyside	2,500	1,922	(578)	2,350	2,350	2,350	2,350	2,350	2,350	2,350	2,350	2,350	2,350	2,350
Elective Procedures Change	(1,156)		1,156	(1,191)	(1,191)	(485)	(325)	(485)	(485)	168	168	328	168	523
Provider Tax										100	90	70		
ARMC Rent					1,500					532				
ARMC Pass Through					250					89				
COVID Grant				8,694										
DIP Loan Borrowing														
Total Collections	**2,279**	**2,612**	**334**	**10,628**	**3,684**	**2,640**	**2,960**	**2,640**	**2,640**	**4,014**	**3,383**	**3,673**	**3,293**	**3,648**
Disbursements														
Payroll, taxes, and other -Y/T	237	357	(120)	474	237	507	404	540	270	540	270	540	270	540
Payroll & Other ASH	730	906	(176)	262	730	324	1,380	387	980	387	980	387	980	387
Other Op Ex	94	82	12	35	29	29	100	29	29	29	29	100	29	29
Purchased services	302	592	(290)	332	439	302	632	332	439	302	632	332	439	302
Contract labor	255	9	246	255	125	125	125	125	125	125	125	125	125	125
Rent	60	107	(47)	60	40	70	200	60	40	70	200	60	40	70
Medical professionals	-	57	(57)	-	-	125	-	-	-	125	-	-	-	125
Utilities	82	17	65	82	82	82	82	82	82	82	82	82	82	82
Prop Tax and Ins	-	391	(391)	31	70			246	100			86	100	
Supplies, pharma., and dietary	325	330	(5)	455	455	460	460	460	465	460	460	465	460	460
Corporate Overhead	214	204	10	-	-	-	157	-	-	-	-	157	-	-
Provider Tax	-		-	-	-	-	-	-	-	-	-	200	200	900
CRO Fees	145	145	-				145					145		
UMR Payments	150	94	56	150	150	150	125	125	100	100	100	100	100	100
Medicaid Repayment ASH			-											
Professional Fees	-		-	-	450	-	-	-	450	-	-	-	550	-
Cash Out for Loan Payoff			-											
DIP Fees and Expenses			-											
DIP Interest	385	389	(4)	-	-	-	385	-	-	-	-	385	-	-
UST Fees	-		-											
			-											
Total Disbursements	**2,979**	**3,679**	**(700)**	**2,135**	**2,807**	**2,174**	**4,195**	**2,386**	**3,080**	**2,220**	**2,878**	**3,164**	**3,375**	**3,120**
WEEKLY NET CASH FLOW	**(700)**	**(1,066)**	**(366)**	**8,493**	**877**	**466**	**(1,235)**	**255**	**(440)**	**1,795**	**505**	**510**	**(82)**	**529**
ENDING CASH (ACTUAL)	**9,279**	**8,913**		**17,406**	**18,283**	**18,749**	**17,515**	**17,769**	**17,330**	**19,125**	**19,630**	**20,140**	**20,058**	**20,587**

Exhibit B

(First Interim Rule)

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Rules and Regulations

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SMALL BUSINESS ADMINISTRATION

13 CFR Part 120

[Docket No. SBA–2020–0015]

RIN 3245–AH34

Business Loan Program Temporary Changes; Paycheck Protection Program

AGENCY: U.S. Small Business Administration.

ACTION: Interim final rule.

SUMMARY: This interim final rule announces the implementation of sections 1102 and 1106 of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act or the Act). Section 1102 of the Act temporarily adds a new product, titled the ''Paycheck Protection Program,'' to the U.S. Small Business Administration's (SBA's) 7(a) Loan 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. The Paycheck Protection Program and loan forgiveness are intended to provide economic relief to small businesses nationwide adversely impacted under the Coronavirus Disease 2019 (COVID–19) Emergency Declaration (COVID–19 Emergency Declaration) issued by President Trump on March 13, 2020. This interim final rule outlines the key provisions of SBA's implementation of sections 1102 and 1106 of the Act in formal guidance and requests public comment.

DATES:

Effective date: This interim final rule is effective April 15, 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 15, 2020.

ADDRESSES: You may submit comments, identified by number SBA–2020–0015 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: 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, 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. A more detailed discussion of sections 1102 and 1106 of the Act is found in section III below.

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, small businesses need to be informed on how to apply for a loan and the terms of the loan under section 1102 of the Act as soon as possible because the last day to apply for and receive a loan is June 30, 2020. The immediate effective date of this interim final rule will benefit small businesses so that they can immediately apply for the loan with a full understanding of loan terms and conditions. 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 1 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 15, 2020. The SBA will consider these comments and the need for making any revisions as a result of these comments.

III. Temporary New Business Loan Program: Paycheck Protection Program

Overview

The CARES Act was enacted to provide immediate assistance to individuals, families, and businesses

affected by the COVID–19 emergency. Among the provisions contained in the CARES Act are provisions authorizing SBA to temporarily guarantee loans under a new 7(a) loan program titled the ''Paycheck Protection Program.'' Loans guaranteed under the Paycheck Protection Program (PPP) will be 100 percent guaranteed by SBA, and the full principal amount of the loans may qualify for loan forgiveness. The following outlines the key provisions of the PPP.

1. General

SBA is authorized to guarantee loans under the PPP through June 30, 2020. Congress authorized a program level of $349,000,000,000 to provide guaranteed loans under this new 7(a) program. The intent of the Act is that SBA provide relief to America's small businesses expeditiously, which is expressed in the Act by giving all lenders delegated authority and streamlining the requirements of the regular 7(a) loan program. For example, for loans made under the PPP, SBA will not require the lenders to comply with section 120.150 ''What are SBA's lending criteria?.'' SBA will allow lenders to rely on certifications of the borrower in order to determine eligibility of the borrower and use of loan proceeds and to rely on specified documents provided by the borrower to determine qualifying loan amount and eligibility for loan forgiveness. Lenders must comply with the applicable lender obligations set forth in this interim final rule, but will be held harmless for borrowers' failure to comply with program criteria; remedies for borrower violations or fraud are separately addressed in this interim final rule. The program requirements of the PPP identified in this rule temporarily supersede any conflicting Loan Program Requirement (as defined in 13 CFR 120.10).

2. What do borrowers need to know and do?

a. Am I eligible?

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

i. You are:

A. A small business concern as defined in section 3 of the Small Business Act (15 U.S.C. 632), and subject to SBA's affiliation rules under 13 CFR 121.301(f) unless specifically waived in the Act; or

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

ii. You were in operation on February 15, 2020 and either had employees for whom you paid salaries and payroll taxes or paid independent contractors, as reported on a Form 1099–MISC.

You are also eligible for a PPP loan if you are an individual who operates under a sole proprietorship or as an independent contractor or eligible self-employed individual, and you were in operation on February 15, 2020.

You must also submit such documentation as is necessary to establish eligibility such as payroll processor records, payroll tax filings, or Form 1099–MISC, or income and expenses from a sole proprietorship. For borrowers that do not have any such documentation, the borrower must provide other supporting documentation, such as bank records, sufficient to demonstrate the qualifying payroll amount.

SBA intends to promptly issue additional guidance with regard to the applicability of affiliation rules at 13 CFR 121.103 and 121.301 to PPP loans.

b. Could I be ineligible even if I meet the eligibility requirements in (a) above?

You are ineligible for a PPP loan if, for example:

i. You are engaged in any activity that is illegal under Federal, state, or local law;

ii. You are a household employer (individuals who employ household employees such as nannies or housekeepers);

iii. An owner of 20 percent or more of the equity of the applicant is incarcerated, on probation, on parole; presently subject to an indictment, criminal information, arraignment, or other means by which formal criminal charges are brought in any jurisdiction; or has been convicted of a felony within the last five years; or

iv. You, or any business owned or controlled by you or any of your owners, has ever obtained a direct or guaranteed loan from SBA or any other Federal agency that is currently delinquent or has defaulted within the last seven years and caused a loss to the government.

The Administrator, in consultation with the Secretary of the Treasury (the Secretary), determined that household employers are ineligible because they are not businesses. 13 CFR 120.100.

c. How do I determine if I am ineligible?

Businesses that are not eligible for PPP loans are identified in 13 CFR 120.110 and described further in SBA's Standard Operating Procedure (SOP) 50 10, Subpart B, Chapter 2, except that nonprofit organizations authorized under the Act are eligible. (SOP 50 10 can be found at *https://www.sba.gov/document/sop-50-10-5-lender-development-company-loan-programs*.)

d. I have determined that I am eligible. How much can I borrow?

Under the PPP, the maximum loan amount is the lesser of $10 million or an amount that you will calculate using a payroll-based formula specified in the Act, as explained below.

e. How do I calculate the maximum amount I can borrow?

The following methodology, which is one of the methodologies contained in the Act, will be most useful for many applicants.

i. Step 1: Aggregate payroll costs (defined in detail below in f.) from the last twelve months for employees whose principal place of residence is the United States.

ii. Step 2: Subtract any compensation paid to an employee in excess of an annual salary of $100,000 and/or any amounts paid to an independent contractor or sole proprietor in excess of $100,000 per year.

iii. Step 3: Calculate average monthly payroll costs (divide the amount from Step 2 by 12).

iv. Step 4: Multiply the average monthly payroll costs from Step 3 by 2.5.

v. Step 5: Add the outstanding amount of an Economic Injury Disaster Loan (EIDL) made between January 31, 2020 and April 3, 2020, less the amount of any ''advance'' under an EIDL COVID–19 loan (because it does not have to be repaid).

The examples below illustrate this methodology.

i. Example 1—No employees make more than $100,000
Annual payroll: $120,000
Average monthly payroll: $10,000
Multiply by 2.5 = $25,000
Maximum loan amount is $25,000

ii. Example 2—Some employees make more than $100,000
Annual payroll: $1,500,000
Subtract compensation amounts in excess of an annual salary of $100,000: $1,200,000
Average monthly qualifying payroll: $100,000
Multiply by 2.5 = $250,000
Maximim loan amount is $250,000

iii. Example 3—No employees make more than $100,000, outstanding EIDL loan of $10,000.
Annual payroll: $120,000
Average monthly payroll: $10,000
Multiply by 2.5 = $25,000
Add EIDL loan of $10,000 = $35,000
Maximum loan amount is $35,000
iv. Example 4—Some employees make more than $100,000, outstanding EIDL loan of $10,000
Annual payroll: $1,500,000
Subtract compensation amounts in excess of an annual salary of $100,000: $1,200,000
Average monthly qualifying payroll: $100,000
Multiply by 2.5 = $250,000
Add EIDL loan of $10,000 = $260,000
Maximum loan amount is $260,000

f. What qualifies as ''payroll costs?''

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, wages, commissions, income, or net earnings from self-employment, or similar compensation.

g. Is there anything that is expressly excluded from the definition of payroll costs?

Yes. The Act expressly excludes the following:

i. Any compensation of an employee whose principal place of residence is outside of the United States;

ii. The compensation of an individual employee in excess of an annual salary of $100,000, prorated as necessary;

iii. Federal employment taxes imposed or withheld between February 15, 2020 and June 30, 2020, including the employee's and employer's share of FICA (Federal Insurance Contributions Act) and Railroad Retirement Act taxes, and income taxes required to be withheld from employees; and

iv. Qualified sick and family leave wages for which a credit is allowed under sections 7001 and 7003 of the Families First Coronavirus Response Act (Pub. L. 116–127).

h. Do independent contractors count as employees for purposes of PPP loan calculations?

No, independent contractors have the ability to apply for a PPP loan on their own so they do not count for purposes of a borrower's PPP loan calculation.

i. What is the interest rate on a PPP loan?

The interest rate will be 100 basis points or one percent.

The Administrator, in consultation with the Secretary, determined that a one percent interest rate is appropriate. First, it provides low cost funds to borrowers to meet eligible payroll costs and other eligible expenses during this temporary period of economic dislocation caused by the coronavirus. Second, for lenders, the 100 basis points offers an attractive interest rate relative to the cost of funding for comparable maturities. For example, the FDIC's weekly national average rate for a 24-month CD deposit product for the week of March 30, 2020 is 42 basis points for non-jumbo and 44 basis points for jumbo (*https://www.fdic.gov/regulations/resources/rates/*). Third, the interest rate is higher than the yield on Treasury securities of comparable maturity. For example, the yield on the Treasury two-year note is approximately 23 basis points. This higher yield combined with the fact that the loans are 100 percent guaranteed by the SBA and the fact that lenders will receive a substantial processing fee from the SBA provide ample inducement for lenders to participate in the PPP.

j. What will be the maturity date on a PPP loan?

The maturity is two years. While the Act provides that a loan will have a maximum maturity of up to ten years from the date the borrower applies for loan forgiveness (described below), the Administrator, in consultation with the Secretary, determined that a two year loan term is sufficient in light of the temporary economic dislocations caused by the coronavirus. Specifically, the considerable economic disruption caused by the coronavirus is expected to abate well before the two year maturity date such that borrowers will be able to re-commence business operations and pay off any outstanding balances on their PPP loans.

k. Can I apply for more than one PPP loan?

No. The Administrator, in consultation with the Secretary, determined that no eligible borrower may receive more than one PPP loan. This means that if you apply for a PPP loan you should consider applying for the maximum amount. While the Act does not expressly provide that each eligible borrower may only receive one PPP loan, the Administrator has determined, in consultation with the Secretary, that because all PPP loans must be made on or before June 30, 2020, a one loan per borrower limitation is necessary to help ensure that as many eligible borrowers as possible may obtain a PPP loan. This limitation will also help advance Congress' goal of keeping workers paid and employed across the United States.

l. Can I use e-signatures or e-consents if a borrower has multiple owners?

Yes, e-signature or e-consents can be used regardless of the number of owners.

m. Is the PPP ''first-come, first-served?''

Yes.

n. When will I have to begin paying principal and interest on my PPP loan?

You will not have to make any payments for six months following the date of disbursement of the loan. However, interest will continue to accrue on PPP loans during this six-month deferment. The Act authorizes the Administrator to defer loan payments for up to one year. The Administrator determined, in consultation with the Secretary, that a six-month deferment period is appropriate in light of the modest interest rate (one percent) on PPP loans and the loan forgiveness provisions contained in the Act.

o. Can my PPP loan be forgiven in whole or in part?

Yes. The amount of loan forgiveness can be up to the full principal amount of the loan and any accrued interest. That is, the borrower will not be responsible for any loan payment if the borrower uses all of the loan proceeds for forgiveable purposes described below and employee and compensation levels are maintained. The actual amount of loan forgiveness will depend, in part, on the total amount of payroll costs, payments of interest on mortgage obligations incurred before February 15, 2020, rent payments on leases dated before February 15, 2020, and utility payments under service agreements dated before February 15, 2020, over the eight-week period following the date of the loan. However, not more than 25 percent of the loan forgiveness amount may be attributable to non-payroll costs. While the Act provides that borrowers are eligible for forgiveness in an amount equal to the sum of payroll costs and

any payments of mortgage interest, rent, and utilities, the Administrator has determined that the non-payroll portion of the forgivable loan amount should be limited to effectuate the core purpose of the statute and ensure finite program resources are devoted primarily to payroll. The Administrator has determined in consultation with the Secretary that 75 percent is an appropriate percentage in light of the Act's overarching focus on keeping workers paid and employed. Further, the Administrator and the Secretary believe that applying this threshold to loan forgiveness is consistent with the structure of the Act, which provides a loan amount 75 percent of which is equivalent to eight weeks of payroll (8 weeks/2.5 months = 56 days/76 days = 74 percent rounded up to 75 percent). Limiting non-payroll costs to 25 percent of the forgiveness amount will align these elements of the program, and will also help to ensure that the finite appropriations available for PPP loan forgiveness are directed toward payroll protection. SBA will issue additional guidance on loan forgiveness.

p. Do independent contractors count as employees for purposes of PPP loan forgiveness?

No, independent contractors have the ability to apply for a PPP loan on their own so they do not count for purposes of a borrower's PPP loan forgiveness.

q. What forms do I need and how do I submit an application?

The applicant must submit SBA Form 2483 (Paycheck Protection Program Application Form) and payroll documentation, as described above. The lender must submit SBA Form 2484 (Paycheck Protection Program Lender's Application for 7(a) Loan Guaranty) electronically in accordance with program requirements and maintain the forms and supporting documentation in its files.

r. How can PPP loans be used?

The proceeds of a PPP loan are to be used for:

i. payroll costs (as defined in the Act and in 2.f.);

ii. costs related to the continuation of group health care benefits during periods of paid sick, medical, or family leave, and insurance premiums;

iii. mortgage interest payments (but not mortgage prepayments or principal payments);

iv. rent payments;

v. utility payments;

vi. interest payments on any other debt obligations that were incurred before February 15, 2020; and/or

vii. refinancing an SBA EIDL loan made between January 31, 2020 and April 3, 2020. If you received an SBA EIDL loan from January 31, 2020 through April 3, 2020, you can apply for a PPP loan. If your EIDL loan was not used for payroll costs, it does not affect your eligibility for a PPP loan. If your EIDL loan was used for payroll costs, your PPP loan must be used to refinance your EIDL loan. Proceeds from any advance up to $10,000 on the EIDL loan will be deducted from the loan forgiveness amount on the PPP loan.

However, at least 75 percent of the PPP loan proceeds shall be used for payroll costs. For purposes of determining the percentage of use of proceeds for payroll costs, the amount of any EIDL refinanced will be included. For purposes of loan forgiveness, however, the borrower will have to document the proceeds used for payroll costs in order to determine the amount of forgiveness. While the Act provides that PPP loan proceeds may be used for the purposes listed above and for other allowable uses described in section 7(a) of the Small Business Act (15 U.S.C. 636(a)), the Administrator believes that finite appropriations and the structure of the Act warrant a requirement that borrowers use a substantial portion of the loan proceeds for payroll costs, consistent with Congress' overarching goal of keeping workers paid and employed. As with the similar limitation on the forgiveness amount explained earlier, the Administrator, in consultation with the Secretary, has determined that 75 percent is an appropriate percentage that will align this element of the program with the loan amount, 75 percent of which is equivalent to eight weeks of payroll. This limitation on use of the loan funds will help to ensure that the finite appropriations available for these loans are directed toward payroll protection, as each loan that is issued depletes the appropriation, regardless of whether portions of the loan are later forgiven.

s. What happens if PPP loan funds are misused?

If you use PPP funds for unauthorized purposes, SBA will direct you to repay those amounts. If you knowingly use the funds for unauthorized purposes, you will be subject to additional liability such as charges for fraud. If one of your shareholders, members, or partners uses PPP funds for unauthorized purposes, SBA will have recourse against the shareholder, member, or partner for the unauthorized use.

t. What certifications need to be made?

On the Paycheck Protection Program application, an authorized representative of the applicant must certify in good faith to all of the below: [1]

i. 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 a Form 1099–MISC.

ii. Current economic uncertainty makes this loan request necessary to support the ongoing operations of the applicant.

iii. The funds will be used to retain workers and maintain payroll or make mortgage interest payments, lease payments, and utility payments; 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. As explained above, not more than 25 percent of loan proceeds may be used for non-payroll costs.

iv. Documentation verifying the number of full-time equivalent employees on 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 will be provided to the lender.

v. Loan forgiveness will be provided for the sum of documented payroll costs, covered mortgage interest payments, covered rent payments, and covered utilities. As explained above, not more than 25 percent of the forgiven amount may be for non-payroll costs.

vi. 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 this program.

vii. 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 U.S.C. 1001 and 3571 by imprisonment of not more than five years and/or a fine of up to $250,000; under 15 U.S.C. 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 U.S.C. 1014 by imprisonment of not more than thirty years and/or a fine of not more than $1,000,000.

[1] A representative of the applicant can certify for the business as a whole if the representative is legally authorized to do so.

viii. I acknowledge that the lender will confirm the eligible loan amount using tax documents I have submitted. I affirm that these tax documents are identical to those submitted to the Internal Revenue Service. I also understand, acknowledge, and agree that the Lender can share the tax information 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.

3. What do lenders need to know and do?

a. Who is eligible to make PPP loans?

i. All SBA 7(a) lenders are automatically approved to make PPP loans on a delegated basis.

ii. The Act provides that the authority to make PPP loans can be extended to additional lenders determined by the Administrator and the Secretary to have the necessary qualifications to process, close, disburse, and service loans made with the SBA guarantee. Since SBA is authorized to make PPP loans up to $349 billion by June 30, 2020, the Adminstrator and the Secretary have jointly determined that authorizing additional lenders is necessary to achieve the purpose of allowing as many eligible borrowers as possible to receive loans by the June 30, 2020 deadline.

iii. The following types of lenders have been determined to meet the criteria and are eligible to make PPP loans unless they currently are designated in Troubled Condition by their primary Federal regulator or are subject to a formal enforcement action with their primary Federal regulator that addresses unsafe or unsound lending practices:

I. Any federally insured depository institution or any federally insured credit union;

II. Any Farm Credit System institution (other than the Federal Agricultural Mortgage Corporation) as defined in 12 U.S.C. 2002(a) that applies the requirements under the Bank Secrecy Act and its implementing regulations (collectively, BSA) as a federally regulated financial institution, or functionally equivalent requirements that are not altered by this rule; and

III. Any depository or non-depository financing provider that originates, maintains, and services business loans or other commercial financial receivables and participation interests; has a formalized compliance program; applies the requirements under the BSA as a federally regulated financial institution, or the BSA requirements of an equivalent federally regulated financial institution; has been operating since at least February 15, 2019, and has originated, maintained, and serviced more than $50 million in business loans or other commercial financial receivables during a consecutive 12 month period in the past 36 months, or is a service provider to any insured depository institution that has a contract to support such institution's lending activities in accordance with 12 U.S.C. 1867(c) and is in good standing with the appropriate Federal banking agency.

iv. Qualified institutions described in 3.a.iii.I. and II. will be automatically qualified under delegated authority by the SBA upon transmission of CARES Act Section 1102 Lender Agreement (SBA Form 3506) unless they currently are designated in Troubled Condition by their primary Federal regulator or are subject to a formal enforcement action by their primary Federal regulator that addresses unsafe or unsound lending practices.

b. What do lenders have to do in terms of loan underwriting?

Each lender shall:

i. Confirm receipt of borrower certifications contained in Paycheck Protection Program Application form issued by the Administration;

ii. Confirm receipt of information demonstrating that a borrower had employees for whom the borrower paid salaries and payroll taxes on or around February 15, 2020;

iii. Confirm the dollar amount of average monthly payroll costs for the preceding calendar year by reviewing the payroll documentation submitted with the borrower's application; and

iv. Follow applicable BSA requirements:

I. Federally insured depository institutions and federally insured credit unions should continue to follow their existing BSA protocols when making PPP loans to either new or existing customers who are eligible borrowers under the PPP. PPP loans for existing customers will not require re-verification under applicable BSA requirements, unless otherwise indicated by the institution's risk-based approach to BSA compliance.

II. Entities that are not presently subject to the requirements of the BSA, should, prior to engaging in PPP lending activities, including making PPP loans to either new or existing customers who are eligible borrowers under the PPP, establish an anti-money laundering (AML) compliance program equivalent to that of a comparable federally regulated institution. Depending upon the comparable federally regulated institution, such a program may include a customer identification program (CIP), which includes identifying and verifying their PPP borrowers' identities (including *e.g.,* date of birth, address, and taxpayer identification number), and, if that PPP borrower is a company, following any applicable beneficial ownership information collection requirements. Alternatively, if available, entities may rely on the CIP of a federally insured depository institution or federally insured credit union with an established CIP as part of its AML program. In either instance, entities should also understand the nature and purpose of their PPP customer relationships to develop customer risk profiles. Such entities will also generally have to identify and report certain suspicious activity to the U.S. Department of the Treasury's Financial Crimes Enforcement Network (FinCEN). If such entities have questions with regard to meeting these requirements, they should contact the FinCEN Regulatory Support Section at *FRC@fincen.gov.* In addition, FinCEN has created a COVID–19-specific contact channel, via a specific drop-down category, for entities to communicate to FinCEN COVID–19-related concerns while adhering to their BSA obligations. Entities that wish to communicate such COVID–19-related concerns to FinCEN should go to *www.FinCEN.gov,* click on ''Need Assistance,'' and select ''COVID19'' in the subject drop-down list.

Each lender's underwriting obligation under the PPP is limited to the items above and reviewing the ''Paycheck Protection Application Form.'' Borrowers must submit such documentation as is necessary to establish eligibility such as payroll processor records, payroll tax filings, or Form 1099–MISC, or income and expenses from a sole proprietorship. For borrowers that do not have any such documentation, the borrower must provide other supporting documentation, such as bank records, sufficient to demonstrate the qualifying payroll amount.

c. Can lenders rely on borrower documentation for loan forgiveness?

Yes. The lender does not need to conduct any verification if the borrower submits documentation supporting its request for loan forgiveness and attests that it has accurately verified the payments for eligible costs. The Administrator will hold harmless any lender that relies on such borrower documents and attestation from a borrower. The Administrator, in

consultation with the Secretary, has determined that lender reliance on a borrower's required documents and attestation is necessary and appropriate in light of section 1106(h) of the Act, which prohibits the Administrator from taking an enforcement action or imposing penalties if the lender has received a borrower attestation.

d. What fees will lenders be paid?

SBA will pay lenders fees for processing PPP loans in the following amounts:

i. Five (5) percent for loans of not more than $350,000;

ii. Three (3) percent for loans of more than $350,000 and less than $2,000,000; and

iii. One (1) percent for loans of at least $2,000,000.

e. Do lenders have to apply the ''credit elsewhere test''?

No. When evaluating an applicant's eligibility lenders will not be required to apply the ''credit elsewhere test'' (as set forth in section 7(a)(1)(A) of the Small Business Act (15 U.S.C. 636) and SBA regulations at 13 CFR 120.101)).

4. What do both borrowers and lenders need to know and do?

a. What are the loan terms and conditions?

Loans will be guaranteed under the PPP under the same terms, conditions and processes as other 7(a) loans, with certain changes including but not limited to:

i. The guarantee percentage is 100 percent.

ii. No collateral will be required.

iii. No personal guarantees will be required.

iv. The interest rate will be 100 basis points or one percent.

v. All loans will be processed by all lenders under delegated authority and lenders will be permitted to rely on certifications of the borrower in order to determine eligibility of the borrower and the use of loan proceeds.

b. Are there any fee waivers?

i. There will be no up-front guarantee fee payable to SBA by the Borrower;

ii. There will be no lender's annual service fee (''on-going guaranty fee'') payable to SBA;

iii. There will be no subsidy recoupment fee; and

iv. There will be no fee payable to SBA for any guarantee sold into the secondary market.

c. Who pays the fee to an agent who assists a borrower?

Agent fees will be paid by the lender out of the fees the lender receives from SBA. Agents may not collect fees from the borrower or be paid out of the PPP loan proceeds. The total amount that an agent may collect from the lender for assistance in preparing an application for a PPP loan (including referral to the lender) may not exceed:

i. One (1) percent for loans of not more than $350,000;

ii. 0.50 percent for loans of more than $350,000 and less than $2 million; and

iii. 0.25 percent for loans of at least $2 million.

The Act authorizes the Administrator to establish limits on agent fees. The Administrator, in consultation with the Secretary, determined that the agent fee limits set forth above are reasonable based upon the application req uirements and the fees that lenders receive for making PPP loans.

d. Can PPP loans be sold into the secondary market?

Yes. A PPP loan may be sold on the secondary market after the loan is fully disbursed. A PPP loan may be sold on the secondary market at a premium or a discount to par value. SBA will issue guidance regarding any advance purchase for loans sold in the secondary market.

e. Can SBA purchase some or all of the loan in advance?

Yes. A lender may request that the SBA purchase the expected forgiveness amount of a PPP loan or pool of PPP loans at the end of week seven of the covered period. The expected forgiveness amount is the amount of loan principal the lender reasonably expects the borrower to expend on payroll costs, covered mortgage interest, covered rent, and covered utility payments during the eight week period after loan disbursement. At least 75 percent of the expected forgiveness amount shall be for payroll costs, as provided in 2.o. To submit a PPP loan or pool of PPP loans for advance purchase, a lender shall submit a report requesting advance purchase with the expected forgiveness amount to the SBA. The report shall include: the Paycheck Protection Program Application Form (SBA Form 2483) and any supporting documentation submitted with such application; the Paycheck Protection Program Lender's Application for 7(a) Loan Guaranty (SBA Form 2484) and any supporting documentation; a detailed narrative explaining the assumptions used in determining the expected forgiveness amount, the basis for those assumptions, alternative assumptions considered, and why alternative assumptions were not used; any information obtained from the borrower since the loan was disbursed that the lender used to determine the expected forgiveness amount, which should include the same documentation required to apply for loan forgiveness such as payroll tax filings, cancelled checks, and other payment documentation; and any additional information the Administrator may require to determine whether the expected forgiveness amount is reasonable. The Administrator, in consultation with the Secretary, determined that seven weeks is the minimum period of time necessary for a lender to reasonably determine the expected forgiveness amount for a PPP loan or pool of PPP loans, since the PPP is a new program and the likelihood that many borrowers will be new clients of the lender. The expected forgiveness amount may not exceed the total amount of principal on the PPP loan or pool of loans. The Administrator will purchase the expected forgiveness amount of the PPP loan(s) within 15 days of the date on which the Administrator receives a complete report that demonstrates that the expected forgiveness amount is indeed reasonable.

5. Additional Information

All loans guaranteed by the SBA pursuant to the CARES Act will be made consistent with constitutional, statutory, and regulatory protections for religious liberty, including the First Amendment to the Constitution, the Religious Freedom Restoration Act, 42 U.S.C. 2000bb–1 and bb–3, and SBA regulation at 13 CFR 113.3–1h, which provides that nothing in SBA nondiscrimination regulations shall apply to a religious corporation, association, educational institution or society with respect to the membership or the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution or society of its religious activities. SBA intends to promptly issue additional guidance with regard to religious liberty protections under this program.

SBA may provide further guidance, if needed, through SBA notices and a program guide which will be posted on SBA's website at *www.sba.gov.*

Questions on the Paycheck Protection Program 7(a) Loans 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, 12988, 13132, and 13771, the Paperwork Reduction Act (44 U.S.C. Ch. 35), and the Regulatory Flexibility Act (5 U.S.C. 601–612)

E.O. 12866 and E.O. 13563

This interim final rule is economically significant for the purposes of Executive Orders 12866 and 13563. 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.

This rule is necessary to implement Sections 1102 and 1106 of the CARES Act in order to provide economic relief to small businesses nationwide adversely impacted under the COVID–19 Emergency Declaration. We anticipate that this rule will result in substantial benefits to small businesses, their employees, and the communities they serve. However, we lack data to estimate the effects of this rule.

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 impose recordkeeping or reporting requirements under the Paperwork Reduction Act (''PRA''). SBA has obtained emergency approval under OMB Control Number 3245–0407 for the information collection (IC) required to implement the program described above. This IC consists of Form 2483 (Paycheck Protection Program Application Form), SBA Form 2484 (Paycheck Protection Program Lender's Application for 7(a) Loan Guaranty), and SBA Form 3506 (CARES Act Section 1102 Lender Agreement), and SBA Form 3507 (CARES Act Section 1102 Lender Agreement—Non-Bank and Non-Insured Depository Institution Lender). The collection is approved for use until September 30, 2020.

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. Small Business Administration's Office of Advocacy guide: *How to Comply with the Regulatory Flexibility Ac. Ch.1. p.9.* Accordingly, SBA is not required to conduct a regulatory flexibility analysis.

Authority: 15 U.S.C. 636(a)(36); Coronavirus Aid, Relief, and Economic Security Act, Public Law 116–136, Section 1114.

Jovita Carranza,

Administrator.

[FR Doc. 2020–07672 Filed 4–10–20; 4:15 pm]

BILLING CODE P

SMALL BUSINESS ADMINISTRATION

13 CFR Part 121

[Docket No. SBA–2020–0019]

RIN 3245–AH35

Business Loan Program Temporary Changes; Paycheck Protection Program

AGENCY: U.S. Small Business Administration.

ACTION: Interim final rule.

SUMMARY: Elsewhere in this issue of the **Federal Register**, the U.S. Small Business Administration (SBA) is publishing an interim final rule (the Initial Rule) announcing the implementation of sections 1102 and 1106 of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act or the Act). Section 1102 of the Act temporarily adds a new program, titled the ''Paycheck Protection Program,'' to the SBA's 7(a) Loan 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. The Paycheck Protection Program and loan forgiveness are intended to provide economic relief to small businesses nationwide adversely impacted by the Coronavirus Disease 2019 (COVID–19). This interim final rule supplements the Initial Rule with additional guidance regarding the application of certain affiliate rules applicable to SBA's implementation of sections 1102 and 1106 of the Act and requests public comment.

DATES:

Effective date: This interim final rule is effective April 15, 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.

Exhibit C

(Congressional Letters to the SBA)

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Fax: (213) 623-9924

BUSH KORNFELD LLP
LAW OFFICES
601 Union St., Suite 5000
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Telephone (206) 292-2110
Facsimile (206) 292-2104

SUSAN M. COLLINS
MAINE

413 DIRKSEN SENATE OFFICE BUILDING
WASHINGTON, DC 20510–1904
(202) 224–2523
(202) 224–2693 (FAX)

United States Senate

WASHINGTON, DC 20510–1904

COMMITTEES:
SPECIAL COMMITTEE ON AGING, CHAIRMAN
APPROPRIATIONS
HEALTH, EDUCATION, LABOR, AND PENSIONS
SELECT COMMITTEE ON INTELLIGENCE

April 24, 2020

Ms. Jovita Carranza
Administrator
U.S. Small Business Administration
409 34d St., SW
Washington, DC 20416

Dear Administrator Carranza:

I am writing to express my concerns regarding the ability of financially distressed hospitals to access badly needed relief for payroll for their employees through the Paycheck Protection Program (PPP). While hospitals are not prohibited from participating in the program, those that have previously been or are currently under bankruptcy protection in order to restructure debt and maintain viability have been unable to access PPP funds, due to an interpretation of underlying Small Business Administration 7(a) program rules.

Hospitals are critical infrastructure and their employees are essential in the COVID-19 response effort. Many hospitals are experiencing substantial increases in expenses associated with preparing for and responding to the pandemic. They are simultaneously facing sharp declines in revenue associated with declining patient volumes due to the cancellation of routine and elective procedures, in order to protect the public health and conserve limited supplies of Personal Protective Equipment, consistent with current guidance from the Centers for Medicare and Medicaid Services.

It is my understanding that waiver authorities do exist for SBA to allow loans to be made to entities with defaulted debt to the federal government, when the applicant shows good cause. Given the critical importance of maintaining health care infrastructure and keeping essential hospital workers employed to care for patients throughout the nation in these unprecedented times, I ask that the SBA give every appropriate consideration, in accordance with all applicable laws and regulations, to exercise this waiver authority and allow financially distressed hospitals to access PPP loans.

Thank you for your consideration of this urgent request. I look forward to your response. If you have any questions, or need additional information, please do not hesitate to contact me or have your staff contact Mark LeDuc in my office at 202-224-3364.

Sincerely,

Susan Collins

Susan M. Collins
United States Senator

ANGUS S. KING, JR.
MAINE

133 HART SENATE OFFICE BUILDING
(202) 224–5344
Website: https://www.King.Senate.gov

COMMITTEES:
ARMED SERVICES
ENERGY AND NATURAL RESOURCES
INTELLIGENCE
RULES AND ADMINISTRATION

United States Senate

WASHINGTON, DC 20510

April 17, 2020

The Honorable Jovita Carranza
Administrator
Small Business Administration
409 Third Street, SW
Washington, DC 20416

Dear Administrator Carranza:

Thank you for speaking with me last Friday regarding the urgent need for the Small Business Administration ("SBA") to clarify that rural hospitals currently undergoing Chapter 11 reorganization are eligible for Paycheck Protection Program ("PPP") loans. As we discussed, there appears to be no legal basis to deny PPP loans to such hospitals. I urge you to revise the PPP Borrower Application form immediately so that it includes hospitals undergoing Chapter 11 reorganization as eligible recipients of PPP loans.

I write today because after our urgent call last Friday and follow-up by my staff, the SBA has thus far failed to change its Borrower Application form. Yesterday, PPP appropriations were exhausted. By not changing the PPP Borrower Application form in a timely manner, the SBA denied Penobscot Valley and Calais Memorial Hospitals in Maine the PPP funding that they desperately require during their time of maximum need, leaving their operations at risk.

Aside from the loss of essential medical resources at this time of critical need, the closure of Calais Memorial or Penobscot Valley Hospital would have economic effects on two rural communities in Maine that echo far beyond the facilities' walls. Rural hospitals are the backbone of small-town economies, contributing to the tax base and employing hundreds. Calais Regional Hospital is the largest employer in Calais, Maine, employing more than 200 people, with an annual economic impact of $55 million; and Penobscot Valley Hospital employs approximately 200 people, with an annual economic impact of $38 million.

Current law does not prevent either hospital from receiving PPP funds. Yet, the SBA has chosen to administer the PPP such that an applicant's ongoing bankruptcy reorganization automatically disqualifies the applicant for PPP assistance. This choice denies critical funding to rural hospitals that are reorganizing their debts in a responsible way.

Rural hospitals and the communities that depend upon them need your help today. As Congress considers providing the SBA with additional PPP funding, I urge you to change the PPP Borrower Application form immediately so that rural hospitals undergoing Chapter 11 reorganizations may receive PPP loans and eventual loan forgiveness. Thank you for your work to support the Nation during this difficult time.

Sincerely,

ANGUS S. KING, JR.
United States Senator

AUGUSTA
4 Gabriel Drive, Suite 3
Augusta, ME 04330
(207) 622–8292

BANGOR
202 Harlow Street, Suite 20350
Bangor, ME 04401
(207) 945–8000

BIDDEFORD
227 Main Street
Biddeford, ME 04005
(207) 352–5216

PRESQUE ISLE
169 Academy Street, Suite A
Presque Isle, ME 04769
(207) 764–5124

Congress of the United States
Washington, DC 20510

April 24, 2020

The Honorable Jovita Carranza
Administrator Small Business Administration
409 Third Street, SW
Washington, DC 20416

Dear Administrator Carranza:

We are writing to urge you to reconsider the blanket exclusion of organizations undergoing Chapter 11 reorganization from participation in the Paycheck Protection Program (PPP). Specifically, we ask you to consider the advisability of allowing essential health organizations, such as critical access hospitals and federally qualified health centers, to participate. These hospitals in Vermont and across the country are on the front lines of the COVID-19 pandemic response and we need the critical services they provide now more than ever before. We should be making all resources available to our health care providers to help them keep the lights on in their time of need.

In rural and underserved areas in Vermont and throughout the country, these facilities are not only essential medical providers, but are the economic backbone of our communities. It is particularly important right now to keep access to care affordable and available for patients in rural areas during the COVID-19 pandemic. If Vermont were to lose any of our critical access hospitals during this uncertain time, it would have a devastating effect on the state's COVID response and rural economy.

Eligibility criteria for PPP set in statute does not specifically exclude entities undergoing Chapter 11 bankruptcy. Yet, the SBA has chosen to administer the PPP such that an applicant's ongoing bankruptcy reorganization automatically disqualifies the applicant for PPP assistance. This decision denies the potential for critical funding to hospitals, health centers, and other essential services that are reorganizing their debt in a responsible way. Availability of PPP assistance to these entities will allow them to continue to provide vital services, pay their workforce, and mitigate the risk of closure. To achieve this outcome, SBA should ensure PPP assistance is used for these purposes and not compensating secured and unsecured creditors.

We urge you to amend the Borrower Application without delay to ensure that critical care in our communities remains available. Thank you for your consideration.

Sincerely,

PATRICK LEAHY
United States Senator

BERNARD SANDERS
United States Senator

PETER WELCH
United States Congressman

Exhibit D

(Lenders Application)

Paycheck Protection Program
Lender Application Form - Paycheck Protection Program Loan Guaranty

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

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: ❑ Sole Proprietor ❑ Partnership ❑ C-Corp ❑ S-Corp ❑ LLC ❑ Independent contractor
❑ Eligible self-employed individual ❑ 501(c)(3) nonprofit ❑ 501(c)(19) veterans organization
❑ Tribal business (sec. 31(b)(2)(C) of Small Business Act) ❑ 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)*

- 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. ❑ Yes ❑ No
- 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. ❑ Yes ❑ No

F. Applicant Certification of Eligibility *(If not true, the loan cannot be approved)*

- The Applicant has certified to the Lender that the Applicant is eligible under the Paycheck Protection Program Rule. ❑ True

G. Franchise/License/Jobber/Membership or Similar Agreement *(If applicable and no, the loan cannot be approved)*

- The Applicant has represented to the Lender that it is a franchise that is listed in the SBA's Franchise Directory. ❑ Yes ❑ No

H. Character Determination *(If no, the loan cannot be approved)*		
• 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.	❑ Yes	❑ No
• 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).	❑ Yes	❑ No

I. Prior Loss to Government/Delinquent Federal Debt *(If no, the loan cannot be approved)*		
• 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.	❑ Yes	❑ No
• 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.	❑ Yes	❑ No

J. U.S. Employees (*If no, the loan cannot be approved)*		
• The Applicant has certified that the principal place of residence for all employees included in the Applicant's payroll calculation is the United States.	❑ Yes	❑ No

K. Fees *(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)*		
• 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?	❑ Yes	❑ 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: _____ Date: _____
Signature

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 E

(Second Interim Rule)

DENTONS US LLP
601 South Figueroa Street, Suite 2500
Los Angeles, CA 90017-5704
Phone: (213) 623-9300
Fax: (213) 623-9924

BUSH KORNFELD LLP
LAW OFFICES
601 Union St., Suite 5000
Seattle, Washington 98101-2373
Telephone (206) 292-2110
Facsimile (206) 292-2104

Compliance With Executive Orders 12866, 12988, 13132, and 13771, the Paperwork Reduction Act (44 U.S.C. Ch. 35), and the Regulatory Flexibility Act (5 U.S.C. 601–612)

E.O. 12866 and E.O. 13563

This interim final rule is economically significant for the purposes of Executive Orders 12866 and 13563. 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.

This rule is necessary to implement Sections 1102 and 1106 of the CARES Act in order to provide economic relief to small businesses nationwide adversely impacted under the COVID–19 Emergency Declaration. We anticipate that this rule will result in substantial benefits to small businesses, their employees, and the communities they serve. However, we lack data to estimate the effects of this rule.

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 impose recordkeeping or reporting requirements under the Paperwork Reduction Act (''PRA''). SBA has obtained emergency approval under OMB Control Number 3245–0407 for the information collection (IC) required to implement the program described above. This IC consists of Form 2483 (Paycheck Protection Program Application Form), SBA Form 2484 (Paycheck Protection Program Lender's Application for 7(a) Loan Guaranty), and SBA Form 3506 (CARES Act Section 1102 Lender Agreement), and SBA Form 3507 (CARES Act Section 1102 Lender Agreement—Non-Bank and Non-Insured Depository Institution Lender). The collection is approved for use until September 30, 2020.

Regulatory Flexibility Act (RFA)

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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. Small Business Administration's Office of Advocacy guide: *How to Comply with the Regulatory Flexibility Ac. Ch.1. p.9.* Accordingly, SBA is not required to conduct a regulatory flexibility analysis.

Authority: 15 U.S.C. 636(a)(36); Coronavirus Aid, Relief, and Economic Security Act, Public Law 116–136, Section 1114.

Jovita Carranza,

Administrator.

[FR Doc. 2020–07672 Filed 4–10–20; 4:15 pm]

BILLING CODE P

SMALL BUSINESS ADMINISTRATION

13 CFR Part 121

[Docket No. SBA–2020–0019]

RIN 3245–AH35

Business Loan Program Temporary Changes; Paycheck Protection Program

AGENCY: U.S. Small Business Administration.

ACTION: Interim final rule.

SUMMARY: Elsewhere in this issue of the **Federal Register**, the U.S. Small Business Administration (SBA) is publishing an interim final rule (the Initial Rule) announcing the implementation of sections 1102 and 1106 of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act or the Act). Section 1102 of the Act temporarily adds a new program, titled the ''Paycheck Protection Program,'' to the SBA's 7(a) Loan 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. The Paycheck Protection Program and loan forgiveness are intended to provide economic relief to small businesses nationwide adversely impacted by the Coronavirus Disease 2019 (COVID–19). This interim final rule supplements the Initial Rule with additional guidance regarding the application of certain affiliate rules applicable to SBA's implementation of sections 1102 and 1106 of the Act and requests public comment.

DATES:

Effective date: This interim final rule is effective April 15, 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 15, 2020.

ADDRESSES: You may submit comments, identified by number SBA–2020–0019 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: 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. On April 2, 2020, SBA issued an interim final rule (the Initial Rule) announcing the implementation of sections 1102 and 1106 of the Act. A more detailed discussion of sections 1102 and 1106 of the Act is found in section III of the Initial Rule.

This interim final rule supplements the Initial Rule with additional guidance regarding the application of certain affiliate rules applicable to SBA's implementation of sections 1102 and 1106 of the Act and requests public comment.

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 (5 U.S.C. 553(b)(3)(B)). Specifically, small businesses need to be informed on how to apply for a loan and the terms of the loan under section 1102 of the Act as soon as possible because the last day to apply for and receive a loan is June 30, 2020. The immediate effective date of this interim final rule will benefit small businesses so that they can immediately apply for the loan with a better understanding of loan terms and conditions. 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 1 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. These comments must be submitted on or before May 15, 2020. The SBA will consider these comments and the need for making any revisions as a result of these comments.

III. Affiliate Rules for Paycheck Protection Program

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 may qualify for loan forgiveness. Additional information about the PPP is available in the Initial Rule.

1. Affiliation Rules Generally

Are affiliates considered together for purposes of determining eligibility?

In most cases, a borrower will be considered together with its affiliates for purposes of determining eligibility for the PPP.[1] Under SBA rules, entities may be considered affiliates based on factors including stock ownership, overlapping management,[2] and identity of interest. 13 CFR 121.301.

How do SBA's affiliation rules affect my eligibility and apply to me under the PPP?

An entity generally is eligible for the PPP if it, combined with its affiliates, is a small business as defined in section 3 of the Small Business Act (15 U.S.C. 632), or (1) has 500 or fewer employees whose principal place of residence is in the United States or is a business that operates in a certain industry and meets applicable SBA employee-based size standards for that industry, and (2) is a

[1] Section 7(a)(36)(D)(iv) of the Small Business Act (15 U.S.C. 636(a)(36)(D)(iv), as added by the Act, waives the affiliation rules contained in § 121.103 for (1) any business concern with not more than 500 employees that, as of the date on which the loan is disbursed, is assigned a North American Industry Classification System code beginning with 72; (2) any business concern operating as a franchise that is assigned a franchise identifier code by the Administration; and (3) any business concern that receives financial assistance from a company licensed under section 301 of the Small Business Investment Act of 1958 (15 U.S.C. 681). This interim final rule has no effect on these statutory waivers, which remain in full force and effect. As a result, the affiliation rules contained in section 121.301 also do not apply to these types of entities.

[2] In order to help potential borrowers identify other businesses with which they may be deemed to be affiliated under the common management standard, the Borrower Application Form, SBA Form 2483, released on April 2, 2020, requires applicants to list other businesses with which they have common management. The information supplied by the applicant in response to that information request should be used by applicants as they assess whether they have affiliates that should be included in their number of employees reported on SBA Form 2483.

tax-exempt nonprofit organization described in section 501(c)(3) of the Internal Revenue Code (IRC), a tax-exempt veterans organization described in section 501(c)(19) of the IRC, a Tribal business concern described in section 31(b)(2)(C) of the Small Business Act, or any other business concern. Prior to the Act, the nonprofit organizations listed above were not eligible for SBA Business Loan Programs under section 7(a) of the Small Business Act; only for-profit small business concerns were eligible. The Act made such nonprofit organizations not only eligible for the PPP, but also subjected them to SBA's affiliation rules. Specifically, section 1102 of the Act provides that the provisions applicable to affiliations under 13 CFR 121.103 apply with respect to nonprofit organizations and veterans organizations in the same manner as with respect to small business concerns. However, the detailed affiliation standards contained in § 121.103 currently do not apply to PPP borrowers, because § 121.103(a)(8) provides that applicants in SBA's Business Loan Programs (which include the PPP) are subject to the affiliation rule contained in 13 CFR 121.301.

2. Faith-Based Organizations

This rule exempts otherwise qualified faith-based organizations from the SBA's affiliation rules, including those set forth in 13 CFR part 121, where the application of the affiliation rules would substantially burden those organizations' religious exercise. This exemption is required, or at a minimum authorized, by the Religious Freedom Restoration Act (RFRA) (Pub. L. 103–141), which provides that the ''[g]overnment shall not substantially burden a person's exercise of religion'' unless the government can ''demonstrate[] that application of the burden'' to the person is both ''in furtherance of a compelling governmental interest'' and ''the least restrictive means of furthering that compelling governmental interest.'' 42 U.S.C. 2000bb–1.

A substantial burden under RFRA includes both government action that compels a person to violate his sincere religious beliefs or suffer a penalty, *see, e.g., Burwell* v. *Hobby Lobby Stores, Inc.,* 573 U.S. 682, 726 (2014), and the imposition of a substantial burden through ''indirect'' measures. *Thomas* v. *Review Bd. of Ind. Emp. Sec. Div.,* 450 U.S. 707, 717–18 (1981). Notably, the government imposes a substantial burden on religious exercise when it ''conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief.'' *Id.* at 718. For example, in *Sherbert* v. *Verner,* 374 U.S. 398 (1963), a State denied the plaintiff unemployment benefits because she would not work on Saturday, the Sabbath of her faith. *Id.* at 400–01. Even though no ''sanctions directly compel[led]'' her to work on Saturday, the Supreme Court held that the State's denial of benefits ''puts the same kind of burden upon the free exercise of religion as would a fine imposed against [her] for her Saturday worship.'' *Id.* at 404. As the Court observed, the State's framework ''forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand.'' *Id.* Consistent with these precedents, RFRA explicitly contemplates that ''the denial of government funding, benefits, or exemptions'' may violate its protections. 42 U.S.C. 2000bb–4.

SBA is aware of the existence of faith-based organizations that would qualify for relief under the CARES Act but for their affiliation with other entities as an aspect of their religious practice. Supreme Court precedent has long recognized that the organizational structure of faith-based entities may itself be a matter of significant religious concern and that faith-based organizations are therefore guaranteed the ''power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.'' *Kedroff* v. *St. Nicholas Cathedral of Russian Orthodox Church in N. Am.,* 344 U.S. 94, 116 (1952). Moreover, an assessment of the extent to which questions concerning religious polity rest upon theological or other religious foundations presents particular difficulties, for the First Amendment ''forbids civil courts'' from ''the interpretation of particular church doctrines and the importance of those doctrines to the religion.'' *Presbyterian Church* v. *Mary Elizabeth Blue Hull Mem'l Presbyterian Church,* 393 U.S. 440, 450 (1969). A number of faith-based organizations understand their affiliation with other religious entities as a part of their exercise of religion, as a mandate given the ''hierarchical or connectional'' structure of their church, *Jones* v. *Wolf,* 443 U.S. 595, 597 (1979), or as an expression of their sincere religious belief. *Cf.* 1 W. Cole Durham & Robert Smith, Religious Organizations and the Law section 8.19 (Westlaw rev. ed. 2017) (''Religious organizations, such as parishes or mission centers, normally tend to choose the civil-property-holding structures that most closely mirror their own ecclesiology or polity.''). Either affiliation decision falls within the definition of ''religious exercise'' that applies to RFRA, which ''includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief.'' *See* 42 U.S.C. 2000cc–5(7)(A); 2000bb–2(4) (''the term 'exercise of religion' means religious exercise, as defined in section 2000cc–5 of this title'').

As applied to these faith-based organizations, the affiliation rules would impose a substantial burden. The affiliation rules would deny an important benefit (participation in a program for which they would otherwise be eligible under the CARES Act) because of the exercise of sincere religious belief (affiliation with other religious entities).

The Administrator has also concluded that she does not have a compelling interest in denying emergency assistance to faith-based organizations that are facing the same economic hardship to which the CARES Act responded and who would be eligible for PPP but for their faith-based organizational and associational decisions. This conclusion is reinforced by the fact that the affiliation rules already contain numerous exemptions, *see generally* 13 CFR 121.103(b), ranging from ''[b]usiness concerns owned and controlled by Indian Tribes, Alaska Native Corporations, [and] Native Hawaiian Organizations,'' *id.* § 121.103(b)(2)(i) to ''member shareholders of a small agricultural cooperative.'' *Id.* § 121.103(b)(7). In light of these exemptions, it is difficult to maintain that denying relief to these faith-based organizations is necessary to further a compelling government interest, let alone the least restrictive means of doing so. *See Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah,* 508 U.S. 520, 547 (1993) (''[A] law cannot be regarded as protecting an interest of the highest order when it leaves appreciable damage to that supposedly vital interest unprohibited.'') (cleaned up); *Gonzales* v. *O Centro Espirita Beneficiente Uniao do Vegetal,* 546 U.S. 418, 433 (2006) (applying same principle under RFRA). SBA accordingly must exempt faith-based organizations that would otherwise be disqualified from the PPP based on features of those organizations' affiliations that are a matter of sincere religious exercise as defined in 42 U.S.C. 2000bb–2.

This action is also supported by 15 U.S.C. 634(b)(6), which authorizes the Administrator to ''make such rules and regulations as he deems necessary to

carry out the authority vested in him by or pursuant to this chapter.'' As relevant here, the CARES Act expanded eligibility for the covered loans during the covered period for nonprofit organizations that employ not more than 500 employees or, if applicable, the size standard in number of employees established by the Administrator for the industry in which the nonprofit organization operates. 15 U.S.C. 636(a)(36)(D)(i). That expansion posed unique concerns for the Administrator, who is tasked with applying the ''provisions applicable to affiliations under section 121.103 of title 13, Code of Federal Regulations, or any successor thereto, . . . with respect to a nonprofit organization and a veterans organizations in the same manner as with respect to a small business concern.'' *Id.* 636(a)(36)(D)(vi). Although these rules may easily be applied to faith-based organizations in many cases, their application to certain faith-based organizations presents significant challenges, in particular because of the large number of faith-based organizations who would now be eligible for the PPP but for their religious exercise.

As discussed above, carrying the affiliation rules over to all faith-based organizations without modification would raise concerns under RFRA. Moreover, application of the affiliation rules, which, for example, provide for assessment of whether one faith-based organization ''controls or has the power to control'' another organization, 13 CFR 121.103(a)(1), could involve SBA in questions of church governance concerning ''the allocation of power within a (hierarchical) church so as to decide . . . religious law (governing church polity),'' in violation of the First Amendment. *Serbian E. Orthodox Diocese for the U.S.A. & Canada* v. *Milivojevich,* 426 U.S. 696, 709 (1979) (internal quotation marks omitted)). Finally, affiliation rules developed in the context of for-profit enterprises present significant administrative difficulties where faith-based organizations are concerned. For example, ''the notion of corporate subsidiarity or affiliation in civil law is entirely foreign to the polity of religious organizations,'' and there is a significant risk that civil authorities will ''mischaracterize or misinterpret the polity of a religious body.'' 1 W. Cole Durham & Robert Smith, Religious Organizations and the Law sections 8.19, 8.21 (discussing examples of judicial mischaracterizations). Consistent with these concerns, it is also notable that other areas of federal law approach issues analogous to affiliation differently for religious organizations. *See, e.g.,* 26 U.S.C. 512 (b)(12).

For these reasons, in addition to the RFRA mandate, the Administrator has determined that it is appropriate to exercise the authority granted under 15 U.S.C. 634(b)(6) to exempt from application of SBA's affiliation rules faith-based organizations that would otherwise be disqualified from participation in PPP because of affiliations that are a part of their religious exercise.

Accordingly, the SBA's affiliation rules, including those set forth in 13 CFR part 121, do not apply to the relationship of any church, convention or association of churches, or other faith-based organization or entity to any other person, group, organization, or entity that is based on a sincere religious teaching or belief or otherwise constitutes a part of the exercise of religion. This includes any relationship to a parent or subsidiary and other applicable aspects of organizational structure or form. A faith-based organization seeking loans under this program may rely on a reasonable, good faith interpretation in determining whether its relationship to any other person, group, organization, or entity is exempt from the affiliation rules under this provision, and SBA will not assess, and will not require participating lenders to assess, the reasonableness of the faith-based organization's determination.

3. Additional Information

SBA may provide further guidance, if needed, through SBA notices and a program guide which will be posted on SBA's website at *www.sba.gov.*

Questions on the Paycheck Protection Program 7(a) Loans 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, 12988, 13132, 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 impose recordkeeping or reporting requirements under the Paperwork Reduction Act (''PRA''). SBA has obtained emergency approval under OMB Control Number 3245–0407 for the information collection (IC) required to implement the program described above. This IC consists of Form 2483 (Paycheck Protection Program Application Form) and SBA Form 2484 (Paycheck Protection Program Lender's Application for 7(a) Loan Guaranty) SBA Form 3506 (CARES Act Section 1102 Lender Agreement), and SBA Form 3507 (CARES Act Section 1102 Lender Agreement—Non-Bank and Non-Insured Depository Institution Lender). The collection is approved for use until October 31, 2020.

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 Ac. Ch.1. p.9.* Accordingly, SBA is not required to conduct a regulatory flexibility analysis.

List of Subjects in 13 CFR Part 121

Administrative practice and procedure, Authority delegations (Government agencies), Intergovernmental relations, Investigations, Reporting and recordkeeping requirements.

For the reasons stated in the preamble, the Small Business Administration amends 13 CFR part 121 as set forth below:

PART 121—SMALL BUSINESS SIZE REGULATIONS

■ 1. The authority citation for part 121 is revised to read as follows:

Authority: 15 U.S.C. 632, 634(b)(6), 636(a)(36), 662, and 694a(9); Pub. L. 116–136, Section 1114.

■ 2. Amend § 121.103 by adding paragraph (b)(10) to read as follows:

§ 121.103 How does SBA determine affiliation?

* * * * *

(b) * * *

(10)(i) The relationship of a faith-based organization to another organization is not considered an affiliation with the other organization under this subpart if the relationship is based on a religious teaching or belief or otherwise constitutes a part of the exercise of religion. In addition, the eligibility criteria set forth in 15 U.S.C. 636(a)(36)(D) are satisfied for any faith-based organization having not more than 500 employees (including individuals employed on a full-time, part-time, or other basis) that pays Federal payroll taxes using its own Internal Revenue Service Employer Identification Number (EIN) or that would support a deduction under the second sentence of 26 U.S.C. 512(b)(12) if the organization generated unrelated business taxable income. For purposes of this paragraph (b)(10), the term ''faith-based organization'' includes, but is not limited to, any organization associated with a church or convention or association of churches within the meaning of 26 U.S.C. 414(e)(3)(D). The term ''organization'' has the meaning given in 26 U.S.C. 414(m)(6)(A). The terms ''church'' and ''convention or association of churches'' have the same meaning that they have in 26 U.S.C. 414.

(ii) No specific process or filing is necessary to claim the benefit of the exemption in paragraph (b)(10)(i) of this section. In applying for a loan under the Paycheck Protection Program (PPP), a faith-based organization may make all necessary certifications with respect to common ownership or management or other eligibility criteria based upon affiliation, if the organization would be an eligible borrower but for application of SBA affiliation rules and if the organization falls within the terms of the exemption described in paragraph (b)(10)(i) of this section. If a faith-based organization indicates any relationship that may pertain to affiliation, such as ownership of, ownership by, or common management with any other organization, on or in connection with a loan application, and if the faith-based organization applying for a loan falls within the terms of the exemption described in paragraph (b)(10)(i) of this section with respect to that relationship, the faith-based organization may indicate on a separate sheet that it is entitled to the exemption. That sheet may be identified as addendum A, and no further listing of the other organization or description of the relationship to that organization is required. See appendix A to this part for a sample ''Addendum A'', but the format need not be used as long as the substance is the same.

* * * * *

■ 3. Add appendix A to part 121 to read as follows:

Appendix A to Part 121—Paycheck Protection Program Sample Addendum A

[Sample]

ADDENDUM A

✓ The Applicant claims an exemption from all SBA affiliation rules applicable to Paycheck Protection Program loan eligibility because the Applicant has made a reasonable, good faith determination that the Applicant qualifies for a religious exemption under 13 CFR 121.103(b)(10), which says that ''[t]he relationship of a faith-based organization to another organization is not considered an affiliation with the other organization . . . if the relationship is based on a religious teaching or belief or otherwise constitutes a part of the exercise of religion.''

Jovita Carranza,

Administrator.

[FR Doc. 2020–07673 Filed 4–10–20; 4:15 pm]

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Exhibit F

(Third Interim Rule)

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Where:

$\dot{m}_{SD}$ = dry air mass flow rate of infiltration air for single-duct portable air conditioners, in pounds per minute (lb/m).

$\dot{m}_{95}$ and $\dot{m}_{83}$ = dry air mass flow rate of infiltration air for dual-duct portable air conditioners, as calculated based on testing according to the test conditions in Table 1 of this appendix, in lb/m.

V_{co_SD}, V_{co_95}, and V_{co_83} = average volumetric flow rate of the condenser outlet air during cooling mode testing for single-duct portable air conditioners; and at the 95 °F and 83 °F dry-bulb outdoor conditions for dual-duct portable air conditioners, respectively, in cubic feet per minute (cfm).

V_{ci_95} and V_{ci_83} = average volumetric flow rate of the condenser inlet air during cooling mode testing at the 95 °F and 83 °F dry-bulb outdoor conditions for dual-duct portable air conditioners, respectively, in cfm.

ρ_{co_SD}, ρ_{co_95}, and ρ_{co_83} = average density of the condenser outlet air during cooling mode testing for single-duct portable air conditioners, and at the 95 °F and 83 °F dry-bulb outdoor conditions for dual-duct portable air conditioners, respectively, in pounds mass per cubic foot (lb_m/ft^3).

ρ_{ci_95} and ρ_{ci_83} = average density of the condenser inlet air during cooling mode testing at the 95 °F and 83 °F dry-bulb outdoor conditions for dual-duct portable air conditioners, respectively, in lb_m/ft^3.

ω_{co_SD}, ω_{co_95}, and ω_{co_83} = average humidity ratio of condenser outlet air during cooling mode testing for single-duct portable air conditioners, and at the 95 °F and 83 °F dry-bulb outdoor conditions for dual-duct portable air conditioners, respectively, in pounds mass of water vapor per pounds mass of dry air (lb_w/lb_{da}).

ω_{ci_95} and ω_{ci_83} = average humidity ratio of condenser inlet air during cooling mode testing at the 95 °F and 83 °F dry-bulb outdoor conditions for dual-duct portable air conditioners, respectively, in lb_w/lb_{da}.

For single-duct and dual-duct portable air conditioners, calculate the sensible component of infiltration air heat contribution according to:

$$Q_{s\_95} = \dot{m} \times 60 \times [(c_{p\_da} \times (T_{ia\_95} - T_{indoor})) + (c_{p\_wv} \times (\omega_{ia\_95} \times T_{ia\_95} - \omega_{indoor} \times T_{indoor}))]$$

$$Q_{s\_83} = \dot{m} \times 60 \times [(c_{p\_da} \times (T_{ia\_83} - T_{indoor})) + (c_{p\_wv} \times (\omega_{ia\_83} \times T_{ia\_83} - \omega_{indoor} \times T_{indoor}))]$$

Where:

Q_{s_95} and Q_{s_83} = sensible heat added to the room by infiltration air, calculated at the 95 °F and 83 °F dry-bulb outdoor conditions in Table 1 of this appendix, in Btu/h.

$\dot{m}$ = dry air mass flow rate of infiltration air, $\dot{m}_{SD}$ or $\dot{m}_{95}$ when calculating Q_{s_95} and $\dot{m}_{SD}$ or $\dot{m}_{83}$ when calculating Q_{s_83}, in lb/m.

c_{p_da} = specific heat of dry air, 0.24 Btu/lb_m-°F.

c_{p_wv} = specific heat of water vapor, 0.444 Btu/lb_m-°F.

T_{indoor} = indoor chamber dry-bulb temperature, 80 °F.

T_{ia_95} and T_{ia_83} = infiltration air dry-bulb temperatures for the two test conditions in Table 1 of this appendix, 95 °F and 83 °F, respectively.

ω_{ia_95} and ω_{ia_83} = humidity ratios of the 95 °F and 83 °F dry-bulb infiltration air, 0.0141 and 0.01086 lb_w/lb_{da}, respectively.

ω_{indoor} = humidity ratio of the indoor chamber air, 0.0112 lb_w/lb_{da}.

60 = conversion factor from minutes to hours.

Calculate the latent heat contribution of the infiltration air according to:

$$Q_{l\_95} = \dot{m} \times 60 \times H_{fg} \times (\omega_{ia\_95} - \omega_{indoor})$$

$$Q_{l\_83} = \dot{m} \times 60 \times H_{fg} \times (\omega_{ia\_83} - \omega_{indoor})$$

Where:

Q_{l_95} and Q_{l_83} = latent heat added to the room by infiltration air, calculated at the 95 °F and 83 °F dry-bulb outdoor conditions in Table 1 of this appendix, in Btu/h.

$\dot{m}$ = mass flow rate of infiltration air, $\dot{m}_{SD}$ or $\dot{m}_{95}$ when calculating Q_{l_95} and $\dot{m}_{SD}$ or $\dot{m}_{83}$ when calculating Q_{l_83}, in lb/m.

H_{fg} = latent heat of vaporization for water vapor, 1061 Btu/lb_m.

ω_{ia_95} and ω_{ia_83} = humidity ratios of the 95 °F and 83 °F dry-bulb infiltration air, 0.0141 and 0.01086 lb_w/lb_{da}, respectively.

ω_{indoor} = humidity ratio of the indoor chamber air, 0.0112 lb_w/lb_{da}.

60 = conversion factor from minutes to hours.

The total heat contribution of the infiltration air is the sum of the sensible and latent heat:

$$Q_{infiltration\_95} = Q_{s\_95} + Q_{l\_95}$$

$$Q_{infiltration\_83} = Q_{s\_83} + Q_{l\_83}$$

Where:

$Q_{infiltration\_95}$ and $Q_{infiltration\_83}$ = total infiltration air heat in cooling mode, calculated at the 95 °F and 83 °F dry-bulb outdoor conditions in Table 1 of this appendix, in Btu/h.

Q_{s_95} and Q_{s_83} = sensible heat added to the room by infiltration air, calculated at the 95 °F and 83 °F dry-bulb outdoor conditions in Table 1 of this appendix, in Btu/h.

Q_{l_95} and Q_{l_83} = latent heat added to the room by infiltration air, calculated at the 95 °F and 83 °F dry-bulb outdoor conditions in Table 1 of this appendix, in Btu/h.

* * * * *

[FR Doc. 2020–07733 Filed 4–17–20; 8:45 am]

BILLING CODE 6450–01–P

SMALL BUSINESS ADMINISTRATION

13 CFR Part 120

[Docket Number SBA–2020–0020]

RIN 3245–AH36

Business Loan Program Temporary Changes; Paycheck Protection Program—Additional Eligibility Criteria and Requirements for Certain Pledges of Loans

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 sections 1102 and 1106 of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act or the Act). Section 1102 of the Act temporarily adds a new program, titled the ''Paycheck Protection Program,'' to the SBA's 7(a) Loan 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 (PPP). The PPP is intended to provide economic relief to small businesses nationwide adversely impacted by the Coronavirus Disease 2019 (COVID–19). This interim final rule supplements the First PPP Interim Final Rule with guidance for individuals with self-employment income who file a Form 1040, Schedule C. This rule also addresses eligibility issues for certain business concerns and requirements for certain pledges of PPP loans. This interim final rule supplements SBA's implementation of sections 1102 and 1106 of the Act and requests public comment.

DATES:

Effective Date: This rule is effective April 20, 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 20, 2020.

ADDRESSES: You may submit comments, identified by number SBA–2020–0020 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, small businesses need to be informed on whether they are eligible to apply for a loan, how to apply for a loan, and the terms of the loan under section 1102 of the Act as soon as possible because the last day to apply for and receive a loan is June 30, 2020. The immediate effective date of this interim final rule will benefit small businesses so that they can immediately determine their eligibility and apply for the loan with a full understanding of loan terms and conditions. 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 20, 2020. SBA will consider these comments and the need for making any revisions as a result of these comments.

III. Additional Paycheck Protection Program Eligibility Criteria and Requirements for Certain Pledges of Loans

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) and a second interim final rule (85 FR 20817) posted April 3, 2020.

1. Individuals With Self-Employment Income Who File a Form 1040, Schedule C

a. I have income from self-employment and file a Form 1040, Schedule C. Am I eligible for a PPP Loan?

You are eligible for a PPP loan if: (i) You were in operation on February 15, 2020; (ii) you are an individual with self-employment income (such as an independent contractor or a sole proprietor); (iii) your principal place of residence is in the United States; and (iv) you filed or will file a Form 1040 Schedule C for 2019. However, if you are a partner in a partnership, you may not submit a separate PPP loan application for yourself as a self-employed individual. Instead, the self-employment income of general active partners may be reported as a payroll cost, up to $100,000 annualized, on a PPP loan application filed by or on behalf of the partnership. Partnerships are eligible for PPP loans under the Act, and the Administrator has determined, in consultation with the Secretary of the Treasury (Secretary), that limiting a partnership and its partners (and an LLC filing taxes as a partnership) to one PPP loan is necessary to help ensure that as many eligible borrowers as possible obtain PPP loans before the statutory deadline of June 30, 2020. This limitation will allow lenders to more quickly process applications and lower the burdens of applying for partnerships/partners. The Administrator has further determined that permitting partners to apply as self-employed individuals would create unnecessary confusion regarding which entity, the partner or the partnership, applies for partner and LLC member income, and would generate loan proceeds use coordination and allocation issues. Rent, mortgage interest, utilities, and other debt service are generally incurred at the partnership level, not partner level, so it is most natural to provide the funds for these expenses to the partnership, not individual partners. In addition, you should be aware that participation in the PPP may affect your eligibility for state-administered unemployment compensation or unemployment assistance programs, including the programs authorized by Title II, Subtitle A of the CARES Act, or CARES Act Employee Retention Credits. SBA will issue additional guidance for those individuals with self-employment income who: (i) Were not in operation in 2019 but who were in operation on February 15, 2020, and (ii) will file a Form 1040 Schedule C for 2020.

b. How do I calculate the maximum amount I can borrow and what documentation is required?

How you calculate your maximum loan amount depends upon whether or not you employ other individuals. If you have no employees, the following methodology should be used to calculate your maximum loan amount:

i. Step 1: Find your 2019 IRS Form 1040 Schedule C line 31 net profit amount (if you have not yet filed a 2019 return, fill it out and compute the value). If this amount is over $100,000, reduce it to $100,000. If this amount is zero or less, you are not eligible for a PPP loan.

ii. Step 2: Calculate the average monthly net profit amount (divide the amount from Step 1 by 12).

iii. Step 3: Multiply the average monthly net profit amount from Step 2 by 2.5.

iv. Step 4: Add the outstanding amount of any Economic Injury Disaster Loan (EIDL) made between January 31, 2020 and April 3, 2020 that you seek to refinance, less the amount of any advance under an EIDL COVID–19 loan (because it does not have to be repaid).

Regardless of whether you have filed a 2019 tax return with the IRS, you must provide the 2019 Form 1040 Schedule C with your PPP loan application to substantiate the applied-for PPP loan amount and a 2019 IRS Form 1099–MISC detailing nonemployee compensation received (box 7), invoice, bank statement, or book of record that establishes you are self-employed. You must provide a 2020 invoice, bank statement, or book of record to establish you were in operation on or around February 15, 2020.

If you have employees, the following methodology should be used to calculate your maximum loan amount:

i. Step 1: Compute 2019 payroll by adding the following:

a. Your 2019 Form 1040 Schedule C line 31 net profit amount (if you have not yet filed a 2019 return, fill it out and compute the value), up to $100,000 annualized, if this amount is over $100,000, reduce it to $100,000, if this amount is less than zero, set this amount at zero;

b. 2019 gross wages and tips paid to your employees whose principal place of residence is in the United States computed using 2019 IRS Form 941 Taxable Medicare wages & tips (line 5c—column 1) from each quarter plus any pre-tax employee contributions for health insurance or other fringe benefits excluded from Taxable Medicare wages & tips; subtract any amounts paid to any individual employee in excess of $100,000 annualized and any amounts paid to any employee whose principal place of residence is outside the United States; and

c. 2019 employer health insurance contributions (health insurance component of Form 1040 Schedule C line 14), retirement contributions (Form 1040 Schedule C line 19), and state and local taxes assessed on employee compensation (primarily under state laws commonly referred to as the State Unemployment Tax Act or SUTA from state quarterly wage reporting forms).

ii. Step 2: Calculate the average monthly amount (divide the amount from Step 1 by 12).

iii. Step 3: Multiply the average monthly amount from Step 2 by 2.5.

iv. Step 4: Add the outstanding amount of any EIDL made between January 31, 2020 and April 3, 2020 that you seek to refinance, less the amount of any advance under an EIDL COVID–19 loan (because it does not have to be repaid).

You must supply your 2019 Form 1040 Schedule C, Form 941 (or other tax forms or equivalent payroll processor records containing similar information) and state quarterly wage unemployment insurance tax reporting forms from each quarter in 2019 or equivalent payroll processor records, along with evidence of any retirement and health insurance contributions, if applicable. A payroll statement or similar documentation from the pay period that covered February 15, 2020 must be provided to establish you were in operation on February 15, 2020.

d. How can PPP loans be used by individuals with income from self-employment who file a 2019 Form 1040, Schedule C?

The proceeds of a PPP loan are to be used for the following.

i. Owner compensation replacement, calculated based on 2019 net profit as described in Paragraph 1.b. above.

ii. Employee payroll costs (as defined in the First PPP Interim Final Rule) for employees whose principal place of residence is in the United States, if you have employees.

iii. Mortgage interest payments (but not mortgage prepayments or principal payments) on any business mortgage obligation on real or personal property (*e.g.,* the interest on your mortgage for the warehouse you purchased to store business equipment or the interest on an auto loan for a vehicle you use to perform your business), business rent payments (*e.g.,* the warehouse where you store business equipment or the vehicle you use to perform your business), and business utility payments (*e.g.,* the cost of electricity in the warehouse you rent or gas you use driving your business vehicle). You must have claimed or be entitled to claim a deduction for such expenses on your 2019 Form 1040 Schedule C for them to be a permissible use during the eight-week period following the first disbursement of the loan (the ''covered period''). For example, if you did not claim or are not entitled to claim utilities expenses on your 2019 Form 1040 Schedule C, you cannot use the proceeds for utilities during the covered period.

iv. Interest payments on any other debt obligations that were incurred before February 15, 2020 (such amounts are not eligible for PPP loan forgiveness).

v. Refinancing an SBA EIDL loan made between January 31, 2020 and April 3, 2020 (maturity will be reset to PPP's maturity of two years). If you received an SBA EIDL loan from January 31, 2020 through April 3, 2020, you can apply for a PPP loan. If your EIDL loan was not used for payroll costs, it does not affect your eligibility for a PPP loan. If your EIDL loan was used for payroll costs, your PPP loan must be used to refinance your EIDL loan. Proceeds from any advance up to $10,000 on the EIDL loan will be deducted from the loan forgiveness amount on the PPP loan.

The Administrator, in consultation with the Secretary, determined that it is appropriate to limit self-employed individuals' (who file a Form 1040 Schedule C) use of loan proceeds to those types of allowable uses for which the borrower made expenditures in 2019. The Administrator has determined that this limitation on self-employed individuals who file a Form 1040 Schedule C is consistent with the borrower certification required by the Act; specifically, that the PPP loan is necessary ''to support the ongoing operations'' of the borrower. The Administrator and the Secretary thus believe that this limitation is consistent with the structure of the Act to maintain existing operations and payroll and not for business expansion. This limitation on the use of PPP loan proceeds will also help to ensure that the finite appropriations available for these loans are directed toward maintaining existing operations and payroll, as each loan that is made depletes the appropriation. Finally, although the Act makes businesses in operation on February 15, 2020 eligible for PPP loans, the Administrator, in consultation with the Secretary, has determined that self-employed individuals will need to rely on their 2019 Form 1040 Schedule C, which provides verifiable documentation on expenses between January 1, 2019 and December 31, 2019.

For individuals with income from self-employment from 2019 for which they have filed or will file a 2019 Form 1040 Schedule C, expenses incurred between January 1, 2020 and February 14, 2020 may not be considered because of the lack of verifiable documentation on expenses in this period. SBA will issue additional guidance for those individuals with self-employment income who: (i) Were not in operation in 2019 but who were in operation on February 15, 2020, and (ii) will file a Form 1040 Schedule C for 2020.

e. Are there any other restrictions on how I can use PPP loan proceeds?

Yes. At least 75 percent of the PPP loan proceeds shall be used for payroll costs. For purposes of determining the percentage of use of proceeds for payroll costs (but not for forgiveness purposes), the amount of any refinanced EIDL will be included. The rationale for this 75 percent floor is contained in the First PPP Interim Final Rule.

f. What amounts shall be eligible for forgiveness?

The amount of loan forgiveness can be up to the full principal amount of the loan plus accrued interest. The actual amount of loan forgiveness will depend, in part, on the total amount spent over the covered period on:

i. Payroll costs including salary, wages, and tips, up to $100,000 of annualized pay per employee (for eight weeks, a maximum of $15,385 per individual), as well as covered benefits for employees (but not owners), including health care expenses, retirement contributions, and state taxes imposed on employee payroll paid by the employer (such as unemployment insurance premiums);

ii. owner compensation replacement, calculated based on 2019 net profit as described in Paragraph 1.b. above, with forgiveness of such amounts limited to eight weeks' worth (8/52) of 2019 net profit, but excluding any qualified sick leave equivalent amount for which a credit is claimed under section 7002 of the Families First Coronavirus Response Act (FFCRA) (Pub. L. 116–127) or qualified family leave equivalent amount for which a credit is claimed under section 7004 of FFCRA;

iii. payments of interest on mortgage obligations on real or personal property incurred before February 15, 2020, to the extent they are deductible on Form 1040 Schedule C (business mortgage payments);

iv. rent payments on lease agreements in force before February 15, 2020, to the extent they are deductible on Form 1040 Schedule C (business rent payments); and

v. utility payments under service agreements dated before February 15, 2020 to the extent they are deductible on Form 1040 Schedule C (business utility payments).

The Administrator, in consultation with the Secretary, has determined that it is appropriate to limit the forgiveness of owner compensation replacement for individuals with self-employment income who file a Schedule C to eight weeks' worth (8/52) of 2019 net profit. This is most consistent with the structure of the Act and its overarching focus on keeping workers paid, and will prevent windfalls that Congress did not intend.

Congress determined that the maximum loan amount is based on 2.5 months of the borrower's payroll during the one-year period preceding the loan.

Congress also determined that the maximum amount of loan forgiveness is based on the borrower's eligible payments—*i.e.,* the sum of payroll costs and certain overhead expenses—over the eight-week period following the date of loan disbursement. For individuals with self-employment income who file a Schedule C, the Administrator, in consultation with the Secretary, has determined that it is appropriate to limit loan forgiveness to a proportionate eight-week share of 2019 net profit, as reflected in the individual's 2019 Form 1040 Schedule C. This is because many self-employed individuals have few of the overhead expenses that qualify for forgiveness under the Act. For example, many such individuals operate out of either their homes, vehicles, or sheds and thus do not incur qualifying mortgage interest, rent, or utility payments. As a result, most of their receipts will constitute net income. Allowing such a self-employed individual to treat the full amount of a PPP loan as net income would result in a windfall. The entire amount of the PPP loan (a maximum of 2.5 times monthly payroll costs) would be forgiven even though Congress designed this program to limit forgiveness to certain eligible expenses incurred in an eight-week covered period. Limiting forgiveness to eight weeks of net profit from the owner's 2019 Form 1040 Schedule C is consistent with the structure of the Act, which provides for loan forgiveness based on eight weeks of expenditures. This limitation will also help to ensure that the finite appropriations are directed toward payroll protection, consistent with the Act's central objective. Finally, 75 percent of the amount forgiven must be attributable to payroll costs for the reasons specified in the First PPP Interim Final Rule.

g. What documentation will I be required to submit to my lender with my request for loan forgiveness?

In addition to the borrower certification required by Section 1106(e)(3) of the Act, to substantiate your request for loan forgiveness, if you have employees, you should submit Form 941 and state quarterly wage unemployment insurance tax reporting forms or equivalent payroll processor records that best correspond to the covered period (with evidence of any retirement and health insurance contributions). Whether or not you have employees, you must submit evidence of business rent, business mortgage interest payments on real or personal property, or business utility payments during the covered period if you used loan proceeds for those purposes.

The 2019 Form 1040 Schedule C that was provided at the time of the PPP loan application must be used to determine the amount of net profit allocated to the owner for the eight-week covered period. The Administrator, in consultation with the Secretary, determined that for purposes of loan forgiveness it is appropriate to require self-employed individuals to rely on the 2019 Form 1040 Schedule C to determine the amount of net profit allocated to the owner during the covered period for the reasons described in Paragraph 1.d. above.

2. Clarification Regarding Eligible Businesses

a. Are eligible businesses owned by directors or shareholders of a PPP Lender permitted to apply for a PPP Loan through the Lender with which they are associated?

The Administrator recognizes that, unlike other SBA loan programs, the financial terms for PPP Loans are uniform for all borrowers, and the standard underwriting process does not apply because no creditworthiness assessment is required for PPP Loans. Consequently, there is no meaningful risk of underwriting bias or below-market rates and terms. The Administrator also recognizes that many directors and equity holders of PPP Lenders are owners of unrelated businesses. For those reasons, the Administrator, in consultation with the Secretary, has determined that SBA regulations (including 13 CFR 120.110 and 120.140) shall not apply to prohibit an otherwise eligible business owned (in whole or part) by an outside director or holder of a less than 30 percent equity interest in a PPP Lender from obtaining a PPP loan from the PPP Lender on whose board the director serves or in which the equity owner

holds an interest, provided that the eligible business owned by the director or equity holder follows the same process as any similarly situated customer or account holder of the Lender. Favoritism by the Lender in processing time or prioritization of the director's or equity holder's PPP application is prohibited. The Administrator cautions, however, that Lenders should comply with all other applicable state and federal regulations concerning loans to associates of the Lender. Lenders should also consult their own internal policies concerning lending to individuals or entities associated with the Lender.

The foregoing paragraph does not apply to a director or owner who is also an officer or key employee of the PPP Lender. Officers and key employees of a PPP Lender may obtain a PPP Loan from a different lender, but not from the PPP Lender with which they are associated. SBA also reminds Lenders that the ''Authorized Lender Official'' for each PPP Loan is subject to the limitations described in the Lender Application Form, which states in relevant part: ''Neither the undersigned Authorized Lender Official, nor such individual's spouse or children, has a financial interest in the Applicant [Borrower].''

b. 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 if the existing standard in 13 CFR 120.110(g) is met or the following two conditions are satisfied: (a) The business's legal gaming revenue (net of payouts but not other expenses) did not exceed $1 million in 2019; and (b) legal gaming revenue (net of payouts but not other expenses) comprised less than 50 percent of the business's total revenue in 2019. Businesses that received illegal gaming revenue are categorically ineligible. The Administrator, in consultation with the Secretary, believes this test appropriately balances the longstanding policy reasons for limiting lending to businesses primarily and substantially engaged in gaming activity with the policy aim of making the PPP Loan available to a broad segment of U.S. businesses and their employees.

3. Requirements for Certain Pledges of PPP Loans

Do the requirements for loan pledges under 13 CFR 120.434 apply to PPP loans pledged for borrowings from a Federal Reserve Bank (FRB) or advances by a Federal Home Loan Bank (FHLB)?

No. Pursuant to SBA regulations at 13 CFR 120.435(d) and (e), a pledge of 7(a) loans to a FRB or FHLB does not require SBA's prior written consent or notice to SBA. SBA, in consultation with Treasury, has determined that for purposes of loans made under the PPP, the additional requirements set forth in 120.434 shall also not apply. This would mean, for example, that SBA would not have to approve loan documents or require a multi-party agreement among SBA, the lender, and others.

4. 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, 12988, 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.

List of Subjects in 13 CFR Part 120

Community development, Environmental protection, Equal employment opportunity, Exports, Loan programs—business, Reporting and recordkeeping requirements, Small businesses.

For the reasons stated above, the Small Business Administration amends 13 CFR part 120 as set forth below.

PART 120—BUSINESS LOANS

■ 1. The authority citation for part 120 continues to read as follows:

Authority: 15 U.S.C. 634(b)(6), (b)(7), (b)(14), (h), and note, 636(a), (h) and (m), and note, 650, 657t, and note, 657u, and note, 687(f), 696(3) and (7), and note, and 697(a) and (e), and note.

■ 2. Revise § 120.435 to read as follows:

§ 120.435 Which loan pledges do not require notice to or consent by SBA?

(a) Notwithstanding the provisions of § 120.434(e), 7(a) loans may be pledged for the following purposes without notice to or consent by SBA:

(1) Treasury tax and loan accounts;

(2) The deposit of public funds;

(3) Uninvested trust funds;

(4) Borrowings from a Federal Reserve Bank; or

(5) Advances by a Federal Home Loan Bank.

(b) For purposes of the Paycheck Protection Program (PPP), the other provisions of § 120.434 shall also not apply to PPP loans pledged under paragraph (a)(4) or (5) of this section.

Jovita Carranza,

Administrator.

[FR Doc. 2020–08257 Filed 4–17–20; 8:45 am]

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DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2019–1074; Product Identifier 2019–NM–191–AD; Amendment 39–19900; AD 2020–07–21]

RIN 2120–AA64

Airworthiness Directives; Yaborã Indústria Aeronáutica S.A. (Type Certificate Previously Held by Embraer S.A.) Airplanes

AGENCY: Federal Aviation Administration (FAA), Department of Transportation (DOT).

ACTION: Final rule.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for certain Yaborã Indústria Aeronáutica S.A. Model ERJ–170 airplanes and Model ERJ 190–100 STD, –100 LR, –100 ECJ, –100 IGW, –200 STD, –200 LR, and –200 IGW airplanes. This AD was prompted by a determination that certain main landing gear (MLG) aft pintle pins repaired using a sulphamate nickel plating have a life limit that is less than the certified life limit. This AD requires a one-time records review or a general visual inspection (GVI) of the MLG aft pintle pins to determine if certain repairs were done, and replacement of certain MLG aft pintle pins with serviceable MLG aft pintle pins, as specified in an Agência Nacional de Aviação Civil (ANAC) Brazilian AD, which is incorporated by reference. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective May 26, 2020.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of May 26, 2020.

ADDRESSES: For the material incorporated by reference (IBR) in this AD contact National Civil Aviation Agency, Aeronautical Products Certification Branch (GGCP), Rua Laurent Martins, n° 209, Jardim Esplanada, CEP 12242–431—São José dos Campos—SP, Brazil; telephone 55 (12) 3203–6600; email *pac@anac.gov.br;* internet *www.anac.gov.br/en/.* You may find this IBR material on the ANAC website at *https://sistemas.anac.gov.br/certificacao/DA/DAE.asp.* You may view this IBR material at the FAA, Transport Standards 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 in the AD docket on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2019–1074.

Examining the AD Docket

You may examine the AD docket on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2019–1074; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this final rule, the regulatory evaluation, any comments received, and other information. The address for Docket Operations is U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: Krista Greer, Aerospace Engineer, International Section, Transport Standards Branch, FAA, 2200 South 216th St., Des Moines, WA 98198; telephone and fax 206–231–3221; email *krista.greer@faa.gov.*

SUPPLEMENTARY INFORMATION:

Discussion

The ANAC, which is the aviation authority for Brazil, has issued Brazilian AD 2019–11–07, effective November 18, 2019 (''Brazilian AD 2019–11–07'') (also referred to as the Mandatory Continuing Airworthiness Information, or ''the MCAI''), to correct an unsafe condition for certain Yaborã Indústria Aeronáutica S.A. Model ERJ 170–100 LR, –100 STD, –100 SE, and –100 SU airplanes; Model ERJ 170–200 LR, –200 SU, –200 STD, and –200 LL airplanes; and Model ERJ 190–100 STD, –100 LR, –100 ECJ, –100 IGW, –100 SR, –200 STD, –200 LR, and –200 IGW airplanes. Model ERJ 190–100 SR airplanes are not certified by the FAA and are not included on the U.S. type certificate data sheet; this AD, therefore, does not include those airplanes in the applicability.

The FAA issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 by adding an AD that would apply to certain Yaborã Indústria Aeronáutica S.A. Model ERJ 170–100 LR, –100 STD, –100 SE, and –100 SU airplanes; Model ERJ 170–200 LR, –200 SU, –200 STD, and –200 LL airplanes; and Model ERJ 190–100 STD, –100 LR, –100 ECJ, –100 IGW, –200 STD, –200 LR, and –200 IGW airplanes. The NPRM published in the **Federal Register** on January 17, 2020 (85 FR 2909). The NPRM was prompted by a determination that certain MLG aft pintle pins repaired using a sulphamate

Exhibit G

(Toppenish Application)

DENTONS US LLP
601 South Figueroa Street, Suite 2500
Los Angeles, CA 90017-5704
Phone: (213) 623-9300
Fax: (213) 623-9924

BUSH KORNFELD LLP
LAW OFFICES
601 Union St., Suite 5000
Seattle, Washington 98101-2373
Telephone (206) 292-2110
Facsimile (206) 292-2104

Exhibit H

(Astria Home Health Application)

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Exhibit I

(April 21, 2020 E-mail from Ms. Ibarra)

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Telephone (206) 292-2110
Facsimile (206) 292-2104

Sandra L. Cortez

From: Cece Ibarra <CIbarra@bannerbank.com>
Sent: Tuesday, April 21, 2020 12:33 PM
To: Sandra L. Cortez
Subject: {[*EXTERNAL*]}Loans

Hi Sandra,

Did you get an email on the loans? It looks like the bankruptcy is going to prevent you from qualify for the loans this would apply to any entity that was included in the bankruptcy. But an email should come if it hasn't already. Sorry ☹ I personally think that if someone deserves this loan is the Hospitals. But that's an SBA rule.

www.bannerbank.com

Cece Ibarra
Vice President
Sunnyside Branch Manager
NMLS# 610014
Office: 509-837-8008
E-mail cibarra@bannerbank.com

Exhibit J

(Fourth Interim Rule)

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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, 12988, 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 Westminster 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 K

(May 6, 2020 Notice to Toppenish)

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BUSH KORNFELD LLP
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Facsimile (206) 292-2104

May 6, 2020

Cary Rowan

502 W. 4TH AVE
TOPPENISH, WA 98948

RE: Your Application for a SBA Paycheck Protection Program (PPP) Loan

Dear Cary Rowan

Thank you for your application for a Small Business Administration (SBA) Paycheck Protection Program (PPP) loan. We regret to inform you that we are unable to approve your request because:

Borrower does not meet SBA eligibility criteria

If you have any questions regarding this notice please contact us at:

Banner Bank
10 S. First Avenue
PO Box 907
Walla Walla, WA 99362

800-272-9933 (Monday – Friday, 7am – 7pm Pacific Time)

Sincerely,

Banner Bank SBA Lending Team

NOTICE: The federal Equal Credit Opportunity Act prohibits creditors from discriminating against credit applicants on the basis of race, color, religion, national origin, sex, marital status, age (provided that 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. The federal agency that administers compliance with this law concerning this creditor is Bureau of Consumer Financial Protection, 1700 G Street NW., Washington, DC 20006.

Loan Application # 10556
PPPAA-420

Certificate Of Completion

Envelope Id: 612138D9F97F485EB2B3B0795DE71D33
Status: Delivered
Subject: Important Information About Your PPP Loan Application
Source Envelope:
Document Pages: 1
Signatures: 0
Envelope Originator:
Certificate Pages: 4
Initials: 0
Banner SBA PPP Loan Applications
AutoNav: Enabled
BannerSBAPPPLoanApplications@bannerbank.com
EnvelopeId Stamping: Enabled
IP Address: 12.129.12.97
Time Zone: (UTC-08:00) Pacific Time (US & Canada)

Record Tracking

Status: Original
5/6/2020 7:38:10 PM
Holder: Banner SBA PPP Loan Applications
BannerSBAPPPLoanApplications@bannerbank.com
Location: DocuSign

Signer Events	Signature	Timestamp
Cary Rowan cary.rowan@astria.health Security Level: Email, Account Authentication (None) **Electronic Record and Signature Disclosure:** Accepted: 5/7/2020 7:09:24 AM ID: aafbe7bb-799a-4eb0-ab8f-7bc2574f24dd		Sent: 5/6/2020 7:38:11 PM Viewed: 5/7/2020 7:09:24 AM

In Person Signer Events	Signature	Timestamp

Editor Delivery Events	Status	Timestamp

Agent Delivery Events	Status	Timestamp

Intermediary Delivery Events	Status	Timestamp

Certified Delivery Events	Status	Timestamp

Carbon Copy Events	Status	Timestamp

Witness Events	Signature	Timestamp

Notary Events	Signature	Timestamp

Envelope Summary Events	Status	Timestamps
Envelope Sent	Hashed/Encrypted	5/6/2020 7:38:11 PM
Certified Delivered	Security Checked	5/7/2020 7:09:24 AM

Payment Events	Status	Timestamps

Electronic Record and Signature Disclosure

ELECTRONIC RECORD AND SIGNATURE DISCLOSURE

From time to time, Banner Bank (we, us or Company) may be required by law to provide to you certain written notices or disclosures. Described below are the terms and conditions for providing to you such notices and disclosures electronically through the DocuSign system. Please read the information below carefully and thoroughly, and if you can access this information electronically to your satisfaction and agree to this Electronic Record and Signature Disclosure (ERSD), please confirm your agreement by selecting the check-box next to ‘I agree to use electronic records and signatures’ before clicking ‘CONTINUE’ within the DocuSign system.

Getting paper copies

At any time, you may request from us a paper copy of any record provided or made available electronically to you by us. You will have the ability to download and print documents we send to you through the DocuSign system during and immediately after the signing session and, if you elect to create a DocuSign account, you may access the documents for a limited period of time (usually 30 days) after such documents are first sent to you. After such time, if you wish for us to send you paper copies of any such documents from our office to you, you will be charged a $0.00 per-page fee. You may request delivery of such paper copies from us by following the procedure described below.

Withdrawing your consent

If you decide to receive notices and disclosures from us electronically, you may at any time change your mind and tell us that thereafter you want to receive required notices and disclosures only in paper format. How you must inform us of your decision to receive future notices and disclosure in paper format and withdraw your consent to receive notices and disclosures electronically is described below.

Consequences of changing your mind

If you elect to receive required notices and disclosures only in paper format, it will slow the speed at which we can complete certain steps in transactions with you and delivering services to you because we will need first to send the required notices or disclosures to you in paper format, and then wait until we receive back from you your acknowledgment of your receipt of such paper notices or disclosures. Further, you will no longer be able to use the DocuSign system to receive required notices and consents electronically from us or to sign electronically documents from us.

All notices and disclosures will be sent to you electronically

Unless you tell us otherwise in accordance with the procedures described herein, we will provide electronically to you through the DocuSign system all required notices, disclosures, authorizations, acknowledgements, and other documents that are required to be provided or made available to you during the course of our relationship with you. To reduce the chance of you inadvertently not receiving any notice or disclosure, we prefer to provide all of the required notices and disclosures to you by the same method and to the same address that you have given us. Thus, you can receive all the disclosures and notices electronically or in paper format through the paper mail delivery system. If you do not agree with this process, please let us know as described below. Please also see the paragraph immediately above that describes the consequences of your electing not to receive delivery of the notices and disclosures electronically from us.

How to contact Banner Bank:

You may contact us to let us know of your changes as to how we may contact you electronically, to request paper copies of certain information from us, and to withdraw your prior consent to receive notices and disclosures electronically as follows:
To contact us by email send messages to: bannerbank@bannerbank.com

To advise Banner Bank of your new email address

To let us know of a change in your email address where we should send notices and disclosures electronically to you, you must send an email message to us at bannerbank@bannerbank.com and in the body of such request you must state: your previous email address, your new email address. We do not require any other information from you to change your email address.

If you created a DocuSign account, you may update it with your new email address through your account preferences.

To request paper copies from Banner Bank

To request delivery from us of paper copies of the notices and disclosures previously provided by us to you electronically, you must send us an email to bannerbank@bannerbank.com and in the body of such request you must state your email address, full name, mailing address, and telephone number. We will bill you for any fees at that time, if any.

To withdraw your consent with Banner Bank

To inform us that you no longer wish to receive future notices and disclosures in electronic format you may:

i. decline to sign a document from within your signing session, and on the subsequent page, select the check-box indicating you wish to withdraw your consent, or you may;

ii. send us an email to bannerbank@bannerbank.com and in the body of such request you must state your email, full name, mailing address, and telephone number. We do not need any other information from you to withdraw consent.. The consequences of your withdrawing consent for online documents will be that transactions may take a longer time to process..

Required hardware and software

The minimum system requirements for using the DocuSign system may change over time. The current system requirements are found here: https://support.docusign.com/guides/signer-guide-signing-system-requirements.

Acknowledging your access and consent to receive and sign documents electronically

To confirm to us that you can access this information electronically, which will be similar to other electronic notices and disclosures that we will provide to you, please confirm that you have read this ERSD, and (i) that you are able to print on paper or electronically save this ERSD for your future reference and access; or (ii) that you are able to email this ERSD to an email address where you will be able to print on paper or save it for your future reference and access. Further, if you consent to receiving notices and disclosures exclusively in electronic format as described herein, then select the check-box next to 'I agree to use electronic records and signatures' before clicking 'CONTINUE' within the DocuSign system.

By selecting the check-box next to 'I agree to use electronic records and signatures', you confirm that:

- You can access and read this Electronic Record and Signature Disclosure; and
- You can print on paper this Electronic Record and Signature Disclosure, or save or send this Electronic Record and Disclosure to a location where you can print it, for future reference and access; and
- Until or unless you notify Banner Bank as described above, you consent to receive exclusively through electronic means all notices, disclosures, authorizations, acknowledgements, and other documents that are required to be provided or made available to you by Banner Bank during the course of your relationship with Banner Bank.

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UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF WASHINGTON

In Re: ASTRIA HEALTH, et al.[1] Debtors and Debtors in Possession,	Lead Case No. 19-01189-11 Adv. Proc. Case No. 20-80016-WLH
ASTRIA HEALTH, et al., Plaintiffs, v.	MOTION FOR MANDATORY WITHDRAWAL OF REFERENCE Hearing: July 23 at 6:30 p.m. Without Oral Argument

[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.

MOTION FOR MANDATORY WITHDRAWAL OF REFERENCE

The United States of America (the "United States"), on behalf of Jovita Carranza, in her capacity as Administrator for the U.S. Small Business Administration ("SBA"), hereby moves (this "Motion") to withdraw the reference of the above-captioned adversary proceeding ("Adversary Proceeding"). This Motion is brought pursuant to 28 U.S.C. § 157(d), Rule 5011 of the Federal Rules of Bankruptcy Procedure, and Rule 5011-1 of the Local Bankruptcy Rules.

INTRODUCTION

Withdrawal of the reference here is mandatory under 28 U.S.C. § 157(d) because Plaintiffs' claims in the Adversary Proceeding require the Bankruptcy Court to interpret new non-bankruptcy law—the Coronavirus Aid, Relief, and Economic Stimulus ("CARES") Act, Pub. L. 116-136, 134 Stat. 281, and the emergency rules issued by the SBA as authorized by the CARES Act in section 1114. Plaintiffs' claims relate to the Paycheck Protection Program ("PPP"), CARES Act § 1102, 15 U.S.C. § 636(a)(36), a $659 billion loan guarantee program created under the CARES Act that has extended hundreds of thousands of loans to small businesses and non-

profits across the nation over the past two months. Plaintiffs argue, among other things, that the SBA violated the Administrative Procedures Act ("APA"), 5 U.S.C. § 701 *et seq.*, by exceeding its statutory authority, or acting arbitrarily or capriciously, when it issued an emergency rule excluding bankrupt entities or entities with an owner in bankruptcy from the PPP. ECF No. 1 at ¶¶ 87-97 (requesting the bankruptcy court to set aside, under 5 U.S.C. §§ 706(2)(A) and (C) of the APA, the SBA's rulemaking "that is in excess of statutory jurisdiction… [and] that is arbitrary and capricious or an abuse of discretion").

The SBA addressed the bankruptcy exclusion in two separate agency rules. Congress, through the CARES Act and Small Business Act, explicitly delegated authority to the Administrator to issue those rules. Resolving the issues raised in the Adversary Proceeding requires an interpretation—not merely an application—of the newly enacted CARES Act, which necessitates withdrawal of the reference.

On June 3, 2020, in the Adversary Proceeding, after briefing and oral argument, the Bankruptcy Court orally granted Plaintiff's request for a preliminary injunction. ECF No. 19. On June 10, 2020, the Bankruptcy Court entered an Order Granting Preliminary Injunction, Denying Stay Pending Appeal, and Certifying Issues to the Ninth Circuit Court of Appeals. ECF No. 22.

The Bankruptcy Court concluded that the Plaintiffs were likely to succeed on the merits on its APA claims that the SBA exceeded its statutory authority to implement the CARES Act PPP and that the SBA's determination to exclude bankrupt

entities or entities with an owner in bankruptcy from participation in the PPP was arbitrary and capricious. ECF No. 22, Exhibit A, Tr. at 15:5-23:14.

The Court asserted that Plaintiff's APA claims were "core" and that the Court had authority to issue a final order because the "APA claim is … a matter concerning the administration of this bankruptcy estate." *Id.*, Tr. at 12:9-12.

Contemporaneous with filing this Motion, the United States is filing a Notice of Appeal of the Bankruptcy Court's Order Granting Preliminary Injunction, Denying Stay Pending Appeal, and Certifying Issues to the Ninth Circuit Court of Appeals.

BACKGROUND

I. THE SMALL BUSINESS ADMINISTRATION

Through the Small Business Act, 15 U.S.C. § 631 *et seq.*, Congress created the SBA to "aid, counsel, assist, and protect, insofar as is possible, the interests of small-business concerns," in order to preserve the system of free competitive enterprise that is "essential" to the economic well-being and security of the Nation. 15 U.S.C. § 631(a). To promote that objective, Congress placed the SBA under the management of a single Administrator, *id.*, § 633(a), (b)(1), who is given "extraordinarily broad powers" under section 7(a) of the Act, 15 U.S.C. § 636(a), to provide a wide variety of technical, managerial, and financial assistance to small-business concerns. *SBA v. McClellan*, 364 U.S. 446, 447 (1960); *see generally* 15 U.S.C. § 636(a) (describing numerous varieties of general small-business loans the Administrator is "authorized" and "empowered" to make); 13 C.F.R. § 120.1. In the performance of these authorized

functions, the Administrator is further empowered to "make such rules and regulations as [she] deems necessary to carry out the authority vested in [her]," and to "take any and all actions . . . [that she] determines . . . are necessary or desirable in making . . . loans." 15 U.S.C. §§ 634(b)(6)−(7). SBA also has the power to establish general policies "which shall govern the granting and denial of applications for financial assistance by the Administration." 15 U.S.C. § 633(a).

II. SECTION 7(a) LENDING

The section 7(a) loan program is the SBA's primary program for providing financial assistance to small businesses. Under the terms of the Small Business Act, assistance under section 7(a) may take the form of loans or loan guarantees. 13 C.F.R. § 120.2(a); *see Valley Nat'l Bank v. Abdnor*, 918 F.2d 128, 129 (10th Cir. 1990); *Cal. Pac. Bank v. SBA*, 557 F.2d 218, 219 (9th Cir. 1977). In practice, the SBA ordinarily guarantees loans made by private lenders rather than disbursing funds directly to borrowers, *see United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 719 (1979), thus reducing risk for lenders and making it easier for them to access capital and for small business to obtain loans. https://www.sba.gov/funding-programs/loans.

III. SECTION 7(a) LOAN UNDERWRITING

Ordinarily, to qualify for an SBA general business loan an applicant must be an operating business organized for profit that is located in the United States, 13 C.F.R. § 120.100(a)−(c); meet the size standards for a "small" business set forth under the statute and SBA rules (usually stated in terms of number of employees, or average

annual receipts), *see* 15 U.S.C. § 632(a)(2); 13 C.F.R. § 120.100(d); 13 C.F.R. Part 121; and demonstrate that the desired credit is not available elsewhere on reasonable terms, 15 U.S.C. § 632(h); 13 C.F.R. §§ 120.100(e), 120.101. Additionally, the Small Business Act requires that "[a]ll loans made under this subsection *shall* be of such sound value or so secured as reasonably to assure repayment." 15 U.S.C. § 636(a)(6) (emphasis added). Form 1919 (attached to the Miller Decl.) serves as the application for section 7(a) loans. It asks whether the applicant has "ever filed for bankruptcy protection." *See also* Standard Operating Procedure 50 10 5(K) (Lender and Development Company Loan Programs) at 37 (allowing lenders to consider "past bankruptcy"). By regulation, requirements listed on Form 1919 and other official SBA forms comprise part of the "Loan program requirements." 13 C.F.R. § 120.10. Lenders agree to abide by these requirements when joining the section 7(a) lending program. *Id.*; *see also* SBA Forms 3506 and 3507 (addressing new PPP lenders).

IV. THE CORONAVIRUS AID, RELIEF, & ECONOMIC STIMULUS (CARES) ACT

On March 27, 2020, the President signed into law the Coronavirus Aid, Relief, and Economic Stimulus (CARES) Act, Pub. L. 116-136, 134 Stat. 281, providing an unprecedented package of emergency economic assistance and other support to assist businesses and Americans coping with the enormous economic and public health crises triggered by the worldwide coronavirus (COVID-19) pandemic. *See* SBA, Interim Final Rule, "Business Loan Program Temporary Changes; Paycheck

Protection Program" (the First Interim Final Rule), 85 Fed. Reg. 20,811 (April 15, 2020). Section 1102 of the CARES Act established the PPP to assist eligible small businesses experiencing economic hardship as a result of COVID-19 measures. *See id*. Section 1102(a)(2) adds a new paragraph (36) to section 7(a) of the Small Business Act, 15 U.S.C. § 636(a)(36), extending loans to eligible small businesses for certain covered uses, including among other things payroll costs. CARES Act § 1102(a)(2); 15 U.S.C. § 636(a)(36)(F)(i).

Otherwise, the existing section 7(a) requirements and limitations remain unaltered and govern PPP lending. The CARES Act provides, "*Except as otherwise provided in this paragraph*, the [SBA] *may* guarantee [PPP] covered loans"—not make loans directly, however—"under the same terms, conditions, and processes as a loan made under this subsection," *i.e.*, section 7(a). 15 U.S.C. § 636(a)(36)(B) (emphasis added). The CARES Act then sets forth in extensive detail the precise ways in which PPP covered loans differ from other section 7(a) loans by authorizing the SBA to guarantee covered loans to particular types of businesses not previously eligible for section 7(a) loans under the SBA's rules. *Id*. § 636(a)(36)(D)−(R). Specifically, it allows SBA to guarantee PPP loans to various nonprofit organizations, independent contractors, and self-employed individuals, as well as to small business concerns, *id*. § 636(a)(36)(D)(i), (ii); relaxes size limitations to allow businesses with as many as 500 employees (or more, depending on the industry in which they operate) to receive assistance, *id*. § 636(a)(36)(D)(i)(I); and (iii) selectively waives certain of

the SBA's affiliation rules used to determine small business "size." Notably, while expanding eligibility to those specified types of businesses, the CARES Act leaves unaltered the requirement that "[a]ll loans made under this subsection *shall* be of such sound value or so secured as reasonably to assure repayment." 15 U.S.C. § 636(a)(6) (emphasis added).

The CARES Act initially allocated $349 billion to guarantee PPP loans. CARES Act § 1102(b)(1). On April 16, 2020, the SBA issued a notice that PPP was closed to new applications. Congress then passed the Paycheck Protection Program and Health Care Enhancement Act (CARES Act II) on April 24, 2020 to add $310 billion to the PPP. PL 116-139 § 101(a)(1).

V. EMERGENCY RULEMAKING AUTHORITY

The CARES Act authorizes the Administrator of the SBA to issue emergency regulations to implement the PPP more rapidly than it could under typical notice and comment requirements. CARES Act § 1114. The Administrator of the SBA posted her First Interim Final Rule on the SBA website on April 3, 2020, which was subsequently published in the Federal Register on April 15, 2020. 85 Fed. Reg. 20,811. The First Interim Final Rule "streamlin[es] the requirements of the regular 7(a) loan program." *Id.* at 20,812. The rule states that lenders need not comply with case-by-case underwriting requirements of 13 C.F.R. § 120.150. *Id.* Instead, under a section titled "What Do Lenders Have to Do in Terms of Loan Underwriting," it states: "Each lender's underwriting obligation under the PPP is limited to [the

enumerated] items above and reviewing the 'Paycheck Protection Application Form.'" The Paycheck Protection Application Form itself requires the borrower to certify, among other things, that it is "not presently involved in a bankruptcy." SBA Form 2483.

On April 24, concurrent with Congress' extension of additional PPP funding, SBA posted a new interim final rule, which was subsequently published in the Federal Register on April 28, 2020, entitled "Business Loan Program Temporary Changes; Paycheck Protection Program –Requirements – Promissory Notes, Authorizations, Affiliation, and Eligibility" (the Fourth Interim Final Rule). 85 Fed. Reg. 23,450. The Fourth Interim Final Rule provides additional information regarding a number of eligibility requirements. Section III(4) of the Fourth Interim Final Rule specifically addresses applicants in bankruptcy. It provides:

> *4. Eligibility of Businesses Presently Involved in Bankruptcy Proceeding.*
>
> *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 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.

Fourth Interim Final Rule. 85 Fed. Reg. at 23,451.

VI. THE PAYCHECK PROTECTION FLEXIBILITY ACT OF 2020

On June 5, 2020, the President signed into law the Paycheck Protection Program Flexibility Act of 2020. *See* P.L. No. 116-142. The new act establishes a minimum maturity of five years for PPP loans with a remaining balance after forgiveness, § 2(a), extends the covered period for loans, § 3(a)−(b), alters certain requirements for loan forgiveness for employers unable to rehire employees or individuals similarly qualified, or unable to return to the same level of business as prior to the COVID-19 outbreak, § 3(b)(7), requires that recipients use at least sixty percent of the covered loan amount for payroll costs and up to forty percent for payment of interest on covered mortgage obligations, rent, or utilities, to be eligible for forgiveness, § 3(b)(8), revises the deferral period for PPP loans, § 3(c), and eliminates a provision that rendered loan recipients with a PPP debt that is ultimately forgiven ineligible to defer payroll tax payments. § 4. The Paycheck Protection Flexibility Act of 2020 does not, however, alter the sound value requirement in 15 U.S.C. § 636(a)(6). Nor does it alter SBA Form 2483 excluding debtors in bankruptcy.

ARGUMENT

District courts have original jurisdiction of "all civil proceedings arising under title 11, or arising in or related to cases under title 11." 28 U.S.C. § 1334(b). Each

district court may, however, "provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district." 28 U.S.C. § 157(a).

Pursuant to this authority, the United States District Court for the Eastern District of Washington has referred all bankruptcy cases filed in the district to the bankruptcy court. *See* LCivR 83.5(a) (Pursuant to 28 U.S.C. § 157(a), this Court hereby refers to the bankruptcy judges of this district all cases under United States Code Title 11, and all proceedings arising under Title 11 or arising in or related to cases under Title 11).

However, 28 U.S.C. § 157(d) provides:

> The district court may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party, for cause shown. The district court shall, on timely notice of a party, so withdraw a proceeding if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce.

28 U.S.C. § 157(d).

The United States' motion, filed prior to the entry of the Bankruptcy Court's scheduling order in the Adversary Proceeding, is timely. *See* LBR 5011-1 (b) (Any motion for withdrawal of reference in an adversary proceeding, in whole or in part, shall be filed in the bankruptcy court no later than 14 days following the entry of the scheduling order").

Mandatory withdrawal of the reference is required here. "The purpose of § 157(d) is to assure that an Article III judge decides issues calling for more than routine application of [federal laws] outside of the Bankruptcy Code." *Ames Dep't Stores, Inc. v. Lumbermens Mut. Cas. Co. (In re Ames Dep't Stores, Inc.)*, 512 B.R. 736, 740 (S.D.N.Y. 2014) (citation omitted) (alteration in original).

The mandatory withdrawal provision of § 157(d) "*mandates* withdrawal in cases requiring material consideration of non-bankruptcy federal law." *Sec. Farms v. Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers*, 124 F.3d 999 at 1008 (9th Cir. 1997) (emphasis in original). While "[t]he Ninth Circuit has not squarely addressed mandatory withdrawal," other circuit courts "have held that 'mandatory withdrawal is required only when [non-title 11] issues require the interpretation, as opposed to mere application, of the non-title 11 statute, or *when the court must undertake analysis of significant open and unresolved issues regarding the non-title 11 law.*'" *In re Tamalpais Bancorp*, 451 B.R. 6, 8-9 (N.D. Cal. 2011) (citations omitted) (emphasis added). "Courts within the Ninth Circuit have largely adopted this approach." *Id.* (citations omitted).

Here, the issues raised by Plaintiffs in the Adversary Proceeding require a court to determine whether the SBA exceeded its statutory authority under the newly-enacted CARES Act, or acted arbitrarily or capriciously, in excluding bankrupt entities or entities with an owner in bankruptcy from participation in the PPP. Because the CARES Act was enacted less than three months ago, on March 27, 2020,

this complex issue of statutory interpretation of non-bankruptcy law is an issue of first impression for courts nationwide. The CARES Act is a non-title 11 law and the interpretation of it under the APA inarguably requires a court to undertake an analysis of significant and unresolved issues of non-bankruptcy law. Accordingly, this issue should be heard and resolved in the district court, and therefore, mandatory withdrawal of the reference is required. *See In re Tamalpais Bancorp*, 451 B.R. at 9 (mandatory withdrawal is triggered when the bankruptcy court must "undertake analysis of significant open and unresolved issues regarding the non-title 11 law"); *One Longhorn Land I, L.P. v. Presley*, 529 B.R. 755, 759 (C.D. Cal. 2015) ("The Ninth Circuit has suggested in dicta that mandatory withdrawal hinges 'on the presence of substantial and material questions of federal law.'") citing *Sec. Farms*, 124 F.3d at 1008 n.4.

Withdrawal is also required because the Bankruptcy Court has exceeded its Constitutional authority. The Bankruptcy Court determined that that Plaintiffs' APA claims are "core" and that the Bankruptcy Court had authority to issue a final order because the "APA claim is … a matter concerning the administration of this bankruptcy estate." ECF No. 22, Exhibit A, Tr. at 12:9-12.

The distinction between core and non-core matters is fundamental to a bankruptcy court's jurisdiction. The Ninth Circuit has defined a core proceeding as one that "invokes a substantive right provided by title 11 or ... a proceeding that, by its nature, could arise only in the context of a bankruptcy case." *In re Ray*, 624 F.3d

1124, 1131 (9th Cir. 2010), quoting *Gruntz v. County of L.A. (In re Gruntz)*, 202 F.3d 1074, 1081 (9th Cir. 2000). A matter is core and "arises under" the Bankruptcy Code if "if its existence depends on a substantive provision of bankruptcy law, that is, if it involves a cause of action created or determined by a statutory provision of the Bankruptcy Code" or "arises in" a case under the Bankruptcy Code if "it is an administrative matter unique to the bankruptcy process that has no independent existence outside of bankruptcy and could not be brought in another forum, but whose cause of action is not expressly rooted in the Bankruptcy Code." *In re Ray*, 624 F.3d at 1131. In core proceedings, a bankruptcy judge "may enter appropriate orders and judgments" subject to appellate review by the district court. 28 U.S.C. § 157(b)(1)).

On the other hand, matters are deemed "non-core" if they "do not depend on the Bankruptcy Code for their existence and they could proceed in another court." *Dunmore v. United States*, 358 F.3d 1107, 1114 (9th Cir. 2004). In non-core proceedings, the bankruptcy judge "shall submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge after . . . reviewing de novo." 28 U.S.C. § 157(c)(1)).

The Bankruptcy Court's decision that Plaintiff's APA claims are "core" cannot be reconciled with this controlling authority. Plaintiff's APA claims clearly do not "invoke a substantive right created by the federal bankruptcy law", nor do they concern an "administrative matter unique to the bankruptcy process." Moreover, the claims are not ones that "could not exist outside of the bankruptcy." Plaintiff's APA

claims do not "invoke a substantive right created by the federal bankruptcy law" because the cause of action for these claim is the APA, not anything in the Bankruptcy Code. *See* 5 U.S.C. § 702; *see also In re Penobscot Valley Hosp.*, 2020 WL 3032939, at *4 (Bankr. D. Me. June 3, 2020) ("the Debtor's complaint [concerning a PPP loan] ventures far beyond the confines of the Bankruptcy Code, asserting a claim under the APA. . . this proceeding is not one arising in or arising under the Bankruptcy Code, but rather is one related to a case under the Bankruptcy Code"); *Diocese of Rochester v. U.S. Small Bus. Admin.*, 2020 WL 3071603, at *4 (W.D.N.Y. June 10, 2020) ("It is not clear whether the Bankruptcy Court would have the authority to finally adjudicate Plaintiffs' claims under the APA. . . This lack of clarity supports withdrawing the referral…"); *In re United Air Lines, Inc.*, 337 B.R. 904, 910 (N.D. Ill. 2006) (Debtors' Title IV of ERISA claim "exists outside the Bankruptcy Code and can arise outside the context of a bankruptcy case. . . Accordingly, the termination proceeding neither invokes a substantive right provided by Title 11 nor, by its nature, could it arise only in the context of a bankruptcy case."). Further, Plaintiffs' APA claims are in no way "administrative matters unique to the bankruptcy process." Finally, Plaintiff's APA claims could exist outside of bankruptcy because there can be no dispute that Plaintiff could have filed its APA suit directly in the district court. 28 U.S.C. § 1331.

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CONCLUSION

For the foregoing reasons, the United States respectfully requests mandatory withdrawal of the reference for the Adversary Proceeding.

RESPECTFULLY SUBMITTED: June 23, 2020.

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UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF WASHINGTON

In Re: ASTRIA HEALTH, et al[1] Debtors and Debtors in Possession, 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.	Lead Case No. 19-01189-11 Adv. Proc. Case No. 20-80016-WLH CERTIFICATE OF SERVICE

[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), SHS 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).

I hereby certify that on June 23, 2020, I electronically filed Defendant's Motion for Mandatory Withdrawal of Reference with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

U.S. Trustee

Plaintiffs

And to the following non CM/ECF participants: n/a

s/Brian M. Donovan
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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
ASTRIA HEALTH, *et al.*, Plaintiffs, v.	**Adv. Proc. Case No. 20-80016-WLH** **OPPOSITION TO MOTION FOR MANDATORY WITHDRAWAL OF REFERENCE**

[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).

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UNITED STATES SMALL BUSINESS ADMINISTRATION and JOVITA CARRANZA, in her capacity as Administrator for the United States Small Business Administration, Defendants.	**[Related Docket No. 26]**

Debtor Astria Health ("Astria"), Debtor SHC Medical Center - Toppenish, doing business as Astria Toppenish Hospital ("Toppenish"), both Washington nonprofit corporations under § 501(c)(3) of title 26 of the United States Code, and Debtor Yakima HMA Home Health LLC doing business as Astria Home Health & Hospice-Yakima ("Astria Home Health"), also a Washington corporation, along with the above-referenced affiliated debtors (collectively, the "Debtors"), the debtors and debtors in possession in the above-captioned chapter 11 bankruptcy cases (collectively, the "Chapter 11 Cases"), hereby file this opposition (the "Opposition") to the *Motion for Mandatory Withdrawal of Reference* [Docket No. 26] (the "Motion") filed by Defendant United States Small Business Administration (the "SBA") acting through Defendant Jovita Carranza in her capacity as the Administrator of the SBA (the "Administrator", and together with the SBA, the "Defendants"), as follows:

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I.

INTRODUCTION

The Defendants' Motion should be denied because (a) it is a violation of the parties' agreement, and the Bankruptcy Court's order, to stay all litigation pending final resolution of any appeal (the "Standstill Agreement"), as memorialized in the *Stipulated [Proposed] Order* [Adv. Pro. Docket No. 25] (filed before the Defendants filed the Motion), and as approved by the Bankruptcy Court in the *Stipulated Order* (the "Standstill Order") [Adv. Pro. Docket No. 33]; (b) the underlying proceeding and issues are core issues in a bankruptcy proceeding; (c) mandatory withdrawal of the reference requires more than mere application of the non-bankruptcy law, while this adversary proceeding required nothing more than the mere application of the Administrative Procedures Act; (d) the claims are neither complex nor beyond the jurisdiction of the Bankruptcy Court; and (e) it would be highly inefficient, and a waste of judicial resources, to require the United States District Court for the Eastern District of Washington (the "District Court") to acquire the intimate familiarity with the facts that are at the heart of the underlying causes of action and that are necessary to adjudicate the adversary proceeding, when the matter may be resolved in the pending SBA appeal of the Bankruptcy Court's order granting a preliminary injunction. For all these reasons, as discussed more fully herein and on the record in the Adversary Proceeding, the Motion should be denied.

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II.

BACKGROUND

A. General Background

The Debtors filed voluntary petitions for relief under chapter 11 of title 11 of the United States Code, §§ 101 *et seq.* (the "Bankruptcy Code")[2] on May 6, 2019 (the "Petition Date") in the United States Bankruptcy Court for the Eastern District of Washington (the "Bankruptcy Court"). These Chapter 11 Cases are currently being jointly administered before the Bankruptcy Court. [Lead Docket No. 10].

Since the Petition Date, the Bankruptcy Court has considered more than 1,400 docket entries, adjudicated hundreds of disputes, and is considering multiple adversary proceedings. Moreover, the record developed in the Bankruptcy Court includes all facts central to resolving the above-captioned adversary proceeding (the "Adversary Proceeding").

B. The SBA Adversary Proceeding

This Adversary Proceeding arises out of Banner Bank's previous denial, at the direction of the SBA acting through the Administrator, of two of the Debtors' applications for loans under the Paycheck Protection Program ("PPP") because the applicants are debtors in bankruptcy, . Through the Adversary Proceeding, the

[2] All references to "§" herein are to sections of the Bankruptcy Code.

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Debtors sought to have the SBA and the Administrator enjoined from their improper and unlawful administration of PPP, which Congress enacted and the President signed as part of the Coronavirus Aid, Relief, and Economic Security Act (the "CARES Act"), Public Law 116-136.[3] The CARES Act included stimulus funds designed to assist businesses, including for-profits and 501(c)(3) nonprofits, and to ensure that American workers continue to be paid despite the economic impact of the Novel Coronavirus ("Covid-19") and social distancing measures. Section 1102 of the CARES Act establishes PPP as a convertible loan program under § 7(a) of the Small Business Act, codified in 15 U.S.C § 636. While nominally called a "loan,"[4] PPP disbursements are treated as grants—and there are no repayment obligations—if, among other things, a certain percentage of PPP funds are used for payroll and wage expenses, interest on mortgages, rent, or utilities. Importantly, neither the CARES Act, the Small Business Act, nor any other applicable law or regulation prohibits the granting of PPP funds to bankruptcy debtors, with the exception of an SBA rule issued and published after the Debtors submitted their PPP applications.

[3] A full text of the CARES Act can be found at https://www.govtrack.us/congress/bills/116/hr748/text (last visited on July 7, 2020).

[4] The Debtors' use of the term "loan" or "loans" herein is not intended to waive or diminish its contention that PPP is in reality a support/grant program.

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Nevertheless, the Defendants denied the Debtors access to PPP disbursements on the sole basis that the Debtors are in bankruptcy, and in so doing exceeded their statutory authority and improperly, unfairly, arbitrarily, capriciously, and unlawfully discriminated against the Debtors—in violation of § 525(a) of the Bankruptcy Code and Administrative Procedure Act (the "APA"), 5 U.S.C. § 706.[5].

After notice and hearing, the Bankruptcy Court granted the Debtors' request for an order requiring the Defendants and all agents, servants, employees, and any parties acting in concert with any of the foregoing (the "Restrained Parties") to consider the Debtors' PPP applications and any related forms, applications, or other documents[6] without any consideration of the involvement of the Debtors or any owner of the Debtors in any bankruptcy. *Order Granting Preliminary Injunction, Denying Stay Pending Appeal, and Certifying Issues to the Ninth Circuit of Appeals* [Adv. Proc. Docket No. 22] (the "Preliminary Injunction Order") on the grounds that the Defendants violated the § 706 of the APA.[7] Contrary to the Defendants'

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[5] The Debtors' allegations are set forth more fully in the Complaint [Adv. Pro. Docket No. 1].

[6] This includes a lender application.

[7] The Defendants appealed the Preliminary Injunction Order to the District Court. *See Notice of Appeal Under 28 U.S.C. §158(a)(1) and Statement of Election*, Adv.

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assertions that the Debtors' claims "require the Bankruptcy Court to interpret new non-bankruptcy law," the Bankruptcy Court merely applied the APA to the facts before it.

Just before the Defendants were set to file their Answer to the Complaint, the parties reached the Standstill Agreement, which would allow the parties to forego the expense of litigation on the merits pending an appeal of the Preliminary Injunction Order. However, within hours of filing the *Stipulated [Proposed] Order* [Adv. Pro. Docket No. 25], the Defendants filed the Motion, needlessly increasing litigation costs to the detriment of the Debtors. At no point during the parties' Standstill Agreement discussions did the Defendants mention they were planning to file the Motion. The Debtors agreed to a stay of all litigation pending the appeal, in good faith and with the understanding that the Standstill Agreement applied to everything other than the appeal itself. The Motion is not a part of the appeal, and is thus a violation of the parties' agreement, and the Standstill Order.

Pro. Docket No. 28; *see also* App. Case No. 20-cv-03089. The Debtors cross-appealed. Adv. Pro. Docket No. 34. As of the date of this filing, neither sides' brief is yet due to be filed.

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III.

ARGUMENT

A. The Motion Should Be Denied Because It Violates the Bankruptcy Court's Order

The Motion should be denied as it violates the terms of the Standstill Agreement between the Defendants and the Debtors and, in turn, violates the Standstill Order [Adv. Pro. Docket No. 33]. That agreement says: "The parties hereby agree to stay this Adversary Proceeding pending the United States' appeal of the Order Granting Preliminary Injunction. Such stay shall only apply to further litigation of this Adversary Proceeding on the merits and does not stay the Order Granting Preliminary Injunction." That language captures the Motion, which is clearly violating the Standstill Agreement and Standstill Order to "stay the Adversary Proceeding pending the United State' appeal." As such, the Defendants are in civil contempt for ignoring the Standstill Order staying the Adversary Proceeding, when there is no fair ground of doubt as to whether the Standstill Order barred the Defendants from filing the Motion. *Taggart v. Lorenzen*, 139 S. Ct. 1795 (June 3, 2019) (A bankruptcy court may hold a creditor in civil contempt for attempting to collect on a debt that has been discharged in bankruptcy "if there is *no fair ground of doubt* as to whether the order barred the creditor's conduct."); *Suh v. Anderson* (*In re Jeong*), 2020 WL 1277575 (B.A.P. 9th Cir. Mar. 16, 2020) (Panel applied the

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Taggart standard in upholding a bankruptcy court order granting a chapter 7 trustee's request for contempt sanctions for a willful violation of the stay.). Here the Debtors do not seek sanctions for violating the standstill agreement and the Bankruptcy Court order other than denial of the Motion and enforcement of the Standstill Agreement.

B. The Proceeding Is Core

The Adversary Proceeding raise two issues, both of which are core matters. The cause of action asserting relief under § 525 is a core proceeding because it asserts a right based expressly and solely on a Bankruptcy Code provision. More importantly, the cause of action related to the Administrative Procedures Act violation is also a core matter, because of the nature of the issue presented. Here the issue is whether the SBA could exclude debtors in bankruptcy from participation in the PPP. It is an issue that can only arise in the context of a bankruptcy case, because the exclusion would not apply outside of a bankruptcy case. Moreover, it could not have existed prepetition, as absent a bankruptcy case it would not exist, and the Debtors' rights are significantly affected as a result of the bankruptcy filing. Thus, this cause of action is core. *Kirk v. Hendon* (*In re Heinsohn*), 247 B.R. 237 (E.D. Tenn. 2000) (proceeding is "core" if it invokes substantive right provided by title 11 or if it is a proceeding that, by its nature, could arise only in the context of bankruptcy); *Houbigant, Inc. v. ACB Mercantile, Inc.* (*In re Houbigant, Inc.*), 185 B.R. 680 (S.D.N.Y. 1995) (proceeding is core if it invokes a substantive right

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provided by the Bankruptcy Code or by nature could arise only in the context of a bankruptcy case); *Hudgins v. Shah* (*In re Sys. Eng'g & Energy Mgmt. Assocs., Inc.*), 252 B.R. 635 (Bankr. E.D. Va. 2000) (among factors that courts may consider in deciding whether claim is "core" are the following: (1) whether claim existed prepetition; (2) whether claim would continue to exist independent of provisions of title 11; and (3) whether parties' rights, obligations, or both are significantly affected as result of debtor's bankruptcy filing).

The Defendants mistakenly cite the Ninth Circuit as supporting their argument. *See* Motion at 13-14 (citing *In re Ray*, 624 F.3d 1124, 1131 (9th Cir. 2010) ("a core proceeding is one that 'invokes a substantive right provided by title 11 or ... a proceeding that, by its nature, could arise only in the context of a bankruptcy case,'")). The Defendants somehow insinuate that this Adversary Proceeding could arise in any context outside of bankruptcy. However, this logic is flawed as the Defendants unambiguously admit that they discriminated against the Debtors solely because of their status as debtors in bankruptcy. *See Defendants Brief in Opposition to Plaintiffs' Motion for Temporary Restraining Order (ECF No. 2) Request for Preliminary Injunction (ECF No. 1)* [Adv. Pro. Docket No. 14] at 15:13-14 ("Here, the status quo is that plaintiffs are excluded from the PPP program because they are in bankruptcy."). Moreover, the Debtors claims for violations of § 525(a) of the Bankruptcy Code can arise only in bankruptcy.

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C. Withdrawal of the Reference is Not Mandated

Federal courts have "original and exclusive jurisdiction of all cases under title 11," which they may refer to the Bankruptcy Court. *See* 28 U.S.C. §§ 157(a) and 1334(a). In select circumstances, though, the District Court must withdraw that reference "if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce." *Id.* § 157(d); *see also Sec. Farms v. Int'l Bhd. of Teamsters*, 124 F.3d 999, 1008 (9th Cir. 1997).

However, courts interpret this provision narrowly to prevent the very type of forum shopping being pursued here by the Defendants. *See In re Temecula Valley Bancorp, Inc.*, 523 B.R. 210, 214 (C.D. Cal. 2014) (citing *In re Vicars Ins. Agency, Inc.*, 96 F.3d 949, 952 (7th Cir. 1996)); *Lucore v. Guild Mortg. Co.*, No. 12-CV-1411-IEG WVG, 2012 WL 2921354, at *2 (S.D. Cal. July 16, 2012) ("Congress intended for this language to be construed narrowly."); *In re Roman Catholic Bishop of San Diego*, No. 07-1355, 2007 WL 2406899 (S.D. Cal. Aug. 20, 2007) ("Congress intended the mandatory withdrawal provision to be construed narrowly so as not to create an 'escape hatch' by which most bankruptcy matters could easily be removed to the district court."); *see also Shurgrue v. Air Line Pilots Ass'n Intel* (*In re Ionosphere Clubs, Inc.*), 922 F.2d 984, 995 (2d Cir. 1990). Indeed, withdrawal is rarely required, consistent with Congress's clear intent behind enacting "a modern

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bankruptcy system [that] places the basic rudiments of the bankruptcy process in the hands of an expert equitable tribunal." *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 94 (1989) (Blackmun, J., dissenting).

Given the high standard, a party seeking to withdraw the reference bears the burden of persuasion, and "must do more than merely suggest that novel issues of law could possibly arise in a bankruptcy proceeding." *In re Tamalpais Bancorp*, 451 B.R. 6, 8 (N.D. Cal. 2011); *see also Weinstein v. Kuhl*, No. 18-01351-HSG, 2018 WL 4904901, at *3 (N.D. Cal. Oct. 9, 2018). As set forth below, the Defendants have not satisfied their burden, and the circumstances here do not warrant withdrawal.

To avoid forum shopping, a majority of courts have found that mandatory withdrawal is proper only where "substantial and material consideration of non-Bankruptcy Code federal statutes is necessary for the resolution of the proceeding." *In re Ionosphere Clubs, Inc.*, 922 F.2d 984, 995 (2d Cir. 1990). In most courts, including most courts in the Ninth Circuit, this standard -- the substantial and material consideration of the non-bankruptcy statutes -- has been articulated as "mandatory withdrawal is required only when [non-title 11] issues require the interpretation, as opposed to mere application, of the non-title 11 statute, or when the court must undertake analysis of significant open and unresolved issues regarding the non-title 11 law." *Tamalpais Bancorp*, 451 B.R. at 8 (citing *In re Vicars Ins. Agency, Inc.*, 96

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F.3d at 954 and collecting cases in the Ninth Circuit adopting this standard); *see also Smails v. City of Pittsburgh Sch. Dist.,* No. 15-1489, 2016 WL 110029, at *2 (M.D. Pa. Jan. 11, 2016); *In re Nortel Networks, Inc.,* 539 B.R. 704, 709 (D. Del. 2015); *One Longhorn Land I, L.P. v. Presley*, 529 B.R. 755, 759-60 (C.D. Cal. 2015); *In re IndyMacBancorp Inc.,* No. CV 11-03969-RGK, 2011 WL 2883012, at *2 (C.D. Cal. July 15, 2011); *United States v. Delfasco, Inc*., 409 B.R. 704, 707 (D. Del. 2009); *In re G-I Holdings, Inc.*, 295 B.R. 222, 224 (D.N.J. 2003).

Here, the SBA argues that the withdrawal is required because the Bankruptcy Court would have to review the CARES Act or some other new and novel body of law. But that is a "red herring." The Bankruptcy Court's decision applies the Administrative Procedures Act, a law which was passed in 1946, more than 70 years ago, to establish uniform procedures for federal agencies to propose and establish regulations. *See, e.g., Franklin v. Massachusetts,* 505 U.S. 788, 796 (1992) (the APA "sets forth the procedures by which federal agencies are accountable to the public and their actions subject to review by the courts"); *United States v. Morton Salt Co*., 338 U.S. 632, 644 (1950) (discussing legislative purpose of the APA); *Sequoia Orange Co. v. Yeutter*, 973 F.2d 752, 758 (9th Cir. 1992) ("The procedural safeguards of the APA help ensure that government agencies are accountable and their decisions are reasoned.").

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The standards governing the application of the APA are well established and understood and the application of them is clear, especially with regard to whether decisions are arbitrary and capricious. *See e.g.*, *Dep't of Homeland Sec. v. Regents of the U. of Cal.*, 591 U. S. ____ (2020) ("The basic rule here is clear: An agency must defend its actions based on the reasons it gave when it acted. This is not the case for cutting corners to allow [the agency] to rely upon reasons absent from its original decision."); *Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 43 (1983). . This is not a case requiring a novel interpretation of the APA or an interpretation of the CARES Act, but merely the application of the APA's well established body of law and well recognized standards to the facts before the Bankruptcy Court. Here, the Bankruptcy Court correctly found that the administrative record is wholly lacking any substantive reasoning or explanation. Where the court is merely applying settled law, as the Bankruptcy Court was doing here with regard to the APA, withdrawal is not appropriate. *LTV Steel Co. v. Union Carbide Corp.* (*In re Chateaugay Corp.*), 193 B.R. 669 (S.D.N.Y. 1996) (withdrawal of reference not required if consideration of non-Code law entails straightforward application of settled law to facts of particular case); *In re E & S Facilities, Inc.*, 181 B.R. 369, 372 (S.D. Ind. 1995) (withdrawal requires either (1) complicated issues of first impression requiring significant interpretation of Federal law, or (2) substantial and material conflicts between the Bankruptcy Code and non-title 11 laws), *aff'd*, 96

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F.3d 949 (7th Cir. 1996); *In re Philadelphia Training Ctr. Corp.*, 155 B.R. 109 (E.D. Pa. 1993) (mandatory withdrawal not required where only routine application of established legal standards is required); *Am. Body Armor & Equip., Inc. v. Clark* (*In re Am. Body Armor & Equip., Inc.*), 155 B.R. 588 (M.D. Fla. 1993) (mandatory withdrawal only for cases of first impression or where "substantial and material conflicts" exist between Bankruptcy Code and other Federal law); *Wittes v. Interco, Inc.*, 137 B.R. 328 (E.D. Mo. 1992) (where issues required no more than ""straightforward application,"" and not significant interpretation of ADEA, reference not withdrawn).

D. Conclusion

Based on the foregoing, the Motion should be denied because it violates the Bankruptcy Court's Standstill Order, asks to withdraw the reference to deal with two core matters under the Bankruptcy Code, and fails to satisfy the requirements for mandatory withdrawal of the reference, because it merely presents the application of well settled legal precedent related to the APA to the facts of this case.

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Dated: July 7, 2020

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OBJECTION TO MANDATORY WITHDRAWAL OF REFERENCE

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UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF WASHINGTON

In Re: ASTRIA HEALTH, et al.[1] Debtors and Debtors in Possession, ASTRIA HEALTH, et al.,	Lead Case No. 19-01189-11 Adv. Proc. Case No. 20-80016-WLH REPLY IN SUPPORT OF MOTION TO WITHDRAW THE REFERENCE Hearing: June 23, 2020 at 6:30 p.m. Without Oral Argument

[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).

Plaintiffs,

v.

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

Defendants.

UNITED STATES REPLY TO PLAINTIFFS' OPPOSITION TO MOTION FOR MANDATORY WITHDRAWAL OF REFERENCE

The United States of America (the "United States"), on behalf its agency the United States Small Business Administration ("SBA"), and SBA's administrator, Jovita Carranza, in her official capacity, respectfully submits this reply in support of its motion to withdraw the reference.

ARGUMENT

The United States filed its Motion for Mandatory Withdrawal of Reference ("Motion") on June 23, 2020. ECF No. 26. Plaintiffs filed their Opposition to Motion for Mandatory Withdrawal of Reference ("Opposition") on July 7, 2020. ECF No. 35.

Plaintiffs argue that withdrawing this adversary proceeding is not required for five reasons: (1) adjudicating Plaintiffs' claims does not require interpreting non-bankruptcy law within the meaning of 28 U.S.C. § 157; (2) Plaintiffs' claims

are core because they uniquely arise in bankruptcy; (3) the Motion violates the Bankruptcy Court's "Stipulated Order," (ECF No. 33); (4) the claims are not complex; and (5) withdrawal is inefficient. ECF No. 35 at 3. None of these arguments are persuasive.

First, most of the Opposition is simply irrelevant to the matter at hand. Only Plaintiffs' first argument — that the Court does not need to interpret non-bankruptcy law – is relevant to mandatory withdrawal under 28 U.S.C. § 157(d). *See Sec. Farms v. Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers*, 124 F.3d 999, 1008 (9th Cir. 1997) (holding that section 157(d) "*mandates* withdrawal in cases requiring material consideration of non-bankruptcy federal law" (emphasis added)). If the Court rejects Plaintiffs' contention that adjudicating the proceeding will not require interpreting non-bankruptcy law, then the Court need not consider Plaintiffs' other arguments.

Second, even if the Court does consider Plaintiffs' other arguments ((2), (4) and (5) as noted above) as related to permissive, rather than mandatory withdrawal, none of Plaintiffs' arguments are persuasive, as explained below.

Finally, the United States' motion asking that the District Court adjudicate the merits of withdrawing the reference with respect to the Adversary Proceeding is procedurally proper and not inconsistent with the standstill agreement made by the parties and issued without alteration by the Bankruptcy Court.

1. Adjudicating this Adversary Proceeding Requires Interpreting the CARES Act.

Plaintiffs agree that 28 U.S.C. § 157(d) mandates withdrawal when adjudicating the proceeding requires consideration of non-bankruptcy "laws of the United States regulating organizations or activities affecting interstate commerce." Opposition at 11. Plaintiffs further agree that this standard is met when "[non-title 11] issues require the interpretation, as opposed to mere application, of the non-title 11 statute, or when the court must undertake analysis of significant open and unresolved issues regarding the non-title 11 law." Opposition at 12 (quoting *In re Tamalpais Bancorp*, 451 B.R. 6, 8 (N.D. Cal. 2011)). However, Plaintiffs then mischaracterize the analysis the Court must undertake by asserting that this case does not require interpreting the CARES Act or analyzing unresolved issues regarding the CARES Act. *See* Opposition at 13.

This assertion is not correct. Plaintiffs' Complaint pleads Administrative Procedure Act violations based on (a) the absence of any "law, regulation, or rule of any kind [that] disqualifies, or authorizes the SBA or the Administrator to disqualify[] bankruptcy debtors from participating in PPP," and (b) that "SBA and the Administrator's automatic disqualification of the Debtors runs completely counter to the mandate of PPP." ECF No. 1 at ¶¶ 89, 100 (Counts IV and V). Resolving these claims *requires* the Court to interpret the CARES Act, because (1) the parties dispute whether the CARES Act authorizes SBA to promulgate

reasonable eligibility requirements for PPP applicants, and (2) the parties dispute whether the bankruptcy exclusion is a reasonable interpretation of the CARES Act. *Compare* Complaint Counts IV and V (above), *with Nat'l Cable & Telecomm'ns Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 986 (2005) ("At the first step [of *Chevron* deference], we ask whether the statute's plain terms directly address the precise question at issue. If the statute is ambiguous on the point, we defer at step two to the agency's interpretation so long as the construction is a reasonable policy choice for the agency to make." (cleaned up) (quoting *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 843, 845 (1984))). Only by interpreting the CARES Act under *Chevron* can the Court determine whether Plaintiffs prevail on their APA claims. Thus, because Plaintiffs' APA claims unquestionably require the Court to interpret non-title 11 law (the CARES Act), mandatory withdrawal is required.[2]

[2] "[M]andatory withdrawal is inappropriate where the asserted non-bankruptcy laws do not relate to interstate commerce." *Tamalpais Bancorp*, 451 B.R. at 9. Here, the CARES Act, and specifically the PPP, unquestionably relates to interstate commerce – and Plaintiffs do not contest this point. The PPP is a nationwide federal lending program available to applicants throughout the United States. PPP loans, which are used by recipients to pay employees (who then use the money in a variety of ways), rent and for other purposes, are clearly items placed in the stream of interstate commerce. Moreover, to the extent that PPP loans allows business to continue operations and produce goods, both now and in the future, those goods are also items placed in the stream of interstate commerce. Thus, the PPP program, established and funded by the CARES Act and implemented by the SBA, which guarantees every PPP loan, unquestionably relates to interstate commerce.

Plaintiffs attempt to resist this result by asserting that the CARES Act was not relevant to the Bankruptcy Court's preliminary injunction decision. Opposition at 13. Even if this were true,[3] it is irrelevant. In its Motion, the United States seeks withdrawal of the adversary proceeding, not review of the preliminary injunction decision (an appeal has been filed for that purpose). As discussed above, resolving this adversary proceeding requires interpreting the CARES Act in order to adjudicate Plaintiffs' APA claims. Thus, withdrawal is mandatory because the case "require[s] the interpretation, as opposed to mere application, of the" CARES Act and "analysis of significant open and unresolved issues regarding the" same. *See Tamalpais Bancorp*, 451 B.R. at 8.

2. Plaintiffs' APA Claims Are Not Core.

As explained above, mandatory withdrawal under 28 U.S.C. § 157(d) turns solely on whether the proceeding requires interpreting significant non-bankruptcy law. However, to the extent that the Court should otherwise permissively withdraw

[3] It is not. The Bankruptcy Court's oral ruling granting the injunction relied on its conclusion that the "SBA appears to have (inaudible) an important aspect of the problem in so far as the CARES Act can make certification that" the loan is necessary to the recipient. ECF No. 22 at 26, Tr. 19:14-19. The Bankruptcy Court continued that the "SBA blunderbuss exclusion [of bankrupt entities] simply disregards . . . 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." *Id.* at 27, Tr 20:3-10. The Bankruptcy Court's statements demonstrate that it was interpreting both the text and the purpose of the CARES Act in granting an injunction based upon an alleged APA violation.

the reference because the Bankruptcy Court will exceed its jurisdiction by entering final judgments on non-core claims, the United States will address the argument.

Plaintiffs agree that a claim is core only if "it invokes a substantive right provided by the Bankruptcy Code or by nature could arise only in the context of a bankruptcy case." Opposition at 9–10 (citing *Houbigant, Inc. v. ACB Mercantile, Inc.* (*In re Houbigant, Inc.*), 185 B.R. 680 (S.D.N.Y. 1995)). Plaintiffs assert that their claims are "core" within the meaning of 28 U.S.C. § 157. Opposition at 9. However, Plaintiffs misapply this standard to the claims asserted in this case.

Plaintiffs do not purport to rely on "a substantive right provided by the Bankruptcy Code" for its APA Claims.[4] Instead, Plaintiffs argue that these claims could have arisen only in the context of a bankruptcy case. Opposition at 10. But that is simply untrue, as identical claims could have been and *have been* brought in district court in other cases. *See, e.g.*, *Tradeways, Ltd. v. U.S. Dep't of the Treasury*, No. CV ELH-20-1324, 2020 WL 3447767 (D. Md. June 24, 2020) (denying preliminary injunction on 525 and APA claims); *Diocese of Rochester v. SBA*, No. 6:20-CV-06243 EAW, 2020 WL 3071603 (W.D.N.Y. June 10, 2020) (same in part and granting summary judgment to SBA in part). Nothing stopped

[4] While the 11 U.S.C. § 525 claim is undoubtedly a bankruptcy claim, Plaintiffs' APA claims are not. And the Bankruptcy Court concluded that "PPP loans are classified as just that, loans" and that "even if [a PPP loan] . . . is some variety of grant, section 525(a) just doesn't stretch far enough to encompass PPP funding." ECF No. 22 at 12 and 15, Tr. at 5:23-24, 8:19-22.

Plaintiffs from doing the same here.

Moreover, even granting Plaintiffs' premise, there is a fundamental distinction between cases that *would not* have arisen but-for a bankruptcy, and cases that *can only* arise in a bankruptcy within the meaning of 28 U.S.C. § 157. As explained in the Motion, in the Ninth Circuit, the "arises in" aspect of core proceedings requires the claim to be "an administrative matter unique to the bankruptcy process that has no independent existence outside of bankruptcy and could not be brought in another forum, but whose cause of action is not expressly rooted in the Bankruptcy Code." *In re Ray*, 624 F.3d 1124, 1131 (9th Cir. 2010). Nothing in the APA is "unique to the bankruptcy process," nor could these claims have "not be[en] brought in another forum." *See id.* Plaintiffs' APA claims thus do not arise in bankruptcy within the meaning of 28 U.S.C. § 157(b), and are not core bankruptcy proceedings.

3. Plaintiffs' Other Arguments Fail.

Plaintiffs' remaining arguments are irrelevant because they do not relate to 28 U.S.C. § 157's mandatory withdrawal standard. It of no moment to the statute whether the claims are "complex," withdrawal is "inefficient," or the Motion contravenes the parties' standstill agreement. However, even considering these arguments on their merits, they fare no better than Plaintiffs' lone argument that does address the mandatory withdrawal standard.

First, these claims are complex; more than 40 courts across the country are handling identical claims and, even while reaching opposite conclusions, many have made a point of noting that the cases are unusual and difficult to resolve.

Second, withdrawal is the most efficient litigation route here. "The purpose of § 157(d) is to assure that an Article III judge decides issues calling for more than routine application of [federal laws] outside of the Bankruptcy Code." *Ames Dep't Stores, Inc. v. Lumbermens Mut. Cas. Co.* (*In re Ames Dep't Stores, Inc.*), 512 B.R. 736, 740 (S.D.N.Y. 2014) (citation omitted) (alteration in original). Were the case to remain in Bankruptcy Court, it would require the District Court to ultimately review the APA claims de novo, wasting judicial resources and stalling final judgment.

Third, there is no violation of the Bankruptcy Court's Stipulated Order, let alone "clear and convincing evidence that a party 'violated a specific and definite order of the court'" as required for a contempt finding. *See Parsons v. Ryan*, 949 F.3d 443, 454 (9th Cir. 2020) (quoting *Stone v. City and Cty. of San Francisco*, 968 F.2d 850, 856 n.9 (9th Cir. 1992)). The Stipulated Order is very clear on its scope, stating: "Such stay shall only apply to further litigation of this Adversary Proceeding on the merits." ECF No. 33 at 3. A motion to withdraw the reference is a procedural vehicle for determining which court shall *decide the merits*, it has nothing to do with the merits themselves. It is appropriate and efficient for the

Court to determine where the merits shall be decided while the appeal is pending, thus preventing needlessly duplicative litigation in the Bankruptcy Court. The motion to withdraw thus furthers the purpose behind the Stipulated Order of resolving this case as efficiently as possible, in addition to complying with its plain terms. The United States would not have stipulated to such an order had this not been the case.

The standstill agreement was agreed to by the parties and submitted to the Bankruptcy Court on June 23, 2020. Later that day, the United States filed its motion to withdraw the reference. On June 24, 2020, the parties participated in a scheduling conference with the Bankruptcy Court. Two days later, on June 26, 2020, the Bankruptcy Court signed the standstill order without alteration. If Plaintiffs believed that the pending motion to withdraw the reference would be frozen by the standstill, then they should have attempted to address that during the scheduling conference or prior to the entry of the standstill order by the Bankruptcy Court. They did not.

Moreover, after Plaintiffs communicated to the United States that they believed the standstill prevented the motion to withdraw from moving forward, the United States offered to abandon the standstill and continue litigating in the Adversary Proceeding. Plaintiffs did not respond to that offer.

//

CONCLUSION

The United States respectfully requests that this adversary proceeding be withdrawn to the District Court.

Respectfully Submitted: July 14, 2020

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July 17, 2020

VIA CM/ECF DOCKETING

Hon. Rosanna Malouf Peterson
U.S. District Court, Eastern District of Washington
P.O. Box 1493
Spokane, WA 99210

Re: Motion to Withdraw the Bankruptcy Reference of *Astria Health, et al. v. United States Small Business Administration, et al. (In re Astria Health, et al.)*, Adv. Proc. No. 20-80016-WLH (Bankr. E.D. Wash.)

Dear Judge Peterson:

I write pursuant to Local Bankruptcy Rule 5011-1(c) to provide comments regarding the government's motion to withdraw the bankruptcy reference filed in the above-referenced adversary proceeding. I do not urge a specific disposition of the motion, but hope to provide some context and perspective that may prove useful to your analysis of the issues.

Overview of the Action

This litigation addresses the Small Business Administration's decision to categorically exclude bankrupt entities from eligibility for the Paycheck Protection Program ("PPP") loans that Congress enacted as part of the Coronavirus Aid, Relief, and Economic Security or CARES Act. The plaintiffs, several debtors in pending complex chapter 11 cases, operate two rural hospitals and several healthcare clinics in the Yakima Valley, among other things. The debtors initiated this adversary proceeding against the SBA after their applications for PPP loans were rejected based solely on their status as debtors under title 11. The debtors challenge the SBA's bankruptcy exclusion on several grounds, including under the Bankruptcy Code and the Administrative Procedures Act. Because of certain time constraints, the debtors also sought an order enjoining rejection of the debtors' loan applications based on the bankruptcy exclusion.

On June 10, 2020, after briefing and oral argument, I granted the requested preliminary injunction and incorporated an oral ruling I read into the record on June 3, 2020. Both sides appealed the preliminary-injunction order. These appeals are pending before Your Honor as case numbers 20-cv-03089-RMP and 20-cv-03098-RMP. Simultaneous with its notice of appeal, the government filed the motion to withdraw the reference at issue here, which seeks to transfer all litigation (including discovery, pre-trial practice, and any trial) remaining after disposition of the pending appeals from this court to the District Court.

Statutory Framework

As you know, the Judicial Code invests federal district courts with jurisdiction over all bankruptcy cases, as well as disputes "arising in" or "related to" such cases, but permits district courts to order automatic and mandatory referral of all bankruptcy cases and all bankruptcy-related matters to the district's bankruptcy judges (who are designated as "units" of the district court).[1] In this district, the bankruptcy reference tracks the statutory framework in Local Civil Rule 83.5(a). There is no disagreement that the dispute at issue here falls within the broad scope of federal bankruptcy jurisdiction and thus was properly referred to me in the first instance.

The government's motion invokes Judicial Code section 157(d), a mechanism to potentially reallocate work between district judges and bankruptcy judges by providing two bases for the district court to withdraw its default bankruptcy reference, one "permissive" and the other "mandatory." Under either, "[t]he burden of persuasion is on the party seeking withdrawal."[2] The burden is allocated in this fashion because withdrawal of the reference is an "exception to the rule," one not intended to provide an "escape hatch" out of bankruptcy courts.[3] Rather, as the Court of Appeals for the Ninth Circuit has consistently recognized, the system designed by the Judicial Code promotes judicial economy by "making use of the bankruptcy court's unique knowledge of Title 11 and familiarity with the actions before them."[4]

Standards for Mandatory Withdrawal

The Court of Appeals for the Ninth Circuit has explained that mandatory withdrawal "hinge[s] on the presence of *substantial and material* questions of federal law."[5] District courts have concluded that the mere *presence* of nonbankruptcy issues is insufficient; rather, withdrawal is mandatory only if those issues "dominate" the bankruptcy issues.[6] District courts have also concluded that the mandatory withdrawal analysis requires that "there at least must be a threshold level of showing" that detailed, substantive interpretation of nonbankruptcy federal law will be required and "that resolution of the claims begs for more than straight forward application of facts to well-established federal law."[7] Furthermore, the *possibility* that nonbankruptcy federal law may play some role in the litigation is insufficient; mandatory withdrawal applies only when substantial and material consideration of such law is *necessary* to resolve the proceeding.[8] Based on these standards, I do not believe that this case presents any issues triggering this narrow exception to the general framework of the bankruptcy reference.

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1 *See* 28 U.S.C. §§ 151, 157(a), 1334.

2 *FTC v. First Alliance Mortg. Co. (In re First Alliance Mortg. Co.)*, 282 B.R. 894, 902 (C.D. Cal. 2001).

3 *See, e.g.*, *Official Comm. of Unsecured Creditors of Neuman Homes, Inc. v. Neumann (In re Neumann Homes, Inc.)*, 414 B.R. 383, 387 (N.D. Ill. 2009).

4 *Sigma Micro Corp. v. Healthcentral.com (In re Healthcentral.com)*, 504 F.3d 775, 787-88 (9th Cir. 2007).

5 *Sec. Farms v. Int'l Bd. of Teamsters*, 124 F.3d 999, 1008 n.4 (9th Cir. 1997) (emphasis added).

6 *See, e.g.*, *Hawaiian Airlines, Inc. v. Mesa Air Grp., Inc.*, 355 B.R. 214, 222 (D. Haw. 2006).

7 *See, e.g.*, *Siegel v. Caldera*, 2010 U.S. Dist. LEXIS 34355, at *11 (C.D. Cal. Mar. 19, 2010).

8 *See, e.g.*, *In re Ionosphere Club, Inc.*, 103 B.R. 416, 418-19 (S.D.N.Y. 1989).

First, although the debtors assert claims under the APA (and I concluded when analyzing the injunctive factors that these claims have a high probability of success), final resolution of these claims on the merits will tread no novel legal ground nor involve resolution of any substantial and material legal questions. The standards and analytic framework for resolving the APA claims raised here are firmly established by robust, clear, and binding Supreme Court and Ninth Circuit precedent.[9] Resolution of the litigation thus merely requires straightforward application of settled and well-developed legal standards to the specific facts presented here.

Second, to the extent a resolution necessitates considering aspects of the CARES Act, that consideration will almost certainly be ancillary to the primary issues presented (including whether the SBA engaged in a process of reasoned analysis and developed the type of record the APA requires) and not involve resolution of *substantial and material* questions of federal law. Only a handful of CARES Act provisions have any conceivable relevance to the issues presented here and the deciding court need not engage in substantial construction to resolve competing, outcome-determinative interpretations of that statute. To the extent analyzing a given sub-issue involves some incidental statutory construction, such task is susceptible to the simple application of well-established canons without addressing any material legal questions. Finally, to the extent any of the debtors' APA claims implicate the purpose of the CARES Act, I do not believe there is any material question or dispute about the Act's legislative purpose, which Congress evidently enacted as a prompt and forceful response to the economic impact of the COVID-19 pandemic. For these reasons, I see nothing triggering a mandatory withdrawal.

Withdrawal for "Cause"

One factor bearing on permissive withdrawal of the reference is whether the litigation is a "core" bankruptcy proceeding or otherwise within the scope of final bankruptcy adjudication. This factor is relevant but not determinative as district courts often conclude that principles of judicial economy favor leaving all bankruptcy-related matters with the bankruptcy court, even non-core proceedings, subject to review by an Article III judge.[10]

To the extent it is relevant to the present motion, the issues arising in this adversary proceeding are core. Judicial Code section 157(b)(2) provides a non-exclusive list of "core"

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[9] *See, e.g.*, *Dep't of Homeland Sec. v. Regents of the Univ. of Cal*., 207 L. Ed. 2d 353, 366-67, 369-77 (2020); *Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 43 (1983); *Latino Issues Forum v. United States EPA*, 558 F.3d 936, 941 (9th Cir. 2009); *Ariz. Cattle Growers' Ass'n v. United States Fish & Wildlife, BLM*, 273 F.3d 1229, 1235-36 (9th Cir. 2001).

[10] *See, e.g.*, *In re Temecula Valley Bancorp, Inc.*, 523 B.R. 210, 223-24 (C.D. Cal. 2014); *Siegel v. FDIC (In re IndyMac Bancorp Inc.)*, 2011 U.S. Dist. LEXIS 78418, at *17-18 (C.D. Cal. July 15, 2011). Through the report and recommendation process used for non-core and *Stern* claims, the district court benefits from the bankruptcy court's specialized expertise with bankruptcy issues and context, as well as the bankruptcy court's greater familiarity with the case, all consistent with the traditional allocation of work between the two courts. *See, e.g.*, *In re Healthcentral.com*, 504 F.3d at 787-88. In a ruling in harmony with a practical division of judicial responsibility, the Supreme Court held that de novo review by the district court, regardless of the precise process that is followed, eliminates any constitutional concerns associated with the non-Article-III status of bankruptcy judges. *See Exec. Benefits Ins. Agency v. Arkison*, 573 U.S. 25, 35-40 (2014); *see also, e.g.*, *Mastro v. Rigby*, 764 F.3d 1090, 1094-95 (9th Cir. 2014).

bankruptcy proceedings, which includes "matters concerning the administration of the estate."[11] The debtors here intend to use the PPP funds to administer their bankruptcy estates under my supervision, including by paying front-line nurses' wages and other costs of administration during the pendency of their bankruptcy cases. As such, the dispute about whether the debtors may participate in PPP funding is a "matter concerning" the administration of their estates and, hence, a "core" bankruptcy proceeding.

Beyond the specific classification under section 157(b)(2), this dispute also fits within the scope of "arising in" bankruptcy jurisdiction, which is a term of art that overlaps the core/non-core distinction. "Arising in" bankruptcy proceedings "are those that are not based on any right expressly created by title 11, but nevertheless, would not exist outside of the bankruptcy."[12] That is the case here – the debtors' challenge to the bankruptcy exclusion from PPP eligibility could have no conceivable existence outside of the bankruptcy context. If a non-bankrupt entity attempted to bring such a challenge, a court would necessarily dismiss the suit based on the plaintiff's lack of injury and, therefore, lack of standing.[13] The *only* party that could maintain a viable action challenging the bankruptcy exclusion is a debtor under title 11 actually denied access to PPP funding. The government correctly notes that APA-related actions *generally* can exist outside of the bankruptcy context but ignores that *the present action* could not; this litigation is solely about a bankruptcy exclusion and that specific dispute could never be litigated other than in the context of a bankruptcy case. The action therefore "arises in" a title 11 case.[14]

For similar reasons, there is no constitutional obstacle preventing the bankruptcy court from finally adjudicating this adversary proceeding (subject to the appellate process under Judicial Code section 158). In *Stern v. Marshall*, the Supreme Court made clear that bankruptcy judges may finally resolve disputes whenever "the action at issue stems from the bankruptcy itself."[15] This action inescapably stems from the Astria bankruptcy cases – had the plaintiffs not been debtors in bankruptcy, their PPP applications would not have been rejected on that basis and this litigation would not exist. Once again, this is not antitrust litigation, a state-law contract dispute, or a similar case that could arise or be prosecuted outside of the bankruptcy context – the dispute necessarily relies on a bankruptcy exclusion that only a debtor in bankruptcy has standing to challenge.

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[11] 28 U.S.C. § 157(b)(2)(A).

[12] *See, e.g.*, *Maitland v. Mitchell (In re Harris Pine Mills)*, 44 F.3d 1431, 1435 (9th Cir. 1995) (quoting *In re Wood*, 825 F.2d 90, 96-97 (5th Cir. 1987)).

[13] *See, e.g.*, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-67 (1992).

[14] The government suggests that this action could have been brought in "another forum" but misses the point of the "arising in" analysis. Cases discussing "another forum" refer to forums not reliant on bankruptcy jurisdiction over the action – such as a state court regarding a nonbankruptcy contract claim or a federal district court regarding an antitrust claim. The point of the "arising in" question is again whether the lawsuit could exist elsewhere absent the bankruptcy case or whether its genesis is the bankruptcy. Although the government mentions two other similar lawsuits filed in federal district courts in the first instance, those lawsuits presumably rested on bankruptcy jurisdiction under 28 U.S.C. § 1334 and it is not clear why the applicable district courts did not apply their standing orders of reference given the plain relationship to title 11 cases.

[15] 564 U.S. 462, 499 (2011).

In sum, this litigation is statutorily "core," is a civil proceeding "arising in" a bankruptcy case, and is an action stemming from the Astria bankruptcy itself. As such, it is a lawsuit over which a bankruptcy judge may properly exercise final adjudicatory authority under Judicial Code section 157 and the United States Constitution.[16]

Standstill Order

The debtors contend that the government's withdrawal motion violates a stipulated order imposing a standstill on further proceedings pending resolution of the appeals before you. Because the government filed its motion before the hearing on the standstill order, it seems reasonable that the parties contemplated the government's motion in discussing their stipulation. I do not know, however, if these discussions or considerations occurred. Regardless, the parties have sought no relief in the bankruptcy court relating to a possible violation of the standstill order. I do not intend to grant any relief that would infringe on your consideration of the withdrawal motion unless Your Honor refers a decision regarding the applicability of the standstill order back to my court. Otherwise, Your Honor might consider deferring argument or a decision regarding the withdrawal motion until after your resolution of the pending appeals.

Impact on the Underlying Cases

Local Bankruptcy Rule 5011-1(c) contemplates that my comments may address "the impact of the adversary proceeding upon the underlying case." Although this dispute is of significant economic consequence for the Astria debtors and a favorable outcome will materially improve the chances of several rural hospitals and clinics successfully reorganizing, I do not believe the pendency of this litigation or any decision regarding the withdrawal motion (or the pending appeals) requires the underlying chapter 11 cases to be held in abeyance or otherwise delayed. The Astria debtors recently filed a chapter 11 plan and are working to prosecute that plan through a confirmation hearing scheduled in September 2020. I anticipate that this process will continue apace regardless of the activity in the adversary proceeding. Put differently, the underlying chapter 11 cases and this adversary proceeding can travel along their separate tracks.

* * *

I hope these comments are helpful during your consideration of the withdrawal motion. If there is anything further that I can provide to assist, I am happy to do so.

Sincerely,

Whitman L. Holt
United States Bankruptcy Judge

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[16] Other bankruptcy courts within the Ninth Circuit have reached a similar conclusion. *See, e.g.*, *Vestavia Hills, Ltd. v. United States SBA (In re Vestavia Hills, Ltd.)*, 2020 Bankr. LEXIS 1713, at *12-13 (Bankr. S.D. Cal. June 26, 2020). I am not aware of any decision by a district court within the Ninth Circuit regarding this issue.