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The Honorable Whitman L. Holt

8 UNITED STATES BANKRUPTCY COURT
 9 FOR THE EASTERN DISTRICT OF WASHINGTON

10 In re:

11 ASTRIA HEALTH, ET AL.,

12 Debtors and Debtors-in-
 Possession.¹

Chapter 11

Lead Case No. 19-01189-11
 Jointly Administered

13 APPLICATION OF BANNER
 14 BANK FOR ALLOWANCE OF
 ADMINISTRATIVE EXPENSE
 CLAIM

15 (SHC MEDICAL CENTER
 16 TOPPENISH DBA ASTRIA
 TOPPENISH HOSPITAL)

17 (No hearing requested)

18
 19
 20
 21 ¹ The Debtors, along with their case numbers, are as follows: Astria Health (19-
 22 01189-11), Glacier Canyon, LLC (19-01193-11), Kitchen and Bath Furnishings,
 23 LLC (19-01194-11), Oxbow Summit, LLC (19-01195-11), SHS Holdco, LLC (19-
 24 01196-11), SHC Medical Center - Toppenish (19-01190-11), SHC Medical Center
 - Yakima (19-01192-11), Sunnyside Community Hospital Association (19-01191-
 25 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
 26 HMA Home Health, LLC (19-01200-11).



1 COMES NOW Banner Bank and hereby submits this Application to the Court
2 for allowance and payment of its administrative expense claim in the amount of
3 \$2,369,046.50 (“Application”), which amount includes principal plus interest as of
4 December 3, 2020, plus such additional interest, fees, and costs, including but not
5 limited to attorneys’ fees and costs, that may accrue through the date of payment,
6 related to post-petition financing extended by Banner Bank to SHC Medical Center
7 Toppenish DBA Astria Toppenish Hospital (“Astria Toppenish”).

8
9 **BACKGROUND**

10 1. On May 6, 2019 (“Petition Date”), the Debtors each filed a Petition for
11 relief under Chapter 11 of the Bankruptcy Code, 11 U.S.C. § 101, *et seq.*, in the
12 United States Bankruptcy Court for the Eastern District of Washington.

13 2. On or about May 15, 2020, Debtors commenced an adversary
14 proceeding, under United States Bankruptcy Court for the Eastern District of
15 Washington Case No. 20-80016 WLH (“SBA Adversary Proceeding”), in which
16 Debtors alleged, among other things, that Astria Toppenish had applied for a post-
17 petition loan under the Paycheck Protection Program (“PPP”), authorized under
18 Coronavirus Aid, Relief, and Economic Security Act (the “CARES Act”), Public
19 Law 116-136, but that Banner Bank had denied the application, under the direction
20 of the Small Business Administration (“SBA”) because Astria Toppenish was a
21 debtor in this Chapter 11 bankruptcy action. (Adv. Dkt. 1.) Debtors sought injunctive
22 relief requiring the SBA and Banner Bank to extend a PPP loan to Astria Toppenish,
23 provided that Astria Toppenish met all other eligibility requirements for the PPP.

24 3. On June 10, 2020, the Court entered an order in the SBA Adversary
25 Proceeding, in which it granted the Debtors’ motion for a preliminary injunction,
26 authorizing Astria Toppenish to resubmit its PPP application, and instructing the

1 SBA and Banner Bank that, provided that Astria Toppenish otherwise met all of the
2 PPP qualifications, they could not refuse the PPP application on the basis that Astria
3 Toppenish was a debtor in a bankruptcy case. The Court also denied the SBA's
4 request for a stay pending appeal. (Adv. Dkt. 22).

5 4. Astria Toppenish resubmitted its application for a PPP loan on June 12,
6 2020, which application was approved in accordance with the Order of this Court
7 compelling the Bank to approve the application as long as the borrower met all of
8 the relevant PPP qualifications. Banner Bank subsequently extended a PPP loan to
9 Astria Toppenish, evidenced by a Promissory Note ("Note") dated as of June 28,
10 2020, in the original principal amount of \$2,358,900.00 ("Loan").

11 5. The Note provides that interest on the Loan shall accrue at the rate of
12 1.00% per annum, and that Astria Toppenish is required to begin making payments
13 on the Loan ten months following the date of disbursement, unless Astria Toppenish
14 applies for and is granted loan forgiveness under the terms of the PPP. A true and
15 correct redacted copy of the Note is attached hereto as Exhibit A.

16 6. On or about June 16, 2020, the Court entered an Order Setting
17 Administrative Claims Bar Date ("Administrative Claims Bar Date Order"), setting
18 a deadline of July 20, 2020 for filing of Administrative Expense Claims pursuant to
19 11 U.S.C. § 503(b) and § 507(a)(2) that arose between the Petition Date and June
20 16, 2020. (Dkt. 1404), and setting forth the procedure for filing of Administrative
21 Expense Claims. Debtors' Disclosure Statement, filed on November 11, 2020,
22 provides that any claims arising after entry of the Administrative Claims Bar Date
23 Order, shall be filed and served not later than 30 days after the effective date of
24 Debtors' Chapter 11 Plan, and that any objections thereto must be filed and served
25 on the Debtors and claimant within 20 days of filing the request for payment. (Dkt.
26 1987). Therefore, this Application is timely, because the Loan was made after the

1 date the Administrative Claims Bar Date Order was issued.

2 7. As of December 3, 2020, the principal amount of \$2,358,900.00
3 remains due and owing on the Loan, in addition to accrued unpaid interest in the
4 amount of \$10,146.50, for a total balance of \$2,369,046.50. Additional interest
5 continues to accrue at a rate of \$64.63 per diem, and other costs and fees, including
6 attorneys' costs and fees, continue to accrue pursuant to the terms of the Note.

7 8 **JURISDICTION AND VENUE**

9 8. The Court has jurisdiction over this Application pursuant to 28 U.S.C.
10 § 157 and § 1334. This Motion is a core proceeding pursuant to 28 U.S.C.
11 § 157(b)(2)(a) and § 1334. Venue is proper before this Court pursuant to 28 U.S.C.
12 § 1408 and § 1409. The relief requested is sought pursuant to 11 U.S.C. § 105 and
13 § 503.

14 15 **RELIEF REQUESTED**

16 9. Astria Toppenish's post-petition obligations to Banner Bank that
17 remain unpaid give rise to a claim that should be afforded administrative priority
18 treatment. Pursuant to 11 U.S.C. § 503(b)(1)(A), administrative claims include "the
19 actual, necessary costs and expenses of preserving the estate." An administrative
20 expense claim will generally be allowed where the expense "(1) arose from a
21 transaction with the debtor-in-possession as opposed to the preceding entity (or,
22 alternatively, that the claimant gave consideration to the debtor-in-possession); and
23 (2) directly and substantially benefited the estate." *Microsoft v. Corp. v. DAK Indus.*
24 (*In re DAK Indus.*), 66 F.3d 1091, 1094 (9th Cir. Cal. 1995). It is widely accepted
25 that "costs for 'preservation of the estate' include those incurred for the continuation
26

1 of the business of the estate.” *See, e.g., In re Azevedo*, 485 B.R. 596, 600 (Bankr.
2 D. Idaho 2013).

3 10. Creditors that extend post-petition funding to debtors in order to
4 facilitate the continued operation of the debtor’s business are generally entitled to
5 payment of their claims as an administrative expense. *See generally* 11 U.S.C. §
6 364(b) (“The court, after notice and a hearing, may authorize the trustee to obtain
7 unsecured credit or to incur unsecured debt other than under subsection (a) of this
8 section, allowable under section 503(b)(1) of this title as an administrative
9 expense.”). In *In re Pizza of Haw., Inc.*, 69 B.R. 60, 61-62 (D. Haw. 1986), for
10 example, franchise fee expenses, a working capital loan, and advertising fees which
11 were incurred postpetition were all entitled to treatment as administrative expense
12 claims.

13 11. The PPP loan extended by Banner Bank to Astria Toppenish is required
14 to be used only for the following purposes in order to be eligible for loan forgiveness:
15 payroll expenses, eligible mortgage interest payments, eligible rent payments, and
16 utility payments, all vital elements in the continuation of a business. In fact, Debtors
17 represented in their Verified Complaint in the SBA Adversary Proceeding that
18 “These funds are vital to maintaining healthcare offerings to the surrounding
19 community. Lack of funding under this program would impair the Debtors’ ability
20 to reorganize in the anticipated timeframe.” (Adv. Dkt 1; ¶ 56). Thus, it cannot be
21 disputed that this funding was necessary for the continued operation of Astria
22 Toppenish’s business.

23 12. Indeed, in *Gateway Radiology Consultants, P.A. v. Caranza (In re*
24 *Gateway Radiology Consultants, P.A.)*, 616 B.R. 833 (Bankr. M. D. Fl. 2020), the
25 court considered a Chapter 11 debtor’s eligibility for a PPP loan, and noted that, to
26 the extent that the debtor does not qualify for loan forgiveness under the PPP, the

1 lender is entitled to payment of the loan as an administrative expense claim under
2 Bankruptcy Code §503(b)(1). *Id.* at 852.

3 13. Similarly, here, if Astria Toppenish complies with the guidelines for
4 use of PPP loan proceeds, then it is eligible to apply for loan forgiveness pursuant to
5 PPP and the CARES Act. However, to the extent that it fails to apply or qualify for
6 forgiveness of the full amount of the Loan, Banner Bank is entitled to payment from
7 Debtors as an administrative expense claim as to any outstanding balance that
8 remains due and owing on the Loan after SBA has processed Astria Toppenish's
9 loan forgiveness request.

10
11 WHEREFORE, Banner Bank respectfully requests allowance and payment of
12 its administrative claim, and that the Court enter an order instructing the Debtors to
13 pay Banner Bank's administrative expense claim in the amount of \$2,369,046.50,
14 plus such additional interest, fees, and costs, including but not limited to attorneys'
15 fees and costs, that may accrue through the date of payment, to be paid on the date
16 that Astria Toppenish is required to begin making payments pursuant to the Note, if
17 and to the extent that Astria Toppenish fails to apply or qualify for loan forgiveness
18 of the full amount of the Loan through the PPP.

19
20 Dated: December 4, 2020

SNELL & WILMER L.L.P.

21
22 By: s/Raminta A. Rudys

23 Raminta A. Rudys, WSB 48360
24 rrudys@swlaw.com

25 Attorneys for Creditor,
26 Banner Bank

1 CERTIFICATE OF SERVICE

2
3 I hereby certify that on December 4, 2020, I caused the foregoing
4 APPLICATION OF BANNER BANK FOR ALLOWANCE OF
5 ADMINISTRATIVE EXPENSE CLAIM (SHC MEDICAL CENTER
6 TOPPENISH DBA ASTRIA TOPPENISH HOSPITAL) to be electronically filed
7 with the clerk of the Court using CM/ECF System. It is my understanding that the
8 CM/ECF System will send electronic notifications of this filing to all parties listed
9 in this case to receive notice electronically.

10
11 Dated this 4th day of December 2020.

12
13 By: /s/Raminta A. Rudys
14 Raminta Rudys, WSBA No. 48360
15 Snell & Wilmer L.L.P.
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17 Bellevue, WA 98007
18 rrudys@swlaw.com
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EXHIBIT A

Promissory Note

Paycheck Protection Program

The Coronavirus Aid, Relief and Economic Security Act, as amended by The Paycheck Protection Program Flexibility Act of 2020 (The "CARES Act")

Banner Bank Loan No. [REDACTED] **1559**
SBA E-Tran No. [REDACTED] **8006**

This Promissory Note is made this on this day 6/28/2020 .

1. PROMISE TO PAY: In return for the loan ("Loan") evidenced by this Promissory Note ("Note"), the undersigned Borrower(s) "SHC Medical Center Toppenish DBA Astria Toppenish Hospital ("Borrower(s)") promises to pay to the order of Lender the amount of (\$ 2,358,900.00) ("Principal"), interest on the unpaid Principal balance, and all other amounts required by this Note.

2. PAYMENT TERMS: The payment terms for this Note are as follows:

A. Interest shall accrue on the unpaid Principal at the rate of 1.00% (one percent) per annum from the date of the Note until paid in full. The interest rate is fixed and will not change during the life of the Loan.

B. Monthly payments each in the amount of \$48,588.91 shall be due on the fifth day of each month, beginning on the first month that is not less than ten full months from the date of the Note, and continuing monthly thereafter through the earlier of the 60th month from the date of the Note or the date on which the Loan is paid in full (giving credit for Loan forgiveness to the extent approved by SBA and such forgiveness amount is paid by SBA to Lender). The amount due in the final month may be less or more than the regular monthly payment, depending on the timing and amount of forgiveness, the duration of the payment deferral period, prepayments and other factors. No payments are due on this loan until the earlier of: (1) the date on which the SBA pays to Lender the forgiveness amount, if less than the full amount then due under this Note; or, (2) the date ten months from the date of first disbursement of this loan. Interest will continue to accrue on the unpaid Principal during the deferment period.

C. Lender will apply each payment (whether the regular monthly payment or any supplemental extra payment as may be voluntarily made by Borrower) in the following order: first to pay interest accrued to the day Lender receives the payment; then to the principal portion of the current regular monthly payment; and finally to any remaining Principal balance.

D. Borrower may prepay this Note at any time without penalty. Borrower may prepay 20 percent or less of the unpaid Principal balance at any time without advance notice to Lender. If

Borrower prepays more than 20% of the Principal balance and the Loan has been sold on the secondary market, Borrower must: (a) give Lender written notice of Borrower's intention to prepay; (b) pay all accrued interest through the date of the prepayment; and (c) if the prepayment is received less than 21 days from the date Lender received the notice, pay an amount equal to 21 days interest from the date Lender received the notice, less any interest accrued during the 21 days and paid under (b) of this paragraph. If Borrower then does not prepay within 30 days from the date Lender received the notice, Borrower must give Lender a new notice before prepayment.

3. LOAN FORGIVENESS: Borrower may apply to Lender for forgiveness of this Loan in an amount equal to the sum of the following costs incurred and paid by Borrower during within a 24-week period ("Expenditure Forgiveness Period") beginning on the date of first disbursement of this loan, and in any event ending not later than December 31, 2020, even if that date is less than 24 weeks from the date of first disbursement of the loan: (a) payroll costs; (b) payments of interest on a covered mortgage obligation (which shall not include prepayment or payment of principal on a covered mortgage obligation); (c) payments on a covered rent obligation; and (d) covered utility payments. The amount of forgiveness shall be calculated (and accordingly may be reduced from the forgiveness amount requested by Borrower) in accordance with the requirements, including the timing requirements, of the CARES Act. Not more than 40% of the amount forgiven can be attributable to non-payroll costs. It is Borrower's obligation to consider and decide whether or not to apply to Lender for forgiveness, when such application should be made, and the amount of forgiveness to be requested; and applications for forgiveness must be made by Borrower in accordance with procedures and forms specified by the SBA and/or Lender.

4. NON-RECOURSE. Lender and SBA shall have no recourse against any individual shareholder, member or partner of Borrower for non-payment of the Loan, except to the extent that such shareholder, member or partner uses the Loan proceeds for an unauthorized purpose.

5. DEFAULT: Borrower is in default under this Note if Borrower:

- A. Fails to make a payment when due under this Note;
- B. Fails to do anything required by this Note;
- C. Makes, or anyone acting on Borrower's behalf makes, a materially false or misleading representation to Lender or Small Business Administration, an Agency of the US Government ("SBA");
- D. Becomes the subject of a proceeding under any bankruptcy or insolvency law; or has a receiver or liquidator appointed for any part of Borrower's business or property; or makes an assignment for the benefit of creditors;
- E. Reorganizes, merges, consolidates, or otherwise changes ownership or business structure without Lender's prior written consent; or

F. Becomes the subject of a civil or criminal action that Lender believes may materially affect Borrower's ability to pay this Note.

6. LENDER'S RIGHTS IF THERE IS A DEFAULT: Without notice or demand and without giving up any of its rights, Lender may:

- A. Require immediate payment of all amounts owing under this Note;
- B. Collect all amounts owing from any Borrower;
- C. File suit and obtain judgment;

7. LENDER'S GENERAL POWERS: Without notice and without Borrower's consent, Lender may incur expenses to collect amounts due under this Note, including reasonable attorney's fees and costs. If Lender incurs such expenses, it may demand immediate repayment from Borrower or add the expenses to the Principal balance.

8. WHEN FEDERAL LAW APPLIES: When the SBA is the holder of this Note, this Note will be interpreted and enforced under federal law, including SBA regulations. Lender or SBA may use state or local procedures for filing papers, recording documents, giving notice, foreclosing liens, and other purposes. By using such procedures, SBA does not waive any federal immunity from state or local control, penalty, tax, or liability. As to this Note, Borrower may not claim or assert against SBA any local or state law to deny any obligation, defeat any claim of SBA, or preempt federal law.

9. STATE-SPECIFIC PROVISIONS: So long as this Note is held by Lender or Lender's assignee; and, if held by SBA, then at SBA's election:

A. Any and all disputes concerning or related to this Note shall be brought in the Superior Court of King County, Washington, or the US District Court, Western District of Washington; and those courts shall be the mandatory, exclusive venue for any such actions. Borrower agrees that those courts are convenient forums, and waives any argument of forum non conveniens. Borrower hereby irrevocably submits to the personal jurisdiction of those courts for any such actions.

B. The internal laws of the State of Washington (excluding conflicts of laws principles) shall govern this instrument in all regards.

10. SUCCESSORS AND ASSIGNS; NOTE ASSIGNABLE BY LENDER: Under this Note, Borrower includes its successors, and Lender includes its successors and assigns. This Note is assignable by Lender.

11. BORROWER'S ADDITIONAL CERTIFICATIONS AND AGREEMENTS:

As a condition of Lender's obligation to make the Loan and disburse to Borrower the Loan proceeds, Borrower further agrees and certifies as follows:

A. Borrower shall provide all documents and information as may be requested by Lender from time to time so as to facilitate Lender's claim on the SBA guaranty of the Loan. Without limitation, Borrower shall provide in writing, on a certified basis, to Lender any and all documents and/or information requested by Lender about the Borrower, about Borrower's use of the Loan proceeds, about Borrower's compliance with the requirements of Lender's Application to the SBA and/or about Borrower's compliance with any and all requirements of the CARES Act in connection with the Loan. Borrower shall keep books and records in a manner satisfactory to Lender, furnish financial statements as requested by Lender from time to time, and allow Lender and SBA to inspect and audit books, records and papers relating to Borrower's financial or business condition.

B. Borrower and the undersigned individually warrant and represent that all information provided to Lender in Borrower's Application for the Loan, including without limitation all information regarding the Borrower's financial condition, is accurate to the best of Borrower's and/or undersigned's knowledge and that neither Borrower nor the undersigned have withheld any material information.

C. Borrower certifies that Borrower intends to and will use the Loan proceeds for the purposes stated in and consistent with the Borrower's Application for the Loan, namely exclusively for: (a) payroll costs; (b) payments of interest on a covered mortgage obligation (which shall not include prepayment or payment of principal on a covered mortgage obligation); (c) payments on a covered rent obligation; and (d) covered utility payments. Borrower certifies that not less than 60% of the Loan amount will be used for payroll costs. Borrower acknowledges that it is Borrower's duty to comply with the CARES Act requirements, and to be familiar with the CARES Act requirements and related SBA regulations insofar as they pertain to Borrower and this loan.

D. *Economic Injury Disaster Loans Eligible for Refinance with Loan Proceeds:* If Borrower on the date of this Loan is obligated under an existing SBA Economic Injury Disaster Loan (EIDL) (EIDL No. 0_____, as identified in Borrower's Application) that is eligible for refinance with the proceeds of this Loan, then the proceeds of the Loan shall be used to refinance the EIDL, in the amount of \$ 0_____ (such refinanced amount shall not include any early advance EIDL loan received by Borrower). Any such refinanced amount shall be disbursed by Lender directly to the SBA and not to Borrower.

E. Borrower understands and agrees that if Borrower defaults on the Loan, SBA may be required to pay Lender under an SBA guarantee of the Loan, in which case SBA may then seek recovery on the Loan (to the extent any balance remains after loan forgiveness).

F. Borrower acknowledges that for the purpose of this transaction, Lender is acting on behalf of SBA, an agency of the United States Government, except that SBA accepts no liability or responsibility for any wrongful act or omission by Lender. Borrower further acknowledges that any false statements to Lender can be considered a false statement to the federal government under 18 U.S.C. § 1001, and may subject the Borrower and/or its principals and owners to criminal penalties and that Lender and SBA are relying upon the correctness, accuracy and truthfulness of the information submitted by the Borrower.

G. Borrower will not, without Lender's consent, change its ownership structure, make any distribution of company assets that would adversely affect its financial condition, or transfer (including pledging) or dispose of any assets, except in the ordinary course of business.

12. GENERAL PROVISIONS:

A. Lender may exercise any of its rights separately or together, as many times and in any order it chooses. Lender may delay or forgo enforcing any of its rights without giving up any of them.

B. Borrower may not use an oral statement of Lender or SBA to contradict or alter the written terms of this Note. Borrower acknowledges the following notice:

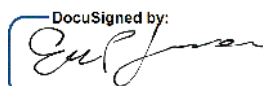
ORAL AGREEMENTS OR ORAL COMMITMENTS TO LOAN MONEY, EXTEND CREDIT, OR TO FORBEAR FROM ENFORCING REPAYMENT OF A DEBT ARE NOT ENFORCEABLE UNDER WASHINGTON LAW.

C. If any part of this Note is unenforceable, all other parts remain in effect.

D. To the extent allowed by law, Borrower waives all demands and notices in connection with this Note, including presentment, demand, protest, and notice of dishonor. Borrower also waives any defenses based upon any claim that Lender did not obtain or maintain the SBA Guaranty.

13. **AUTHORITY TO SIGN NOTE AND TO BIND BORROWER:** Each individual signing this Note on behalf of a partnership, corporation, limited liability company or other entity represents and warrants that he or she is duly authorized to execute and deliver this Note on behalf of such entity as Borrower, and that this Note is binding on such entity. Each individual signing this Note on behalf of a partnership, corporation, limited liability company or other entity represents and warrants to Lender and SBA that signer is an "Authorized Representative of Applicant" and that the signer is authorized to, and does hereby, make the certifications, including with respect to the applicant and each owner of 20% or more of the applicant's equity, contained in the Borrower Application Form. The Lender and SBA are entitled to and do in fact rely on that representation and accept the signer's signature on that basis.

"SHC Medical Center Toppenish DBA Astria Toppenish Hospital
[Borrower]

DocuSigned by:

4DA5C4A4F1D5410...
[Signature]