

JAMES L. DAY (WSBA #20474)
 THOMAS A. BUFORD (WSBA #52969)
 BUSH KORNFELD LLP
 601 Union Street, Suite 5000
 Seattle, WA 98101
 Tel: (206) 292-2110
 Email: jday@bskd.com
tbuford@bskd.com

HONORABLE WHITMAN L. HOLT

SAMUEL R. MAIZEL (Admitted *Pro Hac Vice*)
 DENTONS US LLP
 601 South Figueroa Street, Suite 2500
 Los Angeles, California 90017-5704
 Tel: (213) 623-9300
 Fax: (213) 623-9924
 Email: samuel.maizel@dentons.com

SAM J. ALBERTS (WSBA #22255)
 DENTONS US LLP
 1900 K. Street, NW
 Washington, DC 20006
 Tel: (202) 496-7500
 Fax: (202) 496-7756
 Email: sam.alberts@dentons.com

Attorneys for the Chapter 11 Debtors and Debtors In Possession

**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

**DEBTORS' OMNIBUS OBJECTION TO
 BANNER BANK'S APPLICATIONS FOR
 ALLOWANCE OF ADMINISTRATIVE
 EXPENSE CLAIMS; DECLARATION OF
 MICHAEL LANE IN SUPPORT
 THEREOF**

[Related Docket Nos. 2071, 2073, 2074, and 2075]

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).

**DEBTORS' OMNIBUS OBJECTION TO
 APPLICATIONS FOR ALLOWANCE OF
 ADMINISTRATIVE EXPENSE CLAIM**

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

BUSH KORNFELD LLP
 601 Union Street, Suite 5000
 Seattle, Washington 98101-23
 Telephone (206) 292-2110
 Facsimile (206) 292-2104

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 chapter 11 bankruptcy cases (collectively, the “Chapter 11 Cases”), hereby file this omnibus objection (the “Objection”), pursuant to §§ 105, 503, 507, and 1129 of title 11 of the United States Code, 11 U.S.C. §§ 101, *et seq.* (the “Bankruptcy Code”),² Rule 3007 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”), and Rule 3007-1 of the Local Bankruptcy Rules of the United States Bankruptcy Court for the Eastern District of Washington (the “Court”), to the *Application of Banner Bank for Allowance of Administrative Expense Claim (Yakima HMA Home Health LLC d/b/a Astria Home Health & Hospice - Yakima)* [Docket No. 2071] and the *Application of Banner Bank for Allowance of Administrative Expense Claim (SHC Medical Center Toppenish dba Astria Toppenish Hospital)* [Docket No. 2074] (the “Applications”) filed by Banner Bank. The Debtors object on the grounds that Banner Bank has not met its burden of demonstrating by a preponderance of the evidence that the requested amounts are

² All references to “§” or “section” are to the Bankruptcy Code unless otherwise so specified.

1 “the actual, necessary costs and expenses of preserving the estate,” as required under
2 § 503(b)(1)(A) and Ninth Circuit precedent because (a) whether the Debtors will ever
3 be required to repay the PPP funds has yet to be determined, the Debtors have met
4 every requirement necessary to the PPP funds being forgiven under 15 U.S.C. §
5 9005(d)(8), and under the agreements with Banner Bank, the Debtors are permitted
6 to repay any obligations in the ordinary course of business; and (b) this matter is now
7 *res judicata* by court order, which expressly provides for their treatment. In further
8 support of the Objection, attached hereto is the Declaration of Michael Lane (the
9 “Lane Declaration”) and the Debtors state as follows:

10 I. JURISDICTION AND VENUE

11 1. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157
12 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). The venue
13 of the Chapter 11 Cases is proper pursuant to 28 U.S.C. §§ 1408 and 1409. The
14 statutory predicate for this Objection is §§ 105, 503, 507, and 1129.

15 II. STATEMENT OF FACTS

16 A. General Overview.

17 2. The Debtors filed voluntary petitions for relief under chapter 11 of the
18 Bankruptcy Code on May 6, 2019 (the “Petition Date”). These Chapter 11 Cases are
19 currently being jointly administered before the Court. [Docket No. 10]. Since the
20

1 Petition Date, the Debtors have been operating their businesses as debtors in
2 possession pursuant to §§1107 and 1108.

3 3. Debtor Astria, a Washington nonprofit corporation, is the direct or
4 indirect corporate member of several entities that make it the largest non-profit
5 healthcare system based in Eastern Washington. The Astria system is headquartered
6 in the heart of Yakima Valley, Washington.

7 4. On May 24, 2019, the Office of the United States Trustee (the “U.S.
8 Trustee”) appointed an Official Committee of Unsecured Creditors (the
9 “Committee”) in these Chapter 11 Cases. [Docket No. 135]. No trustee or examiner
10 has been appointed.

11 5. The Debtors filed their *Modified Second Amended Joint Chapter 11*
12 *Plan of Reorganization of Astria Health and Its Debtor Affiliates* [Docket No. 2196]
13 (including all exhibits thereto, any plan supplement, and as amended, modified, or
14 supplemented from time to time, the “Plan”), which was confirmed by order dated
15 December 23, 2020 [Docket No. 2217] (the “Confirmation Order”). The Plan is
16 expected to become effective no later than January 16, 2020. *Id.*

17 **B. Facts Specific to Motions.**

18 6. In response to the global pandemic brought on by widespread
19 transmission of the Novel Coronavirus (“Covid-19”) and the ensuing economic
20 hardships, Congress enacted the Paycheck Protection Program (“PPP”) as part of the

1 Coronavirus Aid, Relief, and Economic Security Act (the “CARES Act”), Public
2 Law 116-136 (signed into law March 27, 2020), as augmented by the Payment
3 Protection Program and Health Care Enhancement Act, Pub. L. 116-139 (signed into
4 law April 24, 2020) and by Public Law No: 116-147 (signed into law July 4, 2020).

5 7. Section 1102 of the CARES Act established PPP under § 7(a) of the
6 Small Business Act, codified in 15 U.S.C § 636, meaning Congress tasked the United
7 States Small Business Administration acting through Jovita Carranza in her capacity
8 as its Administrator (collectively, the “SBA”) with implementing PPP. While
9 nominally called a “loan,”³ PPP disbursements are grants—there are no repayment
10 obligations—if, among other things, a certain percentage of PPP funds are used for
11 payroll and wage expenses, interest on mortgages, rent, or utilities. A qualified
12 borrower may receive PPP funds equal to two and a half times its average monthly
13 payroll, up to a limit of \$10 million. A borrower need not exhaust its other credit
14 options prior to receiving PPP funds. A borrower can obtain funds under PPP by
15 applying with any federally insured participating lender using an application form
16 created by the SBA, and the SBA guarantees the loan.

17 8. The entire purpose of the program is to provide grants to companies in
18 order to ensure that workers can be paid. The CARES Act specifically waives all
19

20 ³ The Debtors’ use of the term “loan” or “loans” herein is not intended to waive or
21 diminish its contention that PPP is in reality a support/grant program.

1 underwriting considerations under § 7(a) of the Small Business Act, including but
2 not limited to, underwriting requirements, collateral review, or loan covenants. There
3 is no evaluation of risk because there is no expectation of repayment, provided funds
4 are used for permitted purposes. All small businesses have a right to apply for PPP
5 funds.

6 9. Debtors, realizing they were precisely the sort of business PPP was
7 enacted to protect since they are a small business (as defined by the SBA) in one of
8 the industries hardest hit by the pandemic, attempted to obtain funding to meet
9 payroll for their employees, among other permitted uses. However, due to what
10 appears to be a completely arbitrary, baseless, and discriminatory requirement
11 imposed by the SBA, the Debtors were initially deemed ineligible to participate based
12 solely on their status as debtors in these Chapter 11 Cases. The Debtors otherwise
13 met the criteria for eligibility to participate in PPP.

14 10. PPP funds were available on a first come, first served basis. As early as
15 April 3, 2020, the Debtors considered submitting an application for PPP funds;
16 however, they were informed such application would be denied because of their
17 status as debtors in bankruptcy. The first tranche of PPP funding was completely
18 exhausted on April 16, 2020.

19 11. In anticipation of additional PPP funding, on April 17, 2020, Debtors
20 Toppenish and Astria Home Health submitted PPP Applications (individually, the

21
**DEBTORS' OBJECTION TO
APPLICATIONS FOR ALLOWANCE
ADMINISTRATIVE EXPENSE CLAIM**

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

BUSH KORNFIELD LL
LAW OFFICES
601 Union St., Suite 5000
Seattle, Washington 98101-237
Telephone (206) 292-2110
Facsimile (206) 292-2104

1 “Toppenish Application” and the “Astria Home Health Application”, respectively)
2 to their commercial lender, Banner Bank. Based on an average monthly payroll of
3 \$1,130,622.00 for its 318 employees, the Toppenish Application requested a total of
4 \$2,826,556.00, to be used for solely for payroll, lease and/or mortgage interest, and
5 utilities. Based on an average monthly payroll of \$188,790.00 for its 24 employees,
6 the Astria Home Health Application requested a total of \$471,975.00, to be used
7 solely for payroll purposes.

8 12. On or about April 23, 2020, Congress enacted legislation making
9 additional funds available for PPP. Availability of those PPP funds ended on June
10 30, 2020 or when PPP funds were exhausted, whichever came first.⁴

11 13. On April 24, 2020, the SBA and the Administrator proposed another
12 interim final rule (the “Fourth Interim Rule”) with respect to PPP that states “[i]f the
13 applicant or the owner of the applicant is the debtor in a bankruptcy proceeding,
14 either at the time it submits the application or at any time before the loan is disbursed,
15 the applicant is ineligible to receive a PPP loan.” The stated basis for this rule is that
16 the Administrator “determined that providing PPP loans to debtors in bankruptcy
17 would present an unacceptably high risk of an unauthorized use of funds or non-

18
19 ⁴ See Robin Saks Frankel, *Congress Passed Another Coronavirus Relief Bill. What’s*
20 *In It For Small Businesses?*, FORBES (April 22, 2020, 9:37 AM), available at
21 <https://www.forbes.com/sites/advisor/2020/04/22/the-senate-passed-another-coronavirus-relief-bill-whats-in-it-for-small-businesses/#19ba34c0114a>.

1 repayment of unforgiven loans.” The SBA and the Administrator published the
2 Fourth Interim Rule on April 28, 2020. This is the sum total of the administrative
3 record.

4 14. After receiving no official denial from Banner Bank or the SBA, on or
5 about April 30, 2020, the Debtors spoke to Banner Bank’s representative, who again
6 stated that it was the SBA’s rule that entities like the Debtors who were in bankruptcy
7 were ineligible for PPP funds. Banner Bank also informed the Debtors that denial
8 letters were not being sent because the focus was on processing eligible applications.

9 15. On May 6, 2020, the Debtors received official notice (the “May 6, 2020
10 Notice”) that Banner Bank was unable to approve the Debtors’ PPP Applications
11 because the Debtors “do[] not meet SBA eligibility criteria.”

12 16. The Fourth Interim Rule had not been proposed at the time the Debtors
13 first submitted their PPP Applications or when the SBA and the Administrator
14 directed Banner Bank not to process the Applications. One of the interim final rules
15 in effect at the time the Debtors submitted their PPP Applications, the First Interim
16 Rule, states that “[t]he program requirements of PPP identified in this rule
17 temporarily supersede any conflicting Loan Program Requirement (as defined in 13
18 CFR 120.10).” The CARES Act, the Small Business Act, the First Interim Rule, the
19 Second Interim Rule, and the Third Interim Rule contained no exclusion against
20 debtors receiving PPP funds.

1 17. On May 15, 2020 the Debtors filed adversary proceeding (Case No. 20-
2 80016) against the SBA, complete with a *Verified Complaint* and a *Motion for*
3 *Temporary Restraining Order and Request for Hearing and Briefing Schedule with*
4 *Respect to the Debtors' Request for a Preliminary Injunction; Declaration of John*
5 *M. Gallagher in Support Thereof*. [Adv. Proc. Docket Nos. 1 and 20]. The Court
6 granted the Debtors' request for preliminary injunction [Adv. Proc. Docket No.] (the
7 "Preliminary Injunction Order") and the PPP Applications were funded in June 2020.

8 18. Shortly after the Court issued the Preliminary Injunction Order, the SBA
9 appealed to the United States District Court for the Eastern District of Washington
10 (the "District Court") and filed a Motion for Mandatory Withdrawal of Reference.
11 The Debtors cross-appealed [Adv. Proc. Docket No. 34] and filed their Opposition
12 to Motion for Mandatory Withdrawal of Reference [Docket No. 35]. These matters
13 are still pending before the District Court.

14 19. The PPP funds have been critical to the Debtors' ability to continue to
15 operate their businesses. These funds continue to be essential to providing medical
16 care that have and will inevitably result in fewer deaths to the citizens of the Yakima
17 Valley and Central Washington, one of the nation's regions hardest hit by the
18 pandemic. Lack of funding under this program would inevitably have resulted in
19 reductions or even elimination of the Debtors' ability to provide essential medical
20

1 services to the communities they serve, at a time when those services were/are more
2 essential than ever.

3 20. The Debtors specifically sized their request for PPP funds to ensure that
4 the funds would be treated as a grant and be forgivable. To the extent any portion of
5 the funds requested by the Debtors would exceed the amount to be forgiven, the
6 Debtors intended to immediately repay such amounts. However, such repayment is
7 now unnecessary as the Debtors have used all of the PPP funds in a manner eligible
8 for forgiveness under the PPP. *See* 15 U.S.C. § 9005(d)(8). Indeed, the Debtors have
9 prepared the forgiveness applications, which are supported by evidence that 100% of
10 the PPP funds were expended for wages. Currently, the Debtors are awaiting
11 approval to submit their forgiveness applications, as Banner Bank has delayed the
12 Debtors from submitting their forgiveness applications until after the current PPP
13 extension is configured and approved.

14 21. On December 4, 2020, Banner Bank filed its Applications, claiming
15 administrative expense related to Banner Bank's disbursement of PPP funds.

16 22. The SBA guarantees the PPP funds, to the extent they are not forgiven.
17 The SBA filed its *Objection to Confirmation of Second Amended Joint Chapter 11*
18 *Plan of Reorganization of Astria Health and its Debtor Affiliates* 7 [Docket No. 2077]
19 (the "Plan Objection"), which requested certain treatment of the PPP funds disbursed
20 to the Debtors in a manner different from what is provided under those certain

documents executed between the Debtors and Banner Bank at the time the PPP funds were disbursed (the “Loan Documents”).⁵

23. Banner Bank, the SBA, and the Debtors agreed to resolve the Plan Objection by including certain language in the Confirmation Order. That language provides:

The Debtors recognize that Banner Bank (the “Lender”), on behalf of itself and its assigns, subrogees and guarantors, has asserted that is entitled to administrative priority status pursuant to sections 364(b) and 503(b)(1) of the Bankruptcy Code to the full amount of Debtors’ obligation on the PPP Loans, as defined by the loan documents and law applicable to the PPP Loans; the Debtors reserve their rights to object. If the PPP Loans are later not forgiven and become due after the Effective Date, the Debtors will agree to make payments to the Lender on the PPP Loans over time in the ordinary course of business.

Nothing in this Order shall be construed as (i) determining, construing, or limiting any right, obligation, or term of the PPP Loans, loan documents, or law governing the PPP loans, including whether all or any part of the PPP Loans are subject to forgiveness; (ii) determining this Court’s authority to make a determination about whether all or any part of the PPP Loans is subject to forgiveness under the loan documents and law governing the PPP Loans.

Confirmation Order at 63-64.

24. Pursuant to stipulations [Docket Nos. 2222 and 2239], the deadline to file an objection to the Applications is January 11, 2020. The Debtors and Banner Bank attempted to resolve these matters without Court intervention, but to no avail.

⁵ Use of the term “loan” or “loans” herein is not intended to waive or diminish the Debtors’ contention that the PPP is in reality a support/grant program.

1 The Debtors have timely filed this Objection.

2 25. The Debtors hereby incorporate the record in these Chapter 11 Cases,
3 as well as the record in the Debtors' adversary proceeding (Adv. Pro. No. 20-80016)
4 and the record in various proceedings before the District Court (Case Nos. 20-03089,
5 20-03098, and 20-03109).

6 **III. ARGUMENT**

7 The Debtors object on the grounds that Banner Bank has not met its burden of
8 demonstrating by a preponderance of the evidence that the requested amounts are
9 "the actual, necessary costs and expenses of preserving the estate," as required under
10 § 503(b)(1)(A) and Ninth Circuit precedent, because (i) repayment of the PPP funds
11 has yet to be determined, (ii) the Debtors have met every requirement necessary to
12 the PPP funds being forgiven under 15 U.S.C. § 9005(d)(8), and (iii) under the
13 agreements with Banner Bank, the Debtors are required to repay any obligations in
14 the ordinary course of business. Moreover, under the doctrine of *res judicata*, these
15 claims have already been decided by the Confirmation Order, which expressly
16 provides for their treatment—there is nothing further for this Court to adjudicate at
17 this juncture.

18 **A. These Contingent Claims Are Not "Actual" Expenses.**

19 Administrative expense priority status under § 503(b)(1)(A) is reserved for
20 "the *actual*, necessary costs and expenses of preserving the estate." § 503(b)(1)(A)

1 (emphasis added). While the Debtors do not deny that the PPP funds were provided
2 to the Debtors pursuant to a postpetition transaction between the party claiming the
3 administrative priority and debtor in possession, and conferred benefit upon the
4 bankruptcy estates, there has been no final determination that the PPP funds are an
5 *actual* expense or that the Debtors will ever have to repay them. *See e.g.*, the
6 Confirmation Order at 63-64 (“*If the PPP Loans are later not forgiven and become*
7 *due after the Effective Date, . . .*”) (emphasis added). This is insufficient to establish
8 an administrative expense.

9 Undeniably, the burden of proof for administrative claims is much higher than
10 claims filed under § 502(a), which are considered *prima facie* evidence of validity
11 and amount of a claim. *Compare* § 503(b) to § 502(a); *see also In re Cook Inlet*
12 *Energy LLC*, 583 B.R. 494, 501 (B.A.P. 9th Cir. 2018) (comparing administrative
13 expense claims with other claims). Administrative expense claimants “bear the
14 burden of persuasion by a preponderance of the evidence to meet the strict standards
15 set, keeping in mind the policy behind the allowance of such claims.” *Id.* (citations
16 omitted). “The terms ‘actual’ and ‘necessary’ are construed narrowly so as ‘to keep
17 fees and administrative costs at a minimum.’” *Id.* (citations omitted).

18 Banner Bank’s claims are contingent, which cannot, by their very nature, be
19 “allowed” because they are not yet “actual” expenses. *See e.g., In re Rock & Republic*
20

1 *Enterprises*, No. 10-11728 AJG, 2011 WL 4756571, at *5 (Bankr. S.D.N.Y. Oct. 7,
2 2011) (collecting cases). That court reasons:

3 Although a *claim* may be contingent, only “actual” administrative
4 expenses, not contingent expenses, are entitled to priority under § 503.
5 11 U.S.C. § 503(b)(1)(A); *Juniper Dev. Grp v. Kahn (In re Hemingway*
6 *Transp., Inc.)*, 993 F.2d 915, 930 (1st Cir. 1993) (finding claims for
7 future response costs to be unavailing insofar as the right to contribution
8 for such costs remained contingent at the time the court considered the
claim). *See also In re Oldco M. Corp.*, 438 B.R. at 786
(Bankr.S.D.N.Y.2010) (disallowing request for administrative expense
related to future environmental remediation costs that debtor may or
may not have to pay in the future as too speculative to support the
allowance of an administrative expense).

9 *Id.*; *see also Hillis Motors, Inc. v. Hawaii Auto. Dealers’ Ass’n*, 997 F.2d 581, 588
10 (9th Cir. 1993) (discussing post-confirmation claims would only be admin expense
11 under 503(b)(9) under unusual circumstances). As these cases demonstrate, the time
12 to decide or “allow” these administrative expense claims is now, and yet the
13 circumstances are not ripe for the Court to finally decide whether the Debtors owe
14 any repayment obligations to Banner Bank.

15 Consequently, there is no *actual* expense to adjudicate. To the extent that
16 Banner Bank argues § 364(b) is applicable (*see Applications at ¶ 10*), such arguments
17 ignore the fact that the Debtors did not seek authority to obtain the PPP funds under
18 § 364(b), and not a single party (including the United States Trustee, the SBA, or
19 Banner Bank) objected on the grounds that the Debtors failed to invoke § 364(b).
20 Rather, the Debtors maintain that PPP funds are not indebtedness at all since the PPP

21
**DEBTORS’ OBJECTION TO
APPLICATIONS FOR ALLOWANCE
ADMINISTRATIVE EXPENSE CLAIM**

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

BUSH KORNFIELD LL
LAW OFFICES
601 Union St., Suite 5000
Seattle, Washington 98101-237
Telephone (206) 292-2110
Facsimile (206) 292-2104

1 funds were part of a support or grant program. The Debtors' position is supported
2 by that fact that they have met every requirement necessary for the forgiveness of
3 these PPP funds, and will never be required to repay them. Lane Declaration at ¶ 22.
4 In any event, Banner Bank does not deny that these claims are contingent.
5 Applications at ¶ 13 ("if [Debtor] complies with the guidelines for use of PPP loan
6 proceeds, then it is eligible to apply for loan forgiveness pursuant to PPP and the
7 CARES Act."). As Banner Bank concedes, the Loan Documents specify when, if
8 ever, the PPP funds would be repaid: in the ordinary course of business in accordance
9 with the Loan Documents and not on the effective date of the plan. *See Applications*
10 *at ¶ 5* ("The Note provides that interest on the Loan shall accrue at the rate of 1.00%
11 per annum, and that [Debtor] is required to begin making payments on the Loan ten
12 months following the date of disbursement, unless [Debtor] applies for and is granted
13 loan forgiveness under the terms of the PPP."). Moreover, Banner Bank has never
14 argued that the PPP funds must be repaid on or before the effective date of the Plan.
15 *But see Plan Objection at 4* (arguing for repayment in full on effective date of Plan).

16 Yet, despite Banner Bank's higher burden, the Applications fall woefully short
17 of "persuasion by a preponderance of the evidence," as Banner Bank does not even
18 attempt to establish that the Debtors definitively owe any repayment obligations at
19 this time. In sum, § 503(b) sets a strict bar for establishing a claim is "the actual,
20 necessary costs and expenses of preserving the estate," and the Banner Bank has

1 failed to meet its burden. The Applications are wholly conclusory and insufficient to
2 establish administrative expense priority.

3 **B. *Res Judicata* Prevents Further Court Order On These Claims’
4 Treatment.**

5 Further resolution of the Applications is barred by *res judicata*. Despite the
6 fact that the Confirmation Order clearly provides for the treatment of Banner Bank’s
7 claims, Banner Bank now seeks the entry of another order, a “comfort order.” *Cnty.*
8 *of Imperial Treasurer-Tax Collector v. Stadtmueller (In re RW Meridian LLC)*, 564
9 B.R. 21, 25 (B.A.P. 9th Cir. 2017) (“A ‘comfort order’ is a bankruptcy term of art
10 for an order confirming an undisputed legal result, and often is entered to confirm
11 that the automatic stay has terminated.”). Entry of the comfort order requested by
12 Banner Bank “would not be a harmless exercise.” *See In re Verity Health System of*
13 *California, Inc.*, No. 18-20151 at 3 (Bankr. C.D.Cal. Dec. 23, 2020) (order denying
14 request for entry of comfort order).

15 “Such an order would undercut the finality of the Plan by falsely suggesting
16 that the Plan’s provisions with respect to the payment of [the PPP Loan is] not clear.”
17 *Id.* “‘There is a compelling reason for finality of reorganization plans,’ since a
18 confirmed plan ‘is to the benefit of all persons who had dealings with the
19 debtor.’” *Id.* (citing *Dale C. Eckert Corp. v. Orange Tree Assocs., Ltd. (In re Orange*
20 *Tree Assocs., Ltd.)*, 961 F.2d 1445, 1447–48 (9th Cir. 1992)). “Were the Court to
21 indulge [Banner Bank’s] request for entry of an order giving [it] permission to do

1 what the Plan already authorizes, interested parties would have reason to doubt
2 whether other provisions of the Plan would be timely effectuated.” *Id.* Others might
3 then question whether Court intervention is required for the Reorganized Debtors “to
4 carry out other duties vested in [them] by the Plan.” *Id.* Such uncertainty would
5 benefit no one. Now that the Plan has been confirmed, “interested parties are entitled
6 to have confidence that the Plan will be expeditiously implemented in accordance
7 with its terms.” *Id.*

8 Moreover, it is inappropriate for the Court to enter an order “where there is no
9 actual case or controversy before it.” *Id.* (citing *City of Los Angeles v. Lyons*, 461
10 U.S. 95, 101, 103 S. Ct. 1660, 1665, 75 L. Ed. 2d 675 (1983). Here, there is no actual
11 case or controversy present because Banner Bank seeks nothing more than
12 affirmation of the treatment already provided for in the Plan that has been confirmed
13 and remains in effect. *Id.* Further resolution of these claims is barred under the
14 doctrine of *res judicata*.

15 IV. CONCLUSION

16 WHEREFORE, the Debtors request this Court deny Banner Bank’s
17 Applications for administrative expense because they are contingent and not “actual”
18 expenses and because the Confirmation Order already provides for their treatment.

1 Dated: January 11, 2021

/s/ Sam J. Alberts

2 JAMES L. DAY (WSBA #20474)
3 THOMAS A. BUFORD (WSBA
#52969)
4 BUSH KORNFELD LLP

5 SAMUEL R. MAIZEL (Admitted *Pro*
6 *Hac Vice*)
7 SAM J. ALBERTS (WSBA #22255)
8 SARAH M. SCHRAG (Admitted *Pro*
9 *Hac Vice*)
10 DENTONS US LLP

11 *Attorneys for the Chapter 11 Debtors*
12 *and Debtors In Possession*

13
14
15
16
17
18
19
20
21
**DEBTORS' OBJECTION TO
APPLICATIONS FOR ALLOWANCE
ADMINISTRATIVE EXPENSE CLAIM**

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 98101-237
Telephone (206) 292-2110
Facsimile (206) 292-2104

1 currently being jointly administered before the Court. [Docket No. 10]. Since the
2 Petition Date, the Debtors have been operating their businesses as debtors in
3 possession pursuant to §§1107 and 1108.

4 5. Debtor Astria, a Washington nonprofit corporation, is the direct or
5 indirect corporate member of several entities that make it the largest non-profit
6 healthcare system based in Eastern Washington. The Astria system is headquartered
7 in the heart of Yakima Valley, Washington.

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

12 7. The Debtors filed their *Modified Second Amended Joint Chapter 11*
13 *Plan of Reorganization of Astria Health and Its Debtor Affiliates* [Docket No. 2196]
14 (including all exhibits thereto, any plan supplement, and as amended, modified, or
15 supplemented from time to time, the “Plan”), which was confirmed by order dated
16 December 23, 2020 [Docket No. 2217] (the “Confirmation Order”). The Plan is
17 expected to become effective no later than January 16, 2020. *Id.*

18 8. In response to the global pandemic brought on by widespread
19 transmission of the Novel Coronavirus (“Covid-19”) and the ensuing economic
20 hardships, Congress enacted the Paycheck Protection Program (“PPP”) as part of the

1 Coronavirus Aid, Relief, and Economic Security Act (the “CARES Act”), Public
2 Law 116-136 (signed into law March 27, 2020), as augmented by the Payment
3 Protection Program and Health Care Enhancement Act, Pub. L. 116-139 (signed into
4 law April 24, 2020) and by Public Law No: 116-147 (signed into law July 4, 2020).

5 9. Section 1102 of the CARES Act established PPP under § 7(a) of the
6 Small Business Act, codified in 15 U.S.C § 636, meaning Congress tasked the United
7 States Small Business Administration acting through Jovita Carranza in her capacity
8 as its Administrator (collectively, the “SBA”) with implementing PPP. While
9 nominally called a “loan,”⁶ PPP disbursements are grants—there are no repayment
10 obligations—if, among other things, a certain percentage of PPP funds are used for
11 payroll and wage expenses, interest on mortgages, rent, or utilities. A qualified
12 borrower may receive PPP funds equal to two and a half times its average monthly
13 payroll, up to a limit of \$10 million. A borrower need not exhaust its other credit
14 options prior to receiving PPP funds. A borrower can obtain funds under PPP by
15 applying with any federally insured participating lender using an application form
16 created by the SBA, and the SBA guarantees the loan.

17 10. The entire purpose of the program is to provide grants to companies in
18 order to ensure that workers can be paid. The CARES Act specifically waives all
19

20 ⁶ The Debtors’ use of the term “loan” or “loans” herein is not intended to waive or
21 diminish its contention that PPP is in reality a support/grant program.

1 underwriting considerations under § 7(a) of the Small Business Act, including but
2 not limited to, underwriting requirements, collateral review, or loan covenants. There
3 is no evaluation of risk because there is no expectation of repayment, provided funds
4 are used for permitted purposes. All small businesses have a right to apply for PPP
5 funds.

6 11. Debtors, realizing they were precisely the sort of business PPP was
7 enacted to protect since they are a small business (as defined by the SBA) in one of
8 the industries hardest hit by the pandemic, attempted to obtain funding to meet
9 payroll for their employees, among other permitted uses. However, due to what
10 appears to be a completely arbitrary, baseless, and discriminatory requirement
11 imposed by the SBA, the Debtors were initially deemed ineligible to participate based
12 solely on their status as debtors in these Chapter 11 Cases. The Debtors otherwise
13 met the criteria for eligibility to participate in PPP.

14 12. PPP funds were available on a first come, first served basis. As early as
15 April 3, 2020, the Debtors considered submitting an application for PPP funds;
16 however, they were informed such application would be denied because of their
17 status as debtors in bankruptcy. The first tranche of PPP funding was completely
18 exhausted on April 16, 2020.

19 13. In anticipation of additional PPP funding, on April 17, 2020, Debtors
20 Toppenish and Astria Home Health submitted PPP Applications (individually, the

1 “Toppenish Application” and the “Astria Home Health Application”, respectively)
2 to their commercial lender, Banner Bank. Based on an average monthly payroll of
3 \$1,130,622.00 for its 318 employees, the Toppenish Application requested a total of
4 \$2,826,556.00, to be used for solely for payroll, lease and/or mortgage interest, and
5 utilities. Based on an average monthly payroll of \$188,790.00 for its 24 employees,
6 the Astria Home Health Application requested a total of \$471,975.00, to be used
7 solely for payroll purposes.

8 14. On or about April 23, 2020, Congress enacted legislation making
9 additional funds available for PPP. Availability of those PPP funds ended on June
10 30, 2020 or when PPP funds were exhausted, whichever came first.⁷

11 15. On April 24, 2020, the SBA and the Administrator proposed another
12 interim final rule (the “Fourth Interim Rule”) with respect to PPP that states “[i]f the
13 applicant or the owner of the applicant is the debtor in a bankruptcy proceeding,
14 either at the time it submits the application or at any time before the loan is disbursed,
15 the applicant is ineligible to receive a PPP loan.” The stated basis for this rule is that
16 the Administrator “determined that providing PPP loans to debtors in bankruptcy
17 would present an unacceptably high risk of an unauthorized use of funds or non-

18
19 ⁷ See Robin Saks Frankel, *Congress Passed Another Coronavirus Relief Bill. What’s*
20 *In It For Small Businesses?*, FORBES (April 22, 2020, 9:37 AM), available at
21 <https://www.forbes.com/sites/advisor/2020/04/22/the-senate-passed-another-coronavirus-relief-bill-whats-in-it-for-small-businesses/#19ba34c0114a>.

1 repayment of unforgiven loans.” The SBA and the Administrator published the
2 Fourth Interim Rule on April 28, 2020. This is the sum total of the administrative
3 record.

4 16. After receiving no official denial from Banner Bank or the SBA, on or
5 about April 30, 2020, the Debtors’ spoke to Banner Bank’s representative, who again
6 stated that it was the SBA’s rule that entities like the Debtors who were in bankruptcy
7 were ineligible for PPP funds. Banner Bank also informed the Debtors that denial
8 letters were not being sent because the focus was on processing eligible applications.

9 17. On May 6, 2020, the Debtors received official notice (the “May 6, 2020
10 Notice”) that Banner Bank was unable to approve the Debtors’ PPP Applications
11 because the Debtors “do[] not meet SBA eligibility criteria.”

12 18. The Fourth Interim Rule had not been proposed at the time the Debtors
13 first submitted their PPP Applications or when the SBA and the Administrator
14 directed Banner Bank not to process the Applications. One of the interim final rules
15 in effect at the time the Debtors submitted their PPP Applications, the First Interim
16 Rule, states that “[t]he program requirements of PPP identified in this rule
17 temporarily supersede any conflicting Loan Program Requirement (as defined in 13
18 CFR 120.10).” The CARES Act, the Small Business Act, the First Interim Rule, the
19 Second Interim Rule, and the Third Interim Rule contained no exclusion against
20 debtors receiving PPP funds.

1 19. On May 15, 2020 the Debtors filed adversary proceeding (Case No. 20-
2 80016) against the SBA, complete with a *Verified Complaint* and a *Motion for*
3 *Temporary Restraining Order and Request for Hearing and Briefing Schedule with*
4 *Respect to the Debtors' Request for a Preliminary Injunction; Declaration of John*
5 *M. Gallagher in Support Thereof*. [Adv. Proc. Docket Nos. 1 and 20]. The Court
6 granted the Debtors' request for preliminary injunction [Adv. Proc. Docket No.] (the
7 "Preliminary Injunction Order") and the PPP Applications were funded in June 2020.

8 20. Shortly after the Court issued the Preliminary Injunction Order, the SBA
9 appealed to the United States District Court for the Eastern District of Washington
10 (the "District Court") and filed a Motion for Mandatory Withdrawal of Reference.
11 The Debtors cross-appealed [Adv. Proc. Docket No. 34] and filed their Opposition
12 to Motion for Mandatory Withdrawal of Reference [Docket No. 35]. These matters
13 are still pending before the District Court.

14 21. The PPP funds have been critical to the Debtors' ability to continue to
15 operate their businesses. These funds continue to be essential to providing medical
16 care that have and will inevitably result in fewer deaths to the citizens of the Yakima
17 Valley and Central Washington, one of the nation's regions hardest hit by the
18 pandemic. Lack of funding under this program would inevitably have resulted in
19 reductions or even elimination of the Debtors' ability to provide essential medical
20

1 services to the communities they serve, at a time when those services were/are more
2 essential than ever.

3 22. The Debtors specifically sized their request for PPP funds to ensure that
4 the funds would be treated as a grant and be forgivable. To the extent any portion of
5 the funds requested by the Debtors would exceed the amount to be forgiven, the
6 Debtors intended to immediately repay such amounts. However, such repayment is
7 now unnecessary as the Debtors have used all of the PPP funds in a manner eligible
8 for forgiveness under the PPP. *See* 15 U.S.C. § 9005(d)(8). Indeed, the Debtors have
9 prepared the forgiveness applications, which are supported by evidence that 100% of
10 the PPP funds were expended for wages. Currently, the Debtors are awaiting
11 approval to submit their forgiveness applications, as Banner Bank has delayed the
12 Debtors from submitting their forgiveness applications until after the current PPP
13 extension is configured and approved.

14 23. On December 4, 2020, Banner Bank filed its Applications, claiming
15 administrative expense related to Banner Bank's disbursement of PPP funds.

16 24. The SBA guarantees the PPP funds, to the extent they are not forgiven.
17 The SBA filed its *Objection to Confirmation of Second Amended Joint Chapter 11*
18 *Plan of Reorganization of Astria Health and its Debtor Affiliates* 7 [Docket No. 2077]
19 (the "Plan Objection"), which requested certain treatment of the PPP funds disbursed
20 to the Debtors in a manner different from what is provided under those certain

documents executed between the Debtors and Banner Bank at the time the PPP funds were disbursed (the “Loan Documents”).⁸

25. Banner Bank, the SBA, and the Debtors agreed to resolve the Plan Objection by including certain language in the Confirmation Order. That language provides:

The Debtors recognize that Banner Bank (the “Lender”), on behalf of itself and its assigns, subrogees and guarantors, has asserted that is entitled to administrative priority status pursuant to sections 364(b) and 503(b)(1) of the Bankruptcy Code to the full amount of Debtors’ obligation on the PPP Loans, as defined by the loan documents and law applicable to the PPP Loans; the Debtors reserve their rights to object. If the PPP Loans are later not forgiven and become due after the Effective Date, the Debtors will agree to make payments to the Lender on the PPP Loans over time in the ordinary course of business.

Nothing in this Order shall be construed as (i) determining, construing, or limiting any right, obligation, or term of the PPP Loans, loan documents, or law governing the PPP loans, including whether all or any part of the PPP Loans are subject to forgiveness; (ii) determining this Court’s authority to make a determination about whether all or any part of the PPP Loans is subject to forgiveness under the loan documents and law governing the PPP Loans.

Confirmation Order at 63-64.

26. The Debtors and Banner Bank attempted to resolve these matters without Court intervention, but to no avail.

⁸ Use of the term “loan” or “loans” herein is not intended to waive or diminish the Debtors’ contention that the PPP is in reality a support/grant program.

1 I declare under penalty of perjury under the laws of the United States of
2 America that the foregoing is true and correct.

3 Dated: January 11, 2021

ASTRIA HEALTH

4 By:



5 Michael Lane
6 Chief Restructuring Officer