

1 Ethan P. Davis
 2 Acting Assistant Attorney General
 3 William D. Hyslop
 4 United States Attorney
 5 Brian M. Donovan
 6 Assistant United States Attorney
 7 Post Office Box 1494
 8 Spokane, WA 99210-1494
 9 Telephone: (509) 353-2767

10 Ruth A. Harvey
 11 Marcus S. Sacks
 12 Daniel Martin
 13 U.S. Department of Justice, Civil Division
 14 PO Box 875
 15 Ben Franklin Station
 16 Washington, District of Columbia 20044
 17 Telephone: (202) 307-1104

18
 19 UNITED STATES BANKRUPTCY COURT
 20 EASTERN DISTRICT OF WASHINGTON

21 In Re:

22 ASTRIA HEALTH, et al.¹

23 Debtors and Debtors in Possession,

24 Lead Case No. 19-01189-11

25 Adv. Proc. Case No. 20-80016-WLH

26 REPLY IN SUPPORT OF MOTION
 27 TO WITHDRAW THE REFERENCE

28 Hearing: June 23, 2020 at 6:30 p.m.
 Without Oral Argument

ASTRIA HEALTH, et al.,

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

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

6 First, most of the Opposition is simply irrelevant to the matter at hand. Only
7 Plaintiffs' first argument — that the Court does not need to interpret non-
8 bankruptcy law — is relevant to mandatory withdrawal under 28 U.S.C. § 157(d).
9 *See Sec. Farms v. Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers*,
10 124 F.3d 999, 1008 (9th Cir. 1997) (holding that section 157(d) "*mandates*
11 withdrawal in cases requiring material consideration of non-bankruptcy federal
12 law" (emphasis added)). If the Court rejects Plaintiffs' contention that adjudicating
13 the proceeding will not require interpreting non-bankruptcy law, then the Court
14 need not consider Plaintiffs' other arguments.
15
16
17

18 Second, even if the Court does consider Plaintiffs' other arguments ((2), (4)
19 and (5) as noted above) as related to permissive, rather than mandatory withdrawal,
20 none of Plaintiffs' arguments are persuasive, as explained below.
21

22 Finally, the United States' motion asking that the District Court adjudicate
23 the merits of withdrawing the reference with respect to the Adversary Proceeding
24 is procedurally proper and not inconsistent with the standstill agreement made by
25 the parties and issued without alteration by the Bankruptcy Court.
26
27
28

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

3 Plaintiffs agree that 28 U.S.C. § 157(d) mandates withdrawal when
4 adjudicating the proceeding requires consideration of non-bankruptcy “laws of the
5 United States regulating organizations or activities affecting interstate commerce.”
6
7 Opposition at 11. Plaintiffs further agree that this standard is met when “[non-title
8 11] issues require the interpretation, as opposed to mere application, of the non-
9 title 11 statute, or when the court must undertake analysis of significant open and
10 unresolved issues regarding the non-title 11 law.” Opposition at 12 (quoting *In re*
11 *Tamalpais Bancorp*, 451 B.R. 6, 8 (N.D. Cal. 2011)). However, Plaintiffs then
12 mischaracterize the analysis the Court must undertake by asserting that this case
13 does not require interpreting the CARES Act or analyzing unresolved issues
14
15 regarding the CARES Act. *See* Opposition at 13.
16

17 This assertion is not correct. Plaintiffs’ Complaint pleads Administrative
18 Procedure Act violations based on (a) the absence of any “law, regulation, or rule
19 of any kind [that] disqualifies, or authorizes the SBA or the Administrator to
20 disqualify[] bankruptcy debtors from participating in PPP,” and (b) that “SBA and
21 the Administrator’s automatic disqualification of the Debtors runs completely
22 counter to the mandate of PPP.” ECF No. 1 at ¶¶ 89, 100 (Counts IV and V).
23
24 Resolving these claims *requires* the Court to interpret the CARES Act, because
25
26 (1) the parties dispute whether the CARES Act authorizes SBA to promulgate
27

1 reasonable eligibility requirements for PPP applicants, and (2) the parties dispute
2 whether the bankruptcy exclusion is a reasonable interpretation of the CARES Act.
3 *Compare* Complaint Counts IV and V (above), with *Nat'l Cable & Telecomm 'ns*
4 *Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 986 (2005) (“At the first step [of
5 *Chevron* deference], we ask whether the statute’s plain terms directly address the
6 precise question at issue. If the statute is ambiguous on the point, we defer at step
7 two to the agency’s interpretation so long as the construction is a reasonable policy
8 choice for the agency to make.” (cleaned up) (quoting *Chevron U.S.A. Inc. v.*
9 *NRDC*, 467 U.S. 837, 843, 845 (1984))). Only by interpreting the CARES Act
10 under *Chevron* can the Court determine whether Plaintiffs prevail on their APA
11 claims. Thus, because Plaintiffs’ APA claims unquestionably require the Court to
12 interpret non-title 11 law (the CARES Act), mandatory withdrawal is required.²
13
14
15
16
17

18 ² “[M]andatory withdrawal is inappropriate where the asserted non-
19 bankruptcy laws do not relate to interstate commerce.” *Tamalpais Bancorp*, 451
20 B.R. at 9. Here, the CARES Act, and specifically the PPP, unquestionably relates
21 to interstate commerce – and Plaintiffs do not contest this point. The PPP is a
22 nationwide federal lending program available to applicants throughout the United
23 States. PPP loans, which are used by recipients to pay employees (who then use
24 the money in a variety of ways), rent and for other purposes, are clearly items
25 placed in the stream of interstate commerce. Moreover, to the extent that PPP
26 loans allows business to continue operations and produce goods, both now and in
27 the future, those goods are also items placed in the stream of interstate commerce.
28 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.

1 Plaintiffs attempt to resist this result by asserting that the CARES Act was
2 not relevant to the Bankruptcy Court's preliminary injunction decision. Opposition
3 at 13. Even if this were true,³ it is irrelevant. In its Motion, the United States seeks
4 withdrawal of the adversary proceeding, not review of the preliminary injunction
5 decision (an appeal has been filed for that purpose). As discussed above, resolving
6 this adversary proceeding requires interpreting the CARES Act in order to
7 adjudicate Plaintiffs' APA claims. Thus, withdrawal is mandatory because the case
8 "require[s] the interpretation, as opposed to mere application, of the" CARES Act
9 and "analysis of significant open and unresolved issues regarding the" same. *See*
10 *Tamalpais Bancorp*, 451 B.R. at 8.

14 **2. Plaintiffs' APA Claims Are Not Core.**

15 As explained above, mandatory withdrawal under 28 U.S.C. § 157(d) turns
16 solely on whether the proceeding requires interpreting significant non-bankruptcy
17 law. However, to the extent that the Court should otherwise permissively withdraw
18

20 ³ It is not. The Bankruptcy Court's oral ruling granting the injunction relied
21 on its conclusion that the "SBA appears to have (inaudible) an important aspect of
22 the problem in so far as the CARES Act can make certification that" the loan is
23 necessary to the recipient. ECF No. 22 at 26, Tr. 19:14-19. The Bankruptcy Court
24 continued that the "SBA blunderbuss exclusion [of bankrupt entities] simply
25 disregards . . . that there is a business that's in trouble, which is the 'problem' that
26 motivated enactment of the CARES Act. The Court sees absolutely no
27 consideration of this important aspect of the -- of the problem whatsoever." *Id.* at
28 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.

1 the reference because the Bankruptcy Court will exceed its jurisdiction by entering
2 final judgments on non-core claims, the United States will address the argument.

3 Plaintiffs agree that a claim is core only if “it invokes a substantive right
4 provided by the Bankruptcy Code or by nature could arise only in the context of a
5 bankruptcy case.” Opposition at 9–10 (citing *Houbigant, Inc. v. ACB Mercantile,*
6 *Inc. (In re Houbigant, Inc.)*, 185 B.R. 680 (S.D.N.Y. 1995)). Plaintiffs assert that
7 their claims are “core” within the meaning of 28 U.S.C. § 157. Opposition at 9.
8

9 However, Plaintiffs misapply this standard to the claims asserted in this case.
10

11 Plaintiffs do not purport to rely on “a substantive right provided by the
12 Bankruptcy Code” for its APA Claims.⁴ Instead, Plaintiffs argue that these claims
13 could have arisen only in the context of a bankruptcy case. Opposition at 10. But
14 that is simply untrue, as identical claims could have been and *have been* brought in
15 district court in other cases. *See, e.g., Tradeways, Ltd. v. U.S. Dep’t of the*
16 *Treasury*, No. CV ELH-20-1324, 2020 WL 3447767 (D. Md. June 24, 2020)
17 (denying preliminary injunction on 525 and APA claims); *Diocese of Rochester v.*
18 *SBA*, No. 6:20-CV-06243 EAW, 2020 WL 3071603 (W.D.N.Y. June 10, 2020)
19 (same in part and granting summary judgment to SBA in part). Nothing stopped
20
21
22
23

24 ⁴ While the 11 U.S.C. § 525 claim is undoubtedly a bankruptcy claim,
25 Plaintiffs’ APA claims are not. And the Bankruptcy Court concluded that “PPP
26 loans are classified as just that, loans” and that “even if [a PPP loan] . . . is some
27 variety of grant, section 525(a) just doesn’t stretch far enough to encompass PPP
28 funding.” ECF No. 22 at 12 and 15, Tr. at 5:23-24, 8:19-22.

1 Plaintiffs from doing the same here.

2 Moreover, even granting Plaintiffs' premise, there is a fundamental
3 distinction between cases that *would not* have arisen but-for a bankruptcy, and
4 cases that *can only* arise in a bankruptcy within the meaning of 28 U.S.C. § 157.
5
6 As explained in the Motion, in the Ninth Circuit, the "arises in" aspect of core
7 proceedings requires the claim to be "an administrative matter unique to the
8 bankruptcy process that has no independent existence outside of bankruptcy and
9 could not be brought in another forum, but whose cause of action is not expressly
10 rooted in the Bankruptcy Code." *In re Ray*, 624 F.3d 1124, 1131 (9th Cir. 2010).
11
12 Nothing in the APA is "unique to the bankruptcy process," nor could these claims
13 have "not be[en] brought in another forum." *See id.* Plaintiffs' APA claims thus do
14 not arise in bankruptcy within the meaning of 28 U.S.C. § 157(b), and are not core
15 bankruptcy proceedings.
16
17

18 **3. Plaintiffs' Other Arguments Fail.**

19 Plaintiffs' remaining arguments are irrelevant because they do not relate to
20 28 U.S.C. § 157's mandatory withdrawal standard. It of no moment to the statute
21 whether the claims are "complex," withdrawal is "inefficient," or the Motion
22 contravenes the parties' standstill agreement. However, even considering these
23 arguments on their merits, they fare no better than Plaintiffs' lone argument that
24 does address the mandatory withdrawal standard.
25
26
27
28

1 First, these claims are complex; more than 40 courts across the country are
2 handling identical claims and, even while reaching opposite conclusions, many
3 have made a point of noting that the cases are unusual and difficult to resolve.
4

5 Second, withdrawal is the most efficient litigation route here. “The purpose
6 of § 157(d) is to assure that an Article III judge decides issues calling for more
7 than routine application of [federal laws] outside of the Bankruptcy Code.” *Ames*
8 *Dep’t Stores, Inc. v. Lumbermens Mut. Cas. Co. (In re Ames Dep’t Stores, Inc.)*,
9 512 B.R. 736, 740 (S.D.N.Y. 2014) (citation omitted) (alteration in original). Were
10 the case to remain in Bankruptcy Court, it would require the District Court to
11 ultimately review the APA claims de novo, wasting judicial resources and stalling
12 final judgment.
13
14

15 Third, there is no violation of the Bankruptcy Court’s Stipulated Order, let
16 alone “clear and convincing evidence that a party ‘violated a specific and definite
17 order of the court’” as required for a contempt finding. *See Parsons v. Ryan*, 949
18 F.3d 443, 454 (9th Cir. 2020) (quoting *Stone v. City and Cty. of San Francisco*,
19 968 F.2d 850, 856 n.9 (9th Cir. 1992)). The Stipulated Order is very clear on its
20 scope, stating: “Such stay shall only apply to further litigation of this Adversary
21 Proceeding on the merits.” ECF No. 33 at 3. A motion to withdraw the reference is
22 a procedural vehicle for determining which court shall *decide the merits*, it has
23 nothing to do with the merits themselves. It is appropriate and efficient for the
24
25
26
27
28

1 Court to determine where the merits shall be decided while the appeal is pending,
2 thus preventing needlessly duplicative litigation in the Bankruptcy Court. The
3 motion to withdraw thus furthers the purpose behind the Stipulated Order of
4 resolving this case as efficiently as possible, in addition to complying with its plain
5 terms. The United States would not have stipulated to such an order had this not
6 been the case.
7

8
9 The standstill agreement was agreed to by the parties and submitted to the
10 Bankruptcy Court on June 23, 2020. Later that day, the United States filed its
11 motion to withdraw the reference. On June 24, 2020, the parties participated in a
12 scheduling conference with the Bankruptcy Court. Two days later, on June 26,
13 2020, the Bankruptcy Court signed the standstill order without alteration. If
14 Plaintiffs believed that the pending motion to withdraw the reference would be
15 frozen by the standstill, then they should have attempted to address that during the
16 scheduling conference or prior to the entry of the standstill order by the
17 Bankruptcy Court. They did not.
18
19

20
21 Moreover, after Plaintiffs communicated to the United States that they
22 believed the standstill prevented the motion to withdraw from moving forward, the
23 United States offered to abandon the standstill and continue litigating in the
24 Adversary Proceeding. Plaintiffs did not respond to that offer.
25

26 //

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CONCLUSION

The United States respectfully requests that this adversary proceeding be withdrawn to the District Court.

Respectfully Submitted: July 14, 2020

ETHAN P. DAVIS
Acting Assistant Attorney General

WILLIAM D. HYSLOP
United States Attorney

/s/ Brian M. Donovan
BRIAN M. DONOVAN
Assistant United States Attorney

RUTH A. HARVEY
MARCUS S. SACKS
DANIEL MARTIN
Commercial Litigation Branch
Civil Division
United States Department of Justice
P.O. Box 875
Ben Franklin Station
Washington D.C. 20044
Tel. (202) 307-1104
marcus.s.sacks@usdoj.gov
daniel.j.martin@usdoj.gov

Attorneys for the United States