Dated: June 02, 2020
The following is ORDERED:

Jennie D. Latta
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

In re JAMES JERRY SKEFOS, et al.[1] Debtors.	Case No. 19-29718-L Chapter 11 (Jointly Administered)

Alpha Visions Learning Academy, Inc., Plaintiff, v. Jovita Carranza, in her Capacity as Administrator for the United States Small Business Administration, Defendant.	Adv. Proc. No. 20-00071

OPINION AND ORDER GRANTING REQUEST FOR PRELIMINARY INJUNCTION AND RELATED RELIEF

BEFORE THE COURT are the "Complaint and Verified Emergency Application for Temporary Restraining Order and Preliminary Injunction" (the "Complaint"), and the "Emergency

[1] The other Debtors in these jointly administered cases are Skefco Properties, Inc., Case No. 19-26580, and Eleftheria, LLC, Case No. 19-26603.

Motion for Temporary Restraining Order" (the "Motion"), filed by Plaintiff, Alpha Visions Learning Academy, Inc. ("Alpha"), on May 14, 2020 [Dkt. Nos. 1 and 2], concerning the United States Small Business Administration's (the "SBA") implementation of the Paycheck Protection Program ("PPP"), a federal loan program that was authorized by Congress in the wake of the global COVID-19 pandemic. The Motion and Complaint allege that the SBA has made approval of any PPP loan expressly contingent on the applicant or any owner of the applicant not being "presently involved in any bankruptcy," even though this condition is not articulated in the Coronavirus Aid, Relief, and Economic Security Act (the "CARES Act") that enacts the PPP, or in the Small Business Act, 15 U.S.C. § 631, *et seq*. The Motion and Complaint allege that the PPP is in reality a support or grant program rather than a loan program. The Motion and Complaint seek entry of a temporary restraining order, preliminary injunction, and permanent injunction pursuant to 11 U.S.C. § 105 and Federal Rule of Bankruptcy Procedure 7065 directing the Defendant, Jovita Carranza, in her capacity as Administrator for the SBA, and all its agents, servants, employees, and any parties acting in concert with them (the "Targeted Parties") to consider Alpha's Paycheck Protection Borrower Application Form (the "Borrower PPP Application") and any related forms, applications, or other documents without consideration of James Jerry Skefos's status as a Chapter 11 debtor. Alpha also seeks an order requiring the Targeted Parties from making or conditioning approval of any PPP loan to Alpha contingent upon Alpha or any owner of Alpha not being "presently involved in any bankruptcy." In addition, Alpha seeks a declaration that SBA violated the Administrative Procedures Act ("APA") and 11 U.S.C. § 525(a) in excluding applications from entities who are in bankruptcy or who have an owner who is in bankruptcy.

In order to maintain the status quo pending a hearing, the parties submitted the "Agreed Order Regarding Scheduling and Reservation of PPP Funds," which was entered May 22, 2020

(the "Agreed Scheduling Order"). [Dkt. No. 8]. Pursuant to the Agreed Scheduling Order, the SBA voluntarily agreed to set aside $68,417.65 from the PPP, an amount equal to the funding applied for by Alpha; the court set a combined hearing on the Motion and Complaint for May 28, 2020; the SBA was given until 5:00 p.m. on May 22, 2020, to file a response to the Motion and request for preliminary injunction; the Plaintiff was given until 5:00 p.m. on May 26, 2020, to file any reply.

SBA filed its "United States' Opposition to Plaintiff's Request for a Preliminary Injunction" on May 26, 2020 (late-filed with leave of court). [Dkt. No. 11]. Alpha filed its "Reply in Further Support of Motion for Temporary Restraining Order" on May 27, 2020. [Dkt. No. 14]. The court conducted a telephonic hearing on May 28, 2020, at which Alpha was represented by Robert W. Miller, of Manier & Herod, PC, and the SBA was represented by Marc S. Sacks, of the United States Department of Justice. The court has reviewed the excellent briefs with accompanying exhibits and carefully considered the arguments of counsel. It now enters this opinion and order granting the request for preliminary injunction and other relief for the reasons set out below.

THE PARTIES

According to the verified Complaint, Alpha is a corporation organized under the laws of the state of Tennessee with its principal place of business in Memphis, Tennessee.

James Jerry Skefos (the "Debtor") is the debtor in the underlying Chapter 11 bankruptcy case pending since the filing of his voluntary petition on December 10, 2019 [Bankr. Dkt. No. 1].

According to the Complaint, the Debtor holds all the equity interests in Alpha as well as other companies.

On March 5, 2020, this court ordered the joint administration of the Debtor's bankruptcy case with two others, Skefco Properties, Inc. ("Skefco"), and Eleftheria, LLC ("Eleftheria").

Michael E. Collins (the "Trustee") was appointed Chapter 11 trustee in these three bankruptcy cases and is currently serving in that capacity.

The Trustee asserts that upon his appointment as trustee for the Debtor, he succeeded to all the rights of the Debtor as sole shareholder in Alpha.

Defendant Jovita Carranza is the Administrator for the SBA.

JURISDICTION, VENUE, AND CONSTITUTIONAL AUTHORITY

Jurisdiction over a complaint arising under the Bankruptcy Code lies with the district court. 28 U.S.C. § 1334(b). Pursuant to authority granted to the district courts at 28 U.S.C. § 157(a), the district court for the Western District of Tennessee has referred to the bankruptcy judges of this district all cases arising under title 11 and all proceedings arising under title 11 or arising in or related to a case under title 11. *In re Jurisdiction and Proceedings Under the Bankruptcy Amendments Act of 1984*, Misc. No. 81-30 (W.D. Tenn. July 10, 1984). The Trustee asserts that this is a core proceeding pursuant to 28 U.S.C. § 157(b) because it is based upon an alleged violation of 11 U.S.C. § 525 and because the alleged discrimination by the Defendant against Alpha, an entity wholly-owned by the Debtor, "has significant prejudicial impact on [the Debtor's] bankruptcy estate and its administration by the Trustee." Complaint, ¶ 10.

Section 525(a) of the Bankruptcy Code provides:

> Except as provided in the Perishable Agricultural Commodities Act, 1930, the Packers and Stockyards Act, 1921, and section 1 of the Act entitled "An Act making appropriations for the Department of Agriculture for the fiscal year ending June 30, 1944, and for other purposes," approved July 12, 1943**, a governmental unit may not deny, revoke, suspend, or refuse to renew a license, permit, charter, franchise, or other similar grant to, condition such a grant to, discriminate with respect to such a grant against, deny employment to, terminate the employment of, or discriminate with respect to employment against,** a person

> that is or has been a debtor under this title or a bankrupt or a debtor under the Bankruptcy Act, **or another person with whom such bankrupt or debtor has been associated, solely because such bankrupt or debtor is or has been a debtor under this title or a bankrupt or debtor under the Bankruptcy Act**, has been insolvent before the commencement of the case under this title, or during the case but before the debtor is granted or denied a discharge, or has not paid a debt that is dischargeable in the case under this title or that was discharged under the Bankruptcy Act.

11 U.S.C. § 525(a) (emphasis added). The Trustee alleges that the PPP is in the nature of a grant rather than a loan and that Alpha is a person with whom the Debtor is associated. Section 525 is somewhat unusual in that it grants protection under the Bankruptcy Code to persons who are not debtors. It does, however, create a cause of action that arises solely under the Bankruptcy Code. As a result, actions under section 525 fall squarely within the bankruptcy jurisdiction granted to the district courts and are core proceedings over which a bankruptcy judge may preside and enter a final order subject only to appellate review. 28. U.S.C. 157(b)(1) and (b)(2). See *Bradley v. Barnes (In re Bradley)*, 989 F.2d 802, 804 (5th Cir. 1993) (If there is a potential violation of § 525, then the court must take jurisdiction.); *Mayo v. Union Bank (In re Mayo)*, 321 B.R. 759 (Bank. D. Vt. 2005) (Action seeking redress of allegedly discriminatory conduct that is actionable by the language of the Bankruptcy Code itself is a core proceeding "arising under" title 11.).

The SBA argues that this bankruptcy court's authority to adjudicate Alpha's section 525(a) claim does not extend to its APA claims, which do not arise under the Bankruptcy Code. SBA does not consent to the entry of a final judgment on the APA claims. The court finds below that the SBA violated the Bankruptcy Code's anti-discrimination provision when it directed lenders to refuse to accept PPP applications from entities owned by bankruptcy debtors. This violation is sufficient to support the entry of an injunction by the bankruptcy court. The court has also made extensive findings and conclusions concerning Alpha's APA claims. Alpha alleges that SBA violated the APA by exceeding its statutory authority and by acting arbitrarily and capriciously in

excluding entities owned by bankruptcy debtors from participation in the PPP. These causes of action only arise as the result of the filing of the bankruptcy petition of Mr. Skefos. Thus, they arise in a bankruptcy case. Moreover, the acts of SBA, which resulted in the refusal of Alpha's application, will directly impact the bankruptcy estate of Mr. Skefos if an injunction is not issued. This court thus concludes that this proceeding is a core proceeding. *See* 28 U.S.C. § 157(b)(2)(A) and (O); *Roman Cath. Church of Archdiocese of Santa Fe v. SBA (In re Roman Cath. Church of Archdiocese of Santa Fe)*, __ B.R. __, 2020 WL 2096113, *4 (Bankr. D. N.M. 2020). This bankruptcy court thus has authority to issue final orders subject only to appellate review pursuant to 28 U.S.C. § 158(a).

Venue is proper in the Western District of Tennessee because this proceeding relates to a bankruptcy case pending in this district. 28 U.S.C. § 1409(a).

SOVEREIGN IMMUNITY

SBA asserts that the Small Business Act's narrow waiver of sovereign immunity precludes the injunctive relief that Alpha seeks. Alpha disagrees.

The Small Business Act provides in pertinent part:

> (b) Powers of Administrator. In the performance of, and with respect to, the functions, powers, and duties vested in him by this chapter the Administrator may—
>
> > (1) sue and be sued in any court of record of a State having general jurisdiction, or in any United States district court, and jurisdiction is conferred upon such district court to determine such controversies without regard to the amount in controversy; **but no attachment, injunction, garnishment, or other similar process, mesne or final, shall be issued against the Administrator or his property**;

15 U.S.C. § 634(b) (emphasis added). SBA relies upon the decision of the United States Court of Appeals for the Sixth Circuit, *Graves v. Unites States,* 1987 WL 38965, at *4 (6th Cir. 1987) (unpublished), which states:

> In our view, the rights of the SBA cannot be affected outside of the consent statute. Section 634(b)(1) waives sovereign immunity to a limited extent. It provides basically that parties may proceed against the SBA but only as Congress has provided. We hold that where, as in the present case, plaintiffs bring an action against a private party, and where that private party brings a counterclaim that implicates the SBA's rights, the SBA's rights are unaffected unless it is made a party to that action pursuant to the consent statute.

SBA asserts that upon this authority, the suit of Alpha must be dismissed.

Alpha counters that the Sixth Circuit's recent ruling in *DV Diamond Club of Flint, LLC v. Small Business Administration,* No. 20-1437 (6th Cir. May 16, 2020), resolves this and many other issues raised in the Motion and Complaint.[2] With respect to the issue of sovereign immunity, Alpha notes that the Eastern District of Michigan stated that section 634(b) '"was not intended to render the agency immune from injunctive relief in situations where the agency has exceeded its statutory authority and where an injunction would not interfere with the agencies internal operations.'" *DV Diamond Club of Flint, LLC v. United States Small Bus. Admin.,* __ F. Supp. 3d __, 2020 WL 2315880, at *7 (E.D. Mich. May 11, 2020) (quoting *Camelot Banquet Rooms, Inc. v. United States Small Bus. Admin.,* No. 20-C-0601, 2020 WL 2088637 at *3-4 (E.D. Wis. May 1, 2020)). In deciding whether to issue a stay pending appeal, neither the majority opinion nor the dissent in *DV Diamond Club* addressed the sovereign immunity question. The court denied the SBA's motion for stay pending appeal (meaning that the district court injunction remains in

[2] The Sixth Circuit's decision in *DV Diamond Club* was directed only to the question of whether the court should stay the preliminary injunction against SBA issued by the United States District Court for the Eastern District of Michigan. In connection with that, the panel also addressed many of the substantive issues raised in the Motion and Complaint in this case. Though not a decision on the merits, the court of appeals' decision is the best indication available at this time concerning how the Sixth Circuit will ultimately rule on many of the issues raised in this proceeding.

effect). Alpha argues that these facts strongly indicate that the Sixth Circuit will ultimately rule that sovereign immunity does not prevent a declaratory judgment action against the SBA concerning its interpretation of the PPP.

Alpha also argues that section 106 of the Bankruptcy Code abrogates sovereign immunity for purposes of the anti-discrimination provision, section 525. Section 106 provides in pertinent part:

> (a) Notwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit to the extent set forth in this section with respect to the following:
>
> (1) Sections … 525 … of this title.
>
> (2) The court may hear and determine any issue arising with respect to the application of such sections to governmental units.

11 U.S.C. § 106(a).

This court is convinced that the refusal of the court of appeals to disturb the injunction issued by the district court in *DV Diamond Club* is the best indication of how the court of appeals will rule on the merits. Relying on *Camelot Banquet Rooms,* which in turn relied upon *Ulstein Maritime, Ltd. v. United States,* 833 F.2d 1052, 1056-57 (1st Cir. 1987), the district court held that section 634(b)(1) does not preclude SBA from being enjoined to set aside unlawful agency action. Here, as there, all that SBA will be enjoined to do is to direct the Plaintiff's chosen lender to process its loan application and to guarantee any PPP loan to which Alpha is otherwise entitled. This court is persuaded that injunctive relief is available to Alpha in the context of this adversary proceeding.

The court is further convinced that injunctive relief is available to Alpha pursuant to the Bankruptcy Code. Section 106(a) unmistakably abrogates a governmental unit's sovereign immunity. *Hunsaker v. United States*, 902 F.3d 963, 966 (9th Cir. 2018); *In re Reed*, 2020 WL 1451565 (Bankr. N.D. Miss. 2020). The SBA is a governmental unit within the meaning of

section 106. 11 U.S.C. § 101(27). The acts of SBA complained of by Alpha fall precisely within the abrogation of sovereign immunity provided by section 106(a). Thus, pursuant to the plain language of the statute, the SBA does not enjoy sovereign immunity in this proceeding which involves the determination of issues arising under section 525 of the Bankruptcy Code. *See, Penobscot Valley Hospital v. Carranza,* 2020 WL 2201943, *2 (Bankr. D. Me. 2020).

BACKGROUND

The Impact of the Pandemic on Alpha's Business

The factual allegations of the Complaint are sworn by the Debtor, James Jerry Skefos, as President of Alpha. The Complaint alleges that Alpha is a childcare center for children ages six weeks to 12 years located in Memphis, Tennessee. Alpha employs 20 individuals and ordinarily has a census of 60-70 children. As a result of the COVID-19 pandemic, the census has dropped over 80% to only 8-10 children per day. Alpha's revenue has likewise dropped precipitously. Thus, the Complaint alleges, Alpha needs PPP funding to allow it to continue to fund its personnel payroll, which is critical to its survival. The "Second Declaration of James Jerry Skefos in Support of Verified Emergency Application for Temporary Restraining Order and Preliminary Injunction" was attached as Exhibit B to Alpha's Reply. [Dkt. No. 14-2]. It states that prior to the filing of his bankruptcy petition, Mr. Skefos was the sole shareholder of Alpha and that he continues to serve as President of Alpha and to oversee its operations. Mr. Skefos states that Alpha employs 20 individuals and normally has a census of between 60-70 children. He states that as a result of the COVID-19 pandemic, Alpha's census has dropped to approximately 10-12 children, and its revenue has dropped precipitously. As result, Alpha has laid off 13 of its employees. Mr. Skefos says that, if permitted to do so, Alpha will reapply for PPP funds and use those funds "in complete compliance with the program's criteria for forgiveness of any obligation to repay them."

The Complaint further alleges that on April 15, 2020, Alpha submitted a completed Borrower PPP Application to Community Bank. On May 7, 2020, Community Bank called Morgan Matheson, an employee of the Debtor, to inform her that the application had not been processed due to Question 1 on the application being marked "yes," indicating that the owner of the applicant is presently involved in bankruptcy. *See Declaration of Morgan Matheson*, Complaint, Ex. 4. Later the same day, Todd Chapman, Senior Vice President of Community Bank, sent an email explaining the denial of Alpha's application and ineligibility for the PPP on the grounds that it is affiliated with a Chapter 11 debtor. *See Email from Todd Chapman*, Complaint, Ex. 5, and *Declaration of Robert Miller,* Complaint, Ex. 6. Mr. Chapman explicitly references the language of the application form which states, "*If questions (1) or (2) below are answered 'Yes,' the loan will not be approved."*

The Complaint alleges that if it were allowed to apply for a PPP loan with the bankruptcy exclusion removed and/or ignored, Alpha would be entitled to PPP funds totaling over $68,417.65, and that it intends to use the funds to pay wages, benefits, and certain taxes, all of which are permissible uses under either section 1102 of the CARES Act or 15 U.S.C. § 636(a).

The CARES Act and the PPP

The CARES Act was signed into law March 27, 2020. The PPP is a program created by the CARES Act to extend the funding program created under section 7(a), 15 U.S.C. § 636, of the Small Business Act to any business with fewer than 500 employees who apply for funds through a federally-insured lending institution. *See generally* §§ 1101-1109, CARES Act. The CARES Act initially authorized the SBA to guarantee up to $349 billion in PPP loans. These funds were quickly exhausted, and Congress increased the authorized amount to $659 billion in April 2020. The PPP increases eligibility for small business loans:

(D) Increased eligibility for certain small businesses and organizations. —

> (i) In general. — During the covered period, in addition to small business concerns, any business concern, nonprofit organization, veterans organization, or Tribal business concern described in section 657a(b)(2)(C) of this title shall be eligible to receive a covered loan if the business concern, nonprofit organization, veterans organization, or Tribal business concern employs not more than the greater of—
>
> (I) 500 employees; or
> (II) if applicable, the size standard in number of employees established by the Administration for the industry in which the business concern, nonprofit organization, veterans organization, or Tribal business concern operates.

15 U.S.C. § 636(a)(36)(D)(i). The PPP allows covered businesses to receive funds equal to 2.5 times their average monthly payroll, up to $10 million. PPP loans may be fully forgiven if the money is used for payroll and related expenses (subject to certain caps), rent, utilities, and interest on certain costs incurred and payments made during the covered period.[3]

In furtherance of emergency rule-making authority granted by the CARES Act, the SBA issued a series of Interim Final Rules in order to implement the PPP. The first Interim Final Rule was published April 15, 2020. It adopted the ineligibility standards set forth in 13 C.F.R. 120.110 as further described in the SBA's Standard Operating Procedure 50-10, subpart B, Chapter 2, effective April 1, 2019 (the "SOP 50-10"). A "Small Business Applicant" must, among other things: (i) be an operating business; (ii) be organized for profit; (iii) be located in the United States; (iv) be small (as defined by the SBA); and (v) demonstrate the need for the desired credit. *See* SOP 50-10, pp. 91-104. Neither the SOP 50-10 nor the first Interim Final Rule specify that chapter 11 debtors and entities owned by a chapter 11 debtor are ineligible to receive a small business loan.

[3] "Definition of covered period. —In this section, the term 'covered period' means the period beginning on March 1, 2020, and ending on December 31, 2020." CARES Act § 1102(a).

In response to the question, "What do lenders have to do in terms of loan underwriting?" the first Interim Final Rule provides:

> 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 ….

First Interim Final Rule, 85 Fed. Reg. at 20,815. The form issued by the Administration (the one completed by Alpha), however, includes the notice: "*If questions (1) or (2) below are answered 'Yes,' the loan will not be approved."* Question 1 asks, "Is the Applicant or any owner of the Applicant 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?" Complaint, Ex. 2; SBA Opposition, Ex. 1.

The second Interim Final Rule issued April 15, 2020, and the third Interim Final Rule issued April 20, 2020, are likewise silent with respect to the eligibility of debtors in bankruptcy and entities owned by debtors in bankruptcy. The third Interim Final Rule makes explicit that creditworthiness is not a factor to be considered by lenders in making PPP loans: "[t]he 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." Third Interim Final Rule, 13 CFR 120, 85 Fed. Reg. at 21,750. On April 24, 2020, however, the SBA issued a fourth Interim Final Rule,

which directly addresses the eligibility of entities owned by an entity "involved in any bankruptcy" to receive a PPP loan:

> 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.

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

ISSUES PRESENTED

Alpha, which is not a debtor in bankruptcy, made its application on April 15, 2020. There seems no dispute that its application was denied because Mr. Skefos answered question 1 on the PPP Application truthfully – indicating that he, the owner of Alpha, is presently a debtor in bankruptcy. No argument is advanced by the SBA for the denial of Alpha's application other than the rulemaking of the SBA. Alpha meets the other streamlined eligibility requirements for the PPP: it is a business with not more than 500 employees. In the context of the pending Motion and request for preliminary injunction, the court must balance the following four factors in determining whether to grant injunctive relief: (1) whether the movant has a strong likelihood of success on

the merits; (2) whether the movant would suffer irreparable injury absent the injunction; (3) whether the injunction would cause substantial harm to others; and (4) whether the public interest would be served by the issuance of an injunction." *Am. Civil Liberties Union Fund of Michigan v. Livingston Cty.*, 796 F.3d 636, 642 (6th Cir. 2015).

Likelihood of Success on the Merits

Substantively, the Motion and Complaint raise the following issues:

1. Did SBA exceed its statutory authority under the Administrative Procedures Act (the "APA") 5 U.S.C. § 706(2)(C) when it imposed a policy disqualifying a business owned by a debtor in bankruptcy from participating in the PPP?
2. Did SBA violate the APA, 5 U.S.C. § 706(2)(A), when it arbitrarily and capriciously imposed a policy disqualifying a business owned by a bankruptcy debtor from participating in the PPP?
3. Did SBA violate the Bankruptcy Code's antidiscrimination provision, 11 U.S.C. § 525, when it imposed a policy disqualifying a business owned by a bankruptcy debtor from participating in the PPP?

Alpha asks for declaratory and injunctive relief with respect to each of these issues. Alpha cannot be granted injunctive relief unless it can show a strong likelihood of success on at least one of these issues.

SBA Exceeded Its Authority in Excluding Entities Owned by Bankruptcy Debtors from the PPP

Alpha argues that SBA exceeded its authority under the APA when it imposed a policy disqualifying a business owned by a debtor in bankruptcy from participating in the PPP. Title 5 section 706(C) of the United States Code directs a reviewing court to "hold unlawful and set aside agency action, findings, and conclusions found to be … in excess of statutory jurisdiction,

authority, or limitations, or short of statutory right." Alpha relies heavily upon the analysis of the Eastern District of Michigan in *DV Diamond Club* in support of its argument. The court there applied the two-step framework for evaluating agency actions announced in *Chevron, U.S.A., Inc. v. Natural Res. Defense Council, Inc.,* 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984). In *Chevron*, the Court said:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Chevron, 467 U.S. at 842-43. In *DV Diamond Club* the applicants were denied PPP loans because they were sexually-oriented businesses, businesses that were rendered ineligible for PPP loans by the Interim Adult Entertainment Ineligibility Rule adopted by the SBA. The District Court in *DV Diamond Club* identified the "precise question" posed by the cases before it as:

> May the SBA exclude from eligibility for a PPP loan guaranty a business concern that (1) during the covered period (2) has less than 500 employees or less than the size standard in number of employees established by the Administration for the industry in which the business operates?

DV Diamond Club, 2020 WL 2315880, at *10. The District Court concluded that it could not because Congress established only two criteria for loan guaranty eligibility and emphasized that "'*any* business … shall be eligible to receive a covered [i.e., SBA guaranteed] loan' if it meets those criteria." *Id.* The District Court concluded that SBA exceeded its statutory authority when it adopted the Interim Adult Entertainment Ineligibility Rule and granted the plaintiffs' motion for

preliminary injunction. In denying SBA's request for a stay pending appeal, the Sixth Circuit stated:

> The term "any" carries an expansive meaning. *See SAS Inst., Inc. v. Iancu,* 138 S. Ct. 1348, 1354 (2018). It "refer[s] to a member of a particular group or class without distinction or limitation" and, in this way, "impl[ies] *every* member of the class or group." *Id.* (quoting Oxford English Dictionary (3d ed., Mar. 2016)). Thus, the Act's specification that "any business concern" is eligible, so long as it meets the size criteria, is a reasonable interpretation. That broad interpretation also comports with Congress's intent to provide support to as many displaced American workers as possible and, in doing so, does not lead to an "absurd result" as the SBA claims. Finally, by specifying "any business concern," Congress made clear that the SBA's longstanding ineligibility rules are inapplicable given the current circumstances. Neither may the SBA continue to apply these rules pursuant to [15 U.S.C.] § 636(a)(36)(B), which states: "Except as otherwise provided in this paragraph, the [SBA] may guarantee covered loans under the same terms, conditions, and processes as a loan made under this subsection." 15 U.S.C. § 636(a)(36)(B). This provision likely constitutes a catch-all governing procedures otherwise unaffected by the mandate of the CARES Act and the PPP and does not detract from the broad grant of eligibility.

DV Diamond Club, No. 20-1437, slip op. at * 4-5. In response to SBA's argument that if Congress wanted sexually-oriented businesses to be eligible for PPP loan guarantees, it would have said so, the court said,

> This specification, however, supports the district court's analysis. It was necessary to specify non-profits because they are not businesses, whereas the Act's specification that eligibility is conferred on "any business concern" encompasses sexually-oriented businesses such as strip clubs that would ordinarily be ineligible for loans.

Id. at *5.

Alpha argues that the analysis employed by the District Court and confirmed by the Sixth Circuit applies directly to its Application. Alpha, it says, meets all the criteria for eligibility under the PPP. The only impediment to Alpha receiving PPP funding, it says, is the SBA's improper exclusion of bankruptcy debtors and their affiliates from the program.

SBA counters that by placing the PPP with the pre-existing section 7(a) lending program, Congress intended that the Administrator exercise broad discretion over the PPP. Indeed, SBA says that the CARES Act expanded the Administrator's authority by enabling her to issue new regulations and rules to implement the PPP without complying with typical notice and comment requirements. United States' Opposition, Dkt. No. 11, p. 24. The Administrator, it says, exercised this authority by incorporating the PPP application form into the first Interim Final Rule and by directly addressing "the ineligibility of entities in active bankruptcy" in the fourth Interim Final Rule. *Id.*

SBA also argues that the bankruptcy exclusion is substantially different from the Interim Adult Entertainment Ineligibility Rule at issue in *DV Diamond Club* because the bankruptcy exclusion "arises out of the existing section 7(a) *statutory* requirement (unaltered by and thus applicable to the PPP) that all loans 'shall be of such sound value … as reasonably to assure repayment.'" 15 U.S.C. § 636(a)(6)." United States' Opposition, Dkt. No. 11, p. 31. SBA argues that when this requirement is read alongside the *DV Diamond Club* court's interpretation of "any business," there is a statutory ambiguity not present in *DV Diamond Club*, whose exclusion was based solely upon a regulation. As a result, SBA urges the court to move to *Chevron* step two and determine whether the bankruptcy exclusion is "a permissible construction of the statute." Here, the SBA says that in order to process PPP applications expeditiously as possible, the SBA eliminated the requirement to perform individual credit review for each PPP while streamlining the pre-existing bankruptcy questions of section 7(a) into the bankruptcy exclusion. In support of this explanation, SBA points to the first and fourth Interim Final Rules, 85 Fed. Reg. at 20,811 and 23,451. At oral argument, counsel for the SBA indicated that in its effort to activate the PPP as quickly as possible, SBA used pre-existing Form 1919 for the application process, a form that

included the question concerning the applicant's or owner's being "presently involved in any bankruptcy," and simply incorporated it into the first Interim Final Rule.[4] Counsel also argued that the SBA was under tremendous pressure to make decisions that could be implemented easily by lenders. The exclusion of bankruptcy debtors and their affiliates, he argued, provides a bright line. The alternative would have been a more conventional underwriting process with concomitant delays in funding.

Alpha argues to the contrary that the PPP drastically altered the underwriting standards for the SBA in Congress's effort to increase access to funding. Congress expressed this intent, Alpha argues, in 15 U.S.C. § 636(a)(36)(D), which is entitled "Increased eligibility for certain small businesses and organizations," and which sets forth the criteria for PPP eligibility in order to "provide support to as many displaced American workers as possible. *DV Diamond Club,* No. 20-1437, slip op. at * 4.

The SBA's arguments are unpersuasive for three reasons. First, for the reasons stated by the District Court and the Sixth Circuit panel, Congress expressed its intent through the CARES Act and the PPP that emergency support be provided to American workers facing the loss of income and, in many cases, health insurance, in the face of the worst global pandemic in more than 100 years. Within that framework, the Administrator was not authorized to exclude American workers on the basis that they happened to be employed by a debtor in bankruptcy or even more remotely, as in this case, by an entity whose owner is a debtor in bankruptcy. Second, the initial "ruling" by the Administrator to include the pre-existing 1919 application form cannot be said to reflect a conscious decision by the Administrator for the reason that it is inconsistent with her later statement to the effect that "unlike other SBA loan programs, the financial terms for PPP Loans

[4] *See* "SBA 7(a) Borrower Information Form," OMB Control No.: 3245-0348, Expiration Date: 07/31/2020, available at https://www.sba.gov/document/sba-form-1919-borrower-information-form.

are uniform for all borrowers, and the standard underwriting process does not apply because no creditworthiness assessment is required for PPP loans." Third Interim Final Rule, 13 CFR 120, 85 Fed. Reg. at 21,750. The statement that no creditworthiness assessment is required for PPP loans is consistent with the reading of the District Court and Sixth Circuit panel that Congress intended "any business" to mean exactly that. The Administrator's later statement that she, "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" is inconsistent with Congress's statement. For reasons stated below, it is also illogical. Third, the exclusion of entities whose owner is "presently involved in a bankruptcy" is even further removed from Congress's expressed intent of providing payroll support to struggling Americans. No explanation was provided by SBA for the exclusion of applicants such as Alpha, which was operating successfully prior to the COVID-19 pandemic, based solely on the status of its owner.

The Administrator exceeded the authority granted to her in the CARES Act by excluding businesses from the PPP on the basis that their owners are "presently involved in a bankruptcy."[5]

SBA Acted Arbitrarily and Capriciously in Excluding Entities Owned by Debtors in Bankruptcy from the PPP

Alpha argues that SBA acted arbitrarily and capriciously when it imposed a policy disqualifying a business owned by a debtor in bankruptcy from participating in the PPP. Title 5 section 706(C) of the United States Code directs a reviewing court to "hold unlawful and set aside

[5] This was the "rule" (expressed through Form 1919) when Alpha applied. As one court has explained, it is a standard so vague as to be almost meaningless. *See, Roman Cath. Church of Archdiocese of Santa Fe v. SBA (In re Roman Cath. Church of Archdiocese of Santa Fe)*, __ B.R. __, 2020 WL 2096113, *6 (Bankr. D. N.M. 2020). The Administrator's later clarification that SBA intends to exclude applicants or entities owned by an applicant that "is the debtor in a bankruptcy proceeding, either at the time it submits the application or at any time before the loan is disbursed" is more precise but still exceeds the Administrator's authority for the reasons stated.

agency action, findings, and conclusions found to be … arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." An agency rule is "arbitrary and capricious if the agency relied on factors [that] Congress has not intended it to consider, entirely failed to consider important an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicles Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto Ins. Co.,* 463 U.S. 29, 43, 103 S. Ct. 2856, 77 L. Ed. 2d 443 (1983). The Supreme Court has explained this standard:

> Even under *Chevron*'s deferential framework, agencies must operate "within the bounds of reasonable interpretation." *Arlington*, 569 U.S., at ——, 133 S. Ct., at 1868. And reasonable statutory interpretation must account for both "the specific context in which ... language is used" and "the broader context of the statute as a whole." *Robinson v. Shell Oil Co*., 519 U.S. 337, 341, 117 S. Ct. 843, 136 L. Ed. 2d 808 (1997). A statutory "provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme ... because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." *United Sav. Assn. of Tex. v. Timbers of Inwood Forest Associates*, *Ltd.*, 484 U.S. 365, 371, 108 S. Ct. 626, 98 L. Ed. 2d 740 (1988). Thus, an agency interpretation that is "inconsisten[t] with the design and structure of the statute as a whole," *University of Tex. Southwestern Medical Center v. Nassar*, 570 U.S. ——, ——, 133 S. Ct. 2517, 2529, 186 L. Ed. 2d 503 (2013), does not merit deference.

Util. Air Regulatory Group v. E.P.A., 573 U.S. 302, 321, 134 S. Ct. 2427, 189 L. Ed. 2d 372 (2014).

In support of its argument that the SBA acted arbitrarily and capriciously in excluding bankruptcy debtors and their affiliates from the PPP, Alpha relies upon the bankruptcy court's decision in *Roman Catholic Church of the Archdiocese of Sante Fe v. United States* (*In re Roman Catholic Church of Archdiocese of Santa Fe),* 2020 WL 2096113 (Bankr. D. N.M. May 1, 2020). Faced with exclusion of its employees from the help provided by the PPP, the Archdiocese sued the SBA raising similar arguments to those raised by Alpha. The court specifically found the SBA's decision to exclude bankruptcy debtors to be arbitrary and capricious, saying:

> The Court finds that Defendant's decision to exclude bankruptcy debtors from the PPP is arbitrary and capricious. While a borrower's bankruptcy status clearly is relevant for a normal loan program, the PPP is the opposite of that. It is not a loan program at all. It is a grant or support program. The statute's eligibility requirements do not include creditworthiness. Quite the contrary, the CARES Act makes PPP money available regardless of financial distress. Financial distress is presumed. Given the effect of the lockdown, many, perhaps most, applicants would not be able to repay their PPP loans. They don't have to, because the "loans" are really grants. Repayment is not a significant part of the program. That is why Congress did not include creditworthiness as a requirement.
>
> Considering the unprecedent[ed] nature of the PPP and the circumstances underlying its enactment, there is no reason to assume that Congress intended to cede to Defendant discretion to exclude bankruptcy debtors from the PPP. Rather, a review of the CARES Act in its entirety shows the opposite. *E.P.A.*, 573 U.S. at 321, 134 S. Ct. 2427 (Congress's intent may be discerned by examining the enactment in its entirety); *[Food & Drug Admin. v.] Brown & Williamson [Tobacco Corp.*, 529 U.S. [120] at 133, 120 S. Ct. 1291 (2000) (same). As discussed below, another CARES Act program (direct loans to mid-sized businesses) specifically excludes bankruptcy debtors. The unmistakable implication is that Congress did not intend to exclude bankruptcy debtors from the PPP.
>
> The structure of the PPP is simple: PPP funds must be used for payroll, mortgage interest, rent, or utilities. If the funds are used as required, they do not have to be repaid. Given the obvious purpose of the PPP, it was arbitrary and capricious for Defendant to engraft a creditworthiness test where none belonged.

Archdiocese of Santa Fe, 2020 WL 2096113, at *6.

SBA argues to the contrary that "nothing in the CARES Act precludes excluding bankruptcy entities from the PPP; the law instead gives the Administrator broad discretion." United States' Opposition, p. 26. In support, SBA points to 15 U.S.C. § 636(a)(6) (the pre-existing 7(a) lending program required lenders to ensure that loans be of "sound value … as reasonably to assure repayment") and Form 1919, questions 6 and 24. Question 6 asks, "Has the Small Business Applicant and/or its Affiliates ever filed for bankruptcy protection?" and Question 24, which is directed to the applicant's principal, asks, "Have you, or any business you controlled, ever filed for bankruptcy protection?" In each case, if the applicant or principal answers, "yes," they are permitted to provide details on a separate sheet. SBA explains that:

> The bankruptcy exclusion in the PPP stems from these pre-existing section 7(a) requirements. The pre-existing bankruptcy questions of section 7(a) were "streamlined" for the PPP to meet SBA's determination that PPP loans must be processed "expeditiously." First Interim Final Rule, 85 Fed. Reg. at 20,811. To streamline the processing, the SBA eliminated the requirement to perform individual credit review for each PPP loan, as with other 7(a) loans. Instead, the PPP program imposed a bright line rule to exclude those in bankruptcy through its official application form.

United States' Opposition, p. 26.

Perhaps nothing illustrates the arbitrariness and caprice of the bankruptcy exclusion rule better than SBA's explanation. In order to implement a Congressional program intended to protect American workers from unemployment and loss of health insurance, SBA arbitrarily eliminated all workers employed by debtors in bankruptcy and all workers employed by entities whose owners are debtors in bankruptcy. Under pre-existing Form 7(a), a truthful answer to questions 6 or 24 opened the opportunity for the applicant or principal to provide additional information. It did not result in automatic disqualification. In attempting to expedite the PPP application process, SBA chose a path that was diametrically opposed to its prior practice and the stated intention of Congress to provide funds for payroll, mortgage interest, rent, and utilities to struggling businesses. As the Administrator herself explained "no creditworthiness assessment is required for PPP Loans," yet the explanation offered by SBA in its Opposition to Alpha's Motion and Complaint is that it excluded bankruptcy debtors in order "reasonably to assure repayment." The bankruptcy exclusion clearly was intended as a creditworthiness determination, but a creditworthiness determination based on nothing more than the bankruptcy status of the applicant or the owner of the applicant. This court agrees with the decision of the bankruptcy judge in *Archdiocese of Santa Fe:* "Given the obvious purpose of the PPP, it was arbitrary and capricious for Defendant to engraft a creditworthiness test where none belonged." 2020 WL 2096113, at *6.

SBA acted arbitrarily and capriciously in excluding applicants whose owners are debtors in bankruptcy from the PPP.

SBA Discriminated Against Alpha in Violation of Bankruptcy Code Section 525(a)

Alpha argues that in excluding applicants whose owners are debtors in bankruptcy from the PPP, the SBA violated section 525(a) of the Bankruptcy Code. That section provides in pertinent part:

> [A] governmental unit may not deny, revoke, suspend, or refuse to renew a license, permit, charter, franchise, or other similar grant to, condition such a grant to, discriminate with respect to such a grant against, … a person that is or has been a debtor under this title … or another person with whom such bankrupt or debtor has been associated, solely because such bankrupt or debtor is or has been a debtor under this title ….

11 U.S.C. § 525(a). Alpha argues that the PPP is in substance a government grant program rather than a government loan program, and thus that the SBA's exclusion of applicants solely on the basis of their status as bankruptcy debtors or affiliates of bankruptcy debtors clearly violates this section. Significantly, it notes, Alpha is not being denied the opportunity to apply for PPP funds due to any analysis of its creditworthiness. That analysis was foreclosed by the rejection of Alpha's application on the basis of Mr. Skefos's status as a debtor in bankruptcy. In the fourth Interim Final Rule, Alpha says, SBA attempted to justify the exclusion of debtors in bankruptcy on the basis that "PPP loans to debtors in bankruptcy would present an unacceptably high risk of an unauthorized use of funds or non-payment of unforgiven funds." 85 C.F.R. at 23,451. Alpha characterizes these "post-hock justifications" as "thin, revisionist, contradictory, and offered in bad faith." Complaint, ¶ 47.

The SBA responds that by its plain language, section 525(a) does not apply to lending or loan guarantees. It claims that the Sixth Circuit directly addressed this issue in *Toth v. Michigan State Housing Dev. Auth.,* 126 F.3d 477 (6th Cir. 1998), in which the court rejected the plaintiff's

claim that Michigan's denial of her application for a low income home improvement loan based upon a recent discharge in bankruptcy was discriminatory. SBA notes that other circuit, district, and bankruptcy courts have reached the same conclusion. United States' Opposition, pp. 15-16. SBA notes that section 525 was "intended to codify the rule of *Perez v. Campbell,* 402 U.S. 637 (1971), which held that a state could not frustrate the Congressional policy of a fresh start for a bankrupt by refusing to renew a driver's license based on a discharged judgment resulting from an automobile accident." *In re Rees,* 61 B.R. 114, 116-124 (Bankr. D. Utah 1986). SBA argues that the PPP is in no way like the driver's license in *Perez*, but instead operates to provide emergency funding to eligible businesses. "Businesses that are excluded from funding are not prohibited from operating, as with a refusal to provide a license, permit, charter or franchise," it says, and "entities in active bankruptcy may be eligible for other relief under the CARES Act itself, including an Emergency Economic Injury Disaster Claim. United States' Opposition, pp. 17-18. The SBA points to two decisions that have rejected debtor's claims that the PPP is not a loan but a grant for purposes of section 525(a). *See Cosi, Inc. v. SBA,* Adv. Proc. No. 20-50591 (BLS) (Bankr. D. Del. April 30, 2020) (Neither the case law, nor section 525 precludes the SBA from imposing a bankruptcy-related condition or criteria within the context of the PPP.); and *Trudy's Texas Star, Inc. v. Carranza,* Adv. Proc. No. 20-10260-hmc (Bankr. W.D. Tex. May 7, 2020) ("The PPP program, under the CARES Act is a loan…. The PPP loan program is not similar to a license, permit, charter, or franchise.").

Alpha replies that although SBA has attempted to argue in this and similar cases that the PPP does not fall within section 525(a) because SBA treats the program as a loan and uses language associated with traditional loans, in fact, the SBA is not the lender but the loan guarantor. Alpha concedes that a true commercial loan does not fall within the prohibition of section 525(a), but

argues that when a subsidy is cast in the form of a loan, even though it is in reality a grant, it falls within the protection of section 525, citing *In re Haffner,* 25 B.R. 882 (N.D. Ind. 1982) (although technically a "loan," the program was a sale support mechanism, i.e., a subsidy, and was therefore covered by section 525). SBA's argument, Alpha says, elevates form over substance, ignoring the intent of Congress that the PPP provide relief to small businesses affected by the economic downturn.

It seems to this court that the PPP is unlike any other government program previously analyzed under section 525, and understandably so. It is intended to meet an unprecedented crisis using whatever tools were ready to hand. The fact that SBA had existing relationships with lenders and their small-business customers throughout the United States provided a structure for distributing congressionally appropriated funds. The fact that notwithstanding the Affordable Care Act's expansion of the availability of health insurance to Americans, many if not most Americans who have health insurance receive it as a benefit of their employment. Thus, maintaining employees' status as employees was important for reasons other than merely providing income replacement. This may have accounted for some of the more unusual provisions of this "loan" program, most importantly, the fact that no underwriting function is anticipated and the fact that the "loan" will be completely forgiven if the applicant simply uses 75% of the loan proceeds to keep its employees employed.

This was the conclusion of Bankruptcy Judge David Jones in *Hidalgo County Emergency Service Foundation v. Carranza (In re Hidalgo County Emergency Service Foundation),* Case No. 19-20497; Adv. Pro. No. 20-2006, 2020 WL 2029252 (Bankr. S.D. Tex.) (transcript of oral ruling rendered April 24, 2020), who said:

> And in fact there really isn't an underwriting function…. There's no evaluation of ability to repay, there's no evaluation of collateral…. 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 who are being harmed. And so long as they use it the right way, they don't have to pay it back.
> ***
> This isn't a loan program. This is a support program.

Complaint, Ex. 10, transcript of April 24, 2020, TRO hearing, pp. 22-23. This was also the conclusion of Bankruptcy Judge David T. Thuma in *Archdiocese of Santa Fe:*

> Plaintiff argues that Defendant's decision to exclude debtors from the PPP violates § 525(a). The Court agrees. *In Stoltz v. Brattleboro Housing Auth. (In re Stoltz),* 315 F.3d 80 (2d Cir. 2002), the Second Circuit analyzed the term "other similar grant:"
>
> > The term "other similar grant" is not defined by the code. In common parlance, a grant is "a transfer of property by deed or writing." Merriam Webster's Collegiate Dictionary 507 (10th ed. 2000). As a legal term, a grant is "[a]n agreement that creates a right of any description other than the one held by the grantor. Examples include leases, easements, charges, patents, franchises, powers, and licenses." Black's Law Dictionary 707 (7th ed. 1999) (emphasis added). Similarly, a lease is "[a] contract by which a rightful possessor of real property conveys the right to use and occupy that property in exchange for consideration." *Id*. at 898.
> > ...
> > The common qualities of the property interests protected under section 525(a), i.e., "license[s], permit[s], charter[s], franchise[s], and other similar grants," are that these property interests are unobtainable from the private sector and essential to a debtor's fresh start. *Id*. at 88-90.
>
> ***
> As shown above, the PPP is not a loan program. It is a grant or support program. The target grant recipients are small businesses in financial distress. The PPP could only be offered by the government; private lenders do not give away money. PPP funds "are unobtainable from the private sector." *Stoltz*, 315 F.3d at 90. They also are essential to Plaintiff's fresh start. *Id*. Of all the benefits a government can grant, free money might be the best of all. Denying Plaintiff access to PPP funds solely because it is a debtor violates § 525(a).

Archdiocese of Santa Fe, 2020 WL 2096113, at *8.

This court joins Judges Jones and Thuma in finding that the PPP "loan" is in the nature of a "license, permit, charter, franchise, or similar grant" without which a debtor's fresh start would be impeded. As there is no question that the only reason that Alpha's application was turned away

by Community Bank was the ruling by SBA that entities owned by debtors in bankruptcy are ineligible for the PPP program, the court finds and concludes that the SBA's bankruptcy exclusion violates section 525(a) of the Bankruptcy Code.

Remaining Preliminary Injunction Factors

The court has determined that Alpha will succeed on the merits of the Complaint. The remaining preliminary injunction factors require little discussion. First, Alpha (and its employees) will suffer irreparable injury absent the injunction. According to the Declaration of Mr. Skefos, Alpha has laid off 13 of its employees. If permitted to do so, Alpha will reapply for PPP funds and intends to use those funds to repay those employees in compliance with the program's criteria for loan forgiveness. Second, the requested injunction directing the SBA not to exclude entities owned by debtors in bankruptcy would cause no harm to others. The SBA has not argued that it would, and the court has been unable to conceive of any possible harm. Fourth, the public interest would be served by the issuance of the injunction. As expressed by the District Court in *DV Diamond Club:*

> [T]he purpose of the PPP is to protect the employment and livelihood of employees who, through no fault of their own, have found their places of employment closed due to the COVID-19 pandemic. That purpose would be frustrated if the Court did not grant the requested preliminary injunction. "Guaranteeing the plaintiffs' loans now, rather than months from now when this case is over, furthers the public interest in helping all small businesses and their employees get through the pandemic." *Camelot Banquet Rooms,* __ F. Supp. 3d at __, 2020 WL 2088637 (E.D. Wis. May 1, 2020).

DV Diamond Club, 2020 WL 2315880 at *17. The same rationale applies to Alpha's business if not more so since a PPP grant to Alpha would not only provide employment to its own employees but would also support the childcare needs of other workers.

Preliminary Injunction

In lieu of a temporary restraining order, Alpha has asked that the court issue a preliminary injunction if it finds that relief to be warranted. It does. *See* Fed. R. Civ. P. 65, made applicable in bankruptcy by Fed. R. Bankr. P. 7065.

No Bond is Required

Because the request for injunction is made by the Trustee acting on behalf of the bankruptcy estate of Mr. Skefos, no bond shall be required. Fed. R. Bankr. P. 7065 ("Rule 65 applies in adversary proceedings, except that a temporary restraining order or preliminary injunction may be issued on application of a debtor, trustee, or debtor in possession without compliance with Rule 65(c).").

CONCLUSION

For the foregoing reasons, the court finds, concludes, and declares that:

1. SBA violated the Administrative Procedures Act, 5 U.S.C. § 706(C), when it exceeded its rulemaking authority by excluding entities owned by bankruptcy debtors from the PPP program.
2. SBA violated the Administrative Procedures Act, 5 U.S.C. § 706(B), when it arbitrarily and capriciously excluded entities owned by bankruptcy debtors from the PPP program.
3. SBA violated the Bankruptcy Code's anti-discrimination provision, 11 U.S.C. § 525(a), when it directed lenders to refuse to accept PPP applications from entities owned by bankruptcy debtors.
4. Alpha's Request for Preliminary and Permanent Injunction is **GRANTED**.

5. By 5:00 p.m. C.D.T, on **Friday, June 5, 2020**, Alpha shall provide to counsel for SBA the name and full contact information (including email address) for their contact at Community Bank (or other lender of Alpha's choice).
6. By 12:00 p.m., C.D.T., on **Friday, June 12, 2020**, SBA shall notify the lender representative in writing that (a) the application of Alpha for a PPP loan shall not be denied based upon the fact that Mr. Skefos is a debtor in bankruptcy; and (b) that if Alpha meets all other eligibility requirements for a PPP loan, the SBA will guarantee it.
7. In the event that Alpha otherwise meets the requirements for a PPP loan, SBA shall guarantee the loan for which it has applied or attempted to apply.

Further Proceedings

At the hearing to consider the Motion and request for preliminary injunction, the court asked counsel whether the hearing might be converted to one on the merits as there seemed to be no material factual dispute.[6] Counsel for Alpha agreed, but counsel for the SBA objected saying that it would prefer to make its administrative record. The court indicated that it would carefully consider the arguments of counsel and the extensive record already before the court to determine whether any additional material factual issues remain for trial. Having carefully reviewed the record and knowing that time is of the essence in Alpha's quest to obtain funds to support its daycare business (a business, by the way, that is among those that are essential to the reopening that communities across the country are attempting), this court joins Judge Thuma in finding no reason to delay entry of a final judgment in this cause.

[6] *See* Fed. R. Civ. P. 65(a)(2) ("Before or after beginning the hearing on a motion for a preliminary injunction, the court may advance the trial on the merits and consolidate it with the hearing.")

There is one remaining matter, however. Alpha has asked that it be awarded its attorney fees and costs pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412. Alpha shall file a motion and affidavit in support of its request within thirty days of the entry of this order. SBA will be given fourteen days to respond. Upon conclusion of the consideration of Alpha's motion, the court will enter a separate judgment consistent with this opinion.

cc: Debtors
Attorney for Debtors
Trustee
Attorney for Chapter 11 Trustee
Plaintiff
Attorney for Plaintiff
Defendant
Attorney(s) for Defendant
United States Trustee