

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re:	Chapter 11
COSI, INC., <i>et al.</i> , ¹	Case No. 20-10417 (BLS)
Debtors.	Jointly Administered
COSI, INC., <i>et al.</i> ,	
Plaintiffs,	
v.	Adversary Proceeding No. 20-_____ (BLS)
THE U.S. SMALL BUSINESS ADMINISTRATION, AND JOVITA CORRANZA, AS ADMINISTRATOR OF THE U.S. SMALL BUSINESS ADMINISTRATION,	
Defendants.	

COMPLAINT

The above-captioned debtors and debtors-in-possession (collectively, the “Debtors”), through their undersigned counsel, bring this Complaint against: the U.S. Small Business Administration, and Jovita Corranza, as Administrator of the U.S. Small Business Administration (together, the “SBA”), and state as follows:

INTRODUCTION

1. The Debtors are in the restaurant and catering business, which is among the segments of our economy hardest hit by the COVID-19 pandemic. Prior to the onset, the Debtors were executing their business plan in an attempt to successfully reorganize the

¹ The Debtors in these Chapter 11 Cases are the following entities (the last four digits of each Debtor’s respective federal tax identification number, if any, follow in parentheses): Cosi, Inc. (3745); Xando Cosi Maryland, Inc. (2196); Cosi Sandwich Bar, Inc. (0910); Hearthstone Associates, LLC (6267); Hearthstone Partners, LLC (9433); Cosi Franchise Holdings LLC (6984); and Cosi Restaurant Holdings LLC (3461). The Debtors’ corporate headquarters are located at 500 Rutherford Avenue, Suite 130, Charlestown, MA 02129.

Company. But now, virtually overnight, their income has been reduced to a trickle, severely jeopardizing their chances of reorganizing and remaining in business if the impact of the pandemic continues. Since the commencement of the outbreak, the Debtors' sales are down over 80% from pre-filing projections.

2. Over the past month, the Debtors have been working feverishly to reduce costs, including temporary measures such as concessions from their landlords during this situation to help stave off a potential liquidation, which, among other consequences, would result in a loss of employment for the Debtors' workers.

3. The Coronavirus Aid, Relief, and Economic Security Act (the "CARES Act") was signed into federal law on March 27, 2020, in order to prevent precisely this outcome. In a press release that same day, Ms. Corranza stated:

Our small businesses are the economic engines of their communities, and the SBA is ready to provide them with the support they need to remain open and keep their workers employed. With our whole-of-government approach led by the President, we are providing small businesses with the resources they need to get them through this unprecedented time.²

4. The CARES Act established the "Paycheck Protection Program" (the "PPP"), which provides forgivable loans of up to \$10 million to small businesses left financially distressed by the COVID-19 pandemic, to be used for up to eight weeks of payroll and day-to-day operating expenses. A press release from the SBA regarding the PPP stated in part:

"These loans will bring immediate economic relief and eight weeks of financial certainty to millions of small businesses and their employees," SBA Administrator Carranza said. "We urge every struggling small business to take

² CARES Act Statement from SBA Administrator Jovita Carranza, March 27, 2020.

advantage of this unprecedented federal resource – their viability is critically important to their employees, their community, and the country.”³

5. Consistent with the mandate of the CARES Act, the PPP was the lifeline that the Debtors needed to maintain their business and their employees’ livelihoods throughout the pandemic. However, contrary to both the Bankruptcy Code and its own governing laws and rules, the SBA has, without notice or justification, adopted a position that bankruptcy debtors are *ipso facto* ineligible to participate in the PPP. The Debtors have been told that they are ineligible for PPP assistance solely on this basis.

6. The SBA’s discrimination based solely on an applicant’s status as a debtor is legally unsupported, arbitrary and capricious, and runs completely counter to the stated purposes of the CARES Act and the PPP. Accordingly, the Debtors bring this Complaint seeking a declaratory judgment, a writ of mandamus, and related relief to compel the SBA to allow them to participate in the PPP.

THE PARTIES

7. The Debtors are debtors in possession in the above-captioned bankruptcy cases, and have their headquarters in Charlestown, Massachusetts.

8. The SBA is an agency of the United States of America whose central office is located at 409 Third Street, S.Q. Washington DC 20416.

9. Ms. Corranza is the Administrator of the SBA, and may be sued in this capacity.

³ SBA’s Paycheck Protection Program for Small Businesses Affected by the Coronavirus Pandemic Launches, April 3, 2020.

JURISDICTION AND VENUE

10. The Court has jurisdiction over this adversary proceeding pursuant to 28 U.S.C. §§1331, 1334, 1361, 2201, and 15 U.S.C. §634(b). Jurisdiction is also proper under the judicial review provisions of the Administrative Procedure Act (the “APA”) 5 U.S.C. §702. Declaratory and injunctive relief is sought consistent with 5 U.S.C. §706 and as authorized by 28 U.S.C. §2201 and 2202.

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

12. Venue for this proceeding is proper in this district pursuant to 28 U.S.C. §§1391 and 1409.

BACKGROUND

A. COSI’s business and the Chapter 11 Cases

13. On February 24, 2020 (the “Petition Date”), the Debtors each filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code in this Court (the “Chapter 11 Cases”). On the Petition Date, the Debtors moved for an order of joint administration pursuant to Bankruptcy Rule 1015(b). The Debtors remain in possession of their property and continue in the operation and management of their business as debtors-in-possession pursuant to sections 1107 and 1108 of the Bankruptcy Code.

14. The Debtors operate fast-casual restaurants and perform associated catering activities under the COSI® brand (“COSI”). COSI features flatbread made fresh throughout the day and specializes in a variety of made-to-order hot and cold sandwiches, salads, bowls, breakfast wraps, bagels, melts, soups, flatbread pizzas, snacks, desserts, and a large offering of handcrafted, coffee-based, and specialty beverages.

15. The events leading up to the Petition Date and the facts and circumstances supporting the relief requested in this Motion are set forth in the Declaration of Vicki Baue, Vice President & General Counsel, Chief Compliance Officer (CCO) and Secretary, in Support of Debtors' Chapter 11 Petitions and First-Day Pleadings [D.I.3] (the "First Day Declaration"), which is incorporated herein by reference.

16. Since the onset of the COVID-19 pandemic, the Debtors' business has virtually ground to a stand-still due to government mandated closures and stay-at-home directives in the cities and states where the Debtors' restaurants and catering hubs are located. Although the Debtors have obtained some temporary concessions from their landlords and are cutting costs everywhere they can, this is not a sustainable long-term strategy. The PPP is exactly the sort of intervention that the Debtors need to sustain their operations and preserve jobs for their employees during the pandemic.

B. The CARES Act and the PPP

17. On March 27, 2020, the President of the United States signed into law the CARES Act, S. 3548, 116 Cong. (2020). Among other things, the CARES Act is intended to protect businesses – particularly small businesses – and their employees in the hardest hit segments of the economy for the duration of the pandemic.

18. Within the CARES Act, this policy is to be carried out through the PPP, which is set forth in Title I of the CARES Act, and which amends section 7(a) of the Small Business Act. The PPP allows lenders to provide federally guaranteed loans to small businesses to cover payroll through June 30, 2020, as well as other expenses including payments of interest on mortgages, rent, utilities, and interest on other debt.

19. A qualified borrower may receive a PPP loan equal to 2.5 times its average monthly payroll, up to a limit of \$10 million. A borrower need not exhaust its other credit options prior to receiving a PPP loan.

20. PPP loans have numerous benefits: no collateral or personal guarantees are required to receive a PPP loan; neither the SBA nor the lenders charge any fees for a PPP loan; PPP loans mature in two years and carry an interest rate of just 1%; payments on PPP loans are deferred for at least six months, and loans may be forgiven entirely if the borrower uses the funds for payroll costs, interest on mortgages, rent, or utilities, and meets certain other conditions set forth in the CARES Act; and, no prepayment penalties exist.

21. Importantly, neither the CARES Act, the Small Business Act, nor any other applicable law or regulation prohibits the granting of PPP loans to bankruptcy debtors.

22. Congress initially authorized up to \$349 billion in total for the PPP. Loan applications were reviewed, and loans granted, on a “first come first served” basis. However, due to overwhelming demand, the full \$349 billion in funding was depleted in less than two weeks, and new loans ceased.

23. Congress has now allocated additional funds, and PPP loans are once again being granted on a “first come first served” basis. However, based on how quickly the prior funding disappeared, and from numerous news reports and statements by industry personnel, new applicants will need to act very quickly to receive PPP loans. See, e.g., Trish Turner, Billions more for small business not available immediately, will likely run out quickly: Lender, abcnews.go.com, April 23, 2020 (copy attached as Exhibit “A”).

C. Disqualification of Debtors from Participating in the PPP

24. To receive a PPP loan, a qualified business must apply with any federally insured participating lender, using an application form created by the SBA.

25. On or about April 2, 2020, the SBA released Official SBA Form 2483, titled “Paycheck Protection Program Borrower Application Form,” which is the SBA’s official form of application for a PPP loan (the “Borrower PPP Application”). A copy of the Borrower PPP Application is attached to this Complaint as Exhibit “B.”

26. Question No. 1 of the Borrower PPP Application asks, “Is the Applicant or any owner of the Applicant . . . presently involved in any bankruptcy? (underling added)”

27. Despite the fact that no law or regulation exists disqualifying bankruptcy debtors from the PPP, the Borrower PPP Application inexplicably states that if the applicant answers “yes” to question No. 1, “the loan will not be approved.”

28. In addition, the SBA has released Official SBA Form 2484, titled “Lender Application Form – Paycheck Protection Program Loan Guaranty,” which is the SBA’s official form that lenders must submit to the SBA in connection with a PPP loan request (the “Lender PPP Application” and, together with the Borrower PPP Application, the “PPP Applications”). A copy of the Lender PPP Application is attached to this Complaint as Exhibit “C.”

29. The Lender PPP Application asks the lender whether “[t]he Applicant has certified to the Lender that neither the Applicant nor any owner (as defined in the Applicant’s SBA Form 2483) is . . . presently involved in any bankruptcy.” Lender PPP Application at §I. The Lender PPP Application states that if the lender answers “no” to this question, “the loan cannot be approved.” Id.

30. The Debtors otherwise meet the criteria for eligibility to participate in the PPP.

31. Prior to the initial PPP funding running out, the Debtors reached out to two potential lenders regarding PPP loans, Bank of America and JP Morgan Chase, each of whom stated that they would reject the Debtors for a PPP loan based on the fact that the Debtors' response to question No. 1 on the Borrower PPP Application is "yes," regardless of any other criteria. A screen shot of the application portal from Bank of America informing the Debtors that they are ineligible to participate in the PPP is attached to this Complaint as Exhibit "D."

32. Once the SBA begins to accept new applications, the Debtors intend to apply again for a PPP loan, in an amount up to \$3,681,759.86, to cover their payroll costs and protect the jobs of their employees.

33. The Debtors are precisely the sort of business the PPP was enacted to protect – they are a small business (as defined by the SBA) in one of the industries hardest hit by the pandemic and are desperately trying to obtain funding to meet payroll for their employees. A PPP loan would allow the Debtors to endure the pandemic without having to make further layoffs.

34. However, due to what appears to be a completely arbitrary, baseless, and discriminatory requirement imposed by the SBA, the Debtors are ineligible to participate based solely on their status as a debtor under title 11 of the United States Code.

D. Other Debtors' Efforts to Obtain PPP Loans

35. Thus far, several chapter 11 debtors in various courts around the country have commenced adversary proceedings and moved for TROs or preliminary injunctions challenging the SBA's discriminatory policy. One of these courts has already ruled. On April 24, 2020, in In

re Hidalgo County Emergency Service Foundation, AP No. 20-02006 (Bankr. S.D. Tex., D. Jones, J.), (“Hidalgo County”), the court granted a TRO in the debtor’s favor providing relief including allowing the debtor to submit to any lender a Borrower PPP Application with the phrase “or presently involved in any bankruptcy” stricken, and with the box for Question No. 1 marked “no.” To the best of the Debtors’ knowledge, the Hidalgo County decision is still the only one. A copy of the court’s order granting the TRO and the transcript of the hearing in Hidalgo County, is attached as Exhibit “E.”

36. In addition, the Debtors have learned of other debtors in bankruptcy who have managed to obtain PPP loans in ways that demonstrate the absurdity of the SBA’s policy. For example, Longview Power, LLC filed a pre-packaged bankruptcy case in this Court on April 14, 2020, two business days after having successfully applied for a PPP loan, and before it had even received the funding. In Longview Power’s “first day” declaration, its CEO stated, “Longview has applied for a loan with the Small Business Administration under the Payroll Protection Program and was notified on April 10, 2020, that the loan was approved. Longview expects to receive the funds postpetition and expects to learn more about the amount of the loan following the Petition Date. Longview expects to use the loan proceeds to fund payroll.” *See Declaration of Jeffrey C. Keffer, Chief Executive Officer of Longview Power, LLC*, at ¶45 (docket No. 4, April 14, 2020) (Bankr. D. Del. No. 20-10951-BLS).

37. Similarly, on April 20, 2020, the first day of its bankruptcy case, another debtor, Elemental Processing, LLC filed a section 364 motion in which it stated without explanation, “The Debtor has filed pre-petition an application with the Small Business Administration through the CARE Act seeking a Payroll Protection Program loan. The Debtor has been approved for a loan of \$750,000 for use toward business operations of payroll, rent, utilities, etc.,

and the Debtor desperately needs such funding to operate its business.” See Motion for Authority to Incur Debt for Post-Petition PPP Funds, at ¶5 (docket No. 13, April 20, 2020) (Bankr. E.D. Ky., No. 20-50640).

38. On April 21, 2020, the Debtor in In re Mountain States Rosen, LLC, No. 20-20111(Bankr. D. Wyo.) filed a motion under section 364 of the Bankruptcy Code for court approval of a PPP loan which the debtor, without explanation, stated had been approved. A fully executed promissory note attached to the debtor’s motion evidences that the loan indeed does appear to have been approved.

39. In In re Advanced Power Technologies, LLC, No. 20-11304 (Bankr. S.D. Fla.) (“Advanced Power”), the debtor filed an emergency motion to dismiss its own case solely for the purpose of obtaining a PPP loan. On April 24, 2020, the court in that case granted the debtor’s motion and dismissed the case without prejudice. Upon information and belief, the debtor filed a PPP application that same day.

40. No possible justification exists for a scheme that permits a debtor to obtain a PPP loan on the very eve of its bankruptcy case, while denying that same loan to a debtor subsequent to its petition date. In fact, the SBA itself would be better served in the latter scenario, as it would be deemed a post-petition lender instead of relegated to pre-petition general unsecured status. Likewise, the fact that Advanced Power had to dismiss its own bankruptcy case in order to apply for a PPP loan demonstrates the wrong-headedness of the SBA’s policy.

41. The Hidalgo County court also recognized that a debtor-in-possession is subject to strict controls, which would help ensure that PPP loan proceeds are used for their intended purposes. In rejecting an argument made by the SBA that it would somehow have insufficient control over a debtor’s use of funds, the court explained:

They [the words “involved in any bankruptcy”] are intended to be discriminatory toward debtors for reasons offered that somehow we [i.e. the SBA] lose control of the money, again I find to be completely frivolous. I cannot imagine anything less controlling than to simply give out money with no underwriting, with no oversight, and then complain that if I have a Federal judge who makes sure that the debtor complies with the law, ensures that the debtors file monthly operating reports, ensure that copies of bank statements are filed on the docket every month, that they somehow lost control. I simply don't buy it. I find the arguments to lack any good faith.

Hidalgo County, Transcript, at pp.31-32 (Exhibit E to the Baue Declaration).

42. Accordingly, the Debtors bring this Complaint seeking a declaratory judgment, injunctive relief, a writ of mandamus, and related relief to compel the SBA to allow them to participate in the PPP to the same extent as a similarly situated non-debtor.

COUNT I

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

43. The Debtors repeat and incorporate by reference each and every allegation set forth above as though fully set forth herein.

44. Section 525(a) of the Bankruptcy Code provides in relevant part that “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, [or] discriminate with respect to such a grant 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”

45. Section 525(a)'s list is illustrative, and not exhaustive. See, e.g., In re Stinson, 285 B.R. 239, 246 (Bankr. W.D. Va. 2002) (“The enumerations in § 525(a) are not intended to be an exhaustive list, rather the section was drafted to permit further development of prohibited discriminatory treatment. When read as a starting point, and not an exclusive and circumscribed

list, the enumerations in § 525(a) can be viewed as examples of prohibited discriminatory treatment and not the only instances thereof.”) (citing Collier on Bankruptcy, ¶ 525.01); H. Rep. No. 95–595, 95th Cong., 1st Sess. 366–67 (1977) (“In addition, the section is not exhaustive. The enumeration of various forms of discrimination against former bankrupts is not intended to permit other forms of discrimination.”).

46. In Hidalgo County – to date the only ruling on the application of section 525(a) to the PPP – the court held that the SBA’s automatic disqualification of bankruptcy debtors from the PPP, including without limitation via the disqualification language in the PPP Applications, violates section 525(a) and is impermissible. See Transcript at pp. 29-32 (Exhibit E to the Baue Declaration).

47. The PPP is a government program designed to provide relief to small businesses and their employees adversely affected by COVID-19.

48. Through the “bankruptcy disqualification” provisions of the PPP Applications, as well as potentially other means, the SBA is denying the Debtors the ability to participate in the PPP program on the sole basis that they are debtors in bankruptcy, in violation of section 525(a) of the Bankruptcy Code.

49. Importantly, the Debtors are not being denied access to the PPP because of their creditworthiness. In fact, the PPP was enacted precisely to provide relief to struggling small businesses such as the Debtors in industries hard hit by the pandemic, without regard to their creditworthiness. In its Interim Rule published on April 20, 2020 (the “Third Interim Rule”), the SBA stated, “The Administrator recognizes that, unlike other SBA loan programs, the financial terms for PPP Loans are uniform for all borrowers, and the standard underwriting process does not apply because no creditworthiness assessment is required for PPP Loans.” Third Interim

Rule, 13 CFR 120, 85 FR 21747, pp. 21747-21752 (p. 14 of printed version). A copy of the Third Interim Rule is attached to the Baue Declaration as Exhibit “F.”

50. This disavowal by the SBA of any concern for creditworthiness cuts directly against any argument it might make that its exclusion of bankruptcy debtors is motivated by this concern.

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

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

53. Through the “bankruptcy disqualification” provisions of the PPP Applications the SBA has violated, and continues to violate, section 525(a) of the Bankruptcy Code by discriminating against debtors in bankruptcy.

54. The SBA’s violation of section 525(a) is causing ongoing harm to the Debtors.

55. The Debtors are entitled to a declaratory judgment that the SBA’s implementation of the PPP in a manner that arbitrarily excludes debtors in bankruptcy, including the Debtors, is unlawful and discriminatory in violation of section 525(a) of the Bankruptcy Code.

56. Further, the Debtors are entitled to preliminary and permanent injunctive relief enjoining the SBA from denying the Debtors a loan under the PPP based on their status as

debtors in bankruptcy, and enjoining the SBA from disbursing or otherwise allocating \$3,681,759.86 from the PPP, i.e. setting aside such amount, which represents the Debtors' loan amount.

57. The Debtors are likely to succeed on the merits of their claims against the SBA.

58. The Debtors will suffer immediate and irreparable harm as a result of the unlawful disqualification of debtors from the PPP, because the PPP offers guaranteed loans with favorable terms that are not otherwise available in the private marketplace, and the PPP funds are being rapidly depleted and, once exhausted, will no longer be available unless Congress enacts further relief. Without a PPP loan, the Debtors may be forced to lay off employees or shut down entirely, which would have a permanent harmful effect on their bankruptcy estates.

59. The balance of hardships weighs heavily in favor of the issuance of injunctive relief for the Debtors. In contrast to the existential harm threatening the Debtors, the SBA would suffer no hardship at all.

60. The Debtors have no adequate remedy at law.

61. Accordingly, the Debtors respectfully request: (a) a declaratory judgment that the SBA's implementation of the PPP in a manner that arbitrarily excludes debtors in bankruptcy, including the Debtors, violates section 525(a) of the Bankruptcy Code; (b) preliminary and permanent injunctive relief enjoining the SBA from denying the Debtors a loan under the PPP based on the Debtors' status as debtors in bankruptcy and (c) preliminary and permanent injunctive relief enjoining the SBA from disbursing or otherwise allocating \$3,681,759.86 from the PPP, i.e. setting aside such amount, which represents the Debtors' loan amount.

62. In addition, in the event that the Debtors are denied a PPP loan or are precluded from participation in the PPP based upon their status as bankruptcy debtors, the Debtors request judgment against the SBA for compensatory damages in an amount to be determined at trial, plus costs and attorneys' fees as provided for and authorized by law.

COUNT II

Administrative Procedure Act – Exceeding Statutory Authority

63. The Debtors repeat and incorporate by reference each and every allegation set forth above as though fully set forth herein.

64. Under the APA, courts must “hold unlawful and set aside agency action” that is “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.” 5 U.S.C. §706(c)(2).

65. The SBA may only exercise the authority conferred upon it by statute.

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

67. On April 2, 2020, the SBA issued an interim final rule (the “First Interim Rule”) providing guidance on, *inter alia*, the eligibility requirements to receive a loan under the PPP. The First Interim Rule adopts the eligibility standards contained in section 120.110, title 13 of the Code of Federal Regulations (“CFR 120.110”), as further described in the SBA’s Standard Operating Procedure 50-10, subpart B, Chapter 2 (the “SOP 50-10”). See First Interim Rule, 2(c) (“Businesses that are not eligible for PPP loans are identified in 13 CFR 120.110 and described further in SBA’s Standard Operating Procedure”).

68. The SOP 50-10 provides that in order to be eligible for a small business loan, an applicant must: “be an operating business;” “be organized for profit;” “be located in the United States (including its territories and possessions);” “be small under SBA size requirements;” and “demonstrate the need for desired credit.” See SOP 50-10, pp. 91-104.

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

70. On April 4, 2020, the SBA issued a supplemental interim final rule (the “Second Interim Rule”) providing further guidance on the PPP. Like the First, the Second Interim Rule does not state that bankruptcy debtors are ineligible for a PPP loan.

71. On April 20, 2020, the SBA issued the Third Interim Rule. Not only does the Third Interim Rule make no mention of bankruptcy debtors, but it specifically states, “The Administrator recognizes that, unlike other SBA loan programs, the financial terms for PPP Loans are uniform for all borrowers, and the standard underwriting process does not apply because no creditworthiness assessment is required for PPP Loans.” Third Interim Rule, 13 CFR 120, 85 FR 21747, pp. 21747-21752 (p. 14 of printed version). This disavowal by the SBA of any concern for creditworthiness cuts directly against any argument it might make that its exclusion of bankruptcy debtors is motivated by this concern.

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

73. However, the SBA issued the PPP Applications, which state that a PPP loan will not be approved if the applicant is “presently involved in any bankruptcy.”

74. The SBA's implementation of the PPP in a manner that causes debtors in bankruptcy, including the Debtors, to be automatically ineligible is "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right," in violation of the APA. 5 U.S.C. §706(2)(C).

75. The SBA has made a final determination with respect to the issuance of the PPP Application and the arbitrary exclusion of bankruptcy debtors from the benefits and protections of the PPP.

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

77. The SBA's violation of the APA is causing ongoing harm to the Debtors.

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

79. Further, the Debtors are entitled to preliminary and permanent injunctive relief enjoining the SBA from denying the Debtors a loan under the PPP based on the Debtors' status as chapter 11 debtors, and enjoining the SBA from disbursing or otherwise allocating \$3,681,759.86 from the PPP, i.e. setting aside such amount, which represents the Debtors' loan amount.

80. The Debtors are likely to succeed on the merits of their claims against the SBA.

81. The Debtors will suffer immediate and irreparable harm as a result of the unlawful disqualification of debtors from the PPP, because the PPP offers guaranteed loans with favorable terms that are not otherwise available in the private marketplace, and the PPP funds are being rapidly depleted and, once exhausted, will no longer be available unless Congress enacts further relief. Without a PPP loan, the Debtors may be forced to lay off employees or shut down entirely, which would have a permanent harmful effect on their bankruptcy estates.

82. The balance of hardships weighs heavily in favor of the issuance of injunctive relief for the Debtors. In contrast to the existential harm threatening the Debtors, the SBA would suffer no hardship at all.

83. The Debtors have no adequate remedy at law.

84. Accordingly, the Debtors respectfully request: (a) a declaratory judgment that the SBA's implementation of the PPP in a manner that causes debtors in bankruptcy, including the Debtors, to be ineligible is "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right," in violation of the APA; (b) preliminary and permanent injunctive relief enjoining the SBA from denying the Debtors a loan under the PPP based on the Debtors' status as debtors in bankruptcy and (c) preliminary and permanent injunctive relief enjoining the SBA from disbursing or otherwise allocating \$3,681,759.86 from the PPP, i.e. setting aside such amount, which represents the Debtors' loan amount.

COUNT III

Administrative Procedure Act – Arbitrary and Capricious

85. The Debtors repeat and incorporate by reference each and every allegation set forth above as though fully set forth herein.

86. The APA provides that courts must “hold unlawful and set aside” agency action that is “arbitrary, capricious, [or] an abuse of discretion.” 5 U.S.C. §706(2)(A).

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

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

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

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

91. The SBA has made a final determination with respect to the issuance of the PPP Applications and its arbitrary and unjustifiable exclusion of bankruptcy debtors from participating in the PPP.

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

93. The SBA’s violation of the APA is causing ongoing harm to the Debtors.

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

95. Further, the Debtors are entitled to preliminary and permanent injunctive relief enjoining the SBA from denying the Debtors a loan under the PPP based on their status as debtors in bankruptcy, and enjoining the SBA from disbursing or otherwise allocating \$3,681,759.86 from the PPP, i.e. setting aside such amount, which represents the Debtors' loan amount.

96. The Debtors are likely to succeed on the merits of their claims against the SBA.

97. The Debtors will suffer immediate and irreparable harm as a result of the unlawful disqualification of debtors from the PPP, because the PPP offers guaranteed loans with favorable terms that are not otherwise available in the private marketplace, and the PPP funds are being rapidly depleted and, once exhausted, will no longer be available unless Congress enacts further relief. Without a PPP loan, the Debtors may be forced to lay off employees or shut down entirely, which would have a permanent harmful effect on their bankruptcy estates.

98. The balance of hardships weighs heavily in favor of the issuance of injunctive relief for the Debtors. In contrast to the existential harm threatening the Debtors, the SBA would suffer no hardship at all.

99. The Debtors have no adequate remedy at law.

100. Accordingly, the Debtors respectfully request: (a) a declaratory judgment that the SBA's implementation of the PPP in a manner that causes debtors in bankruptcy, including the Debtors, to be ineligible is "arbitrary, capricious, [or] an abuse of discretion" in violation of the

APA; (b) preliminary and permanent injunctive relief enjoining the SBA from denying the Debtors a loan under the PPP based on the Debtors' status as debtors in bankruptcy and (c) preliminary and permanent injunctive relief enjoining the SBA from disbursing or otherwise allocating \$3,681,759.86 from the PPP, i.e. setting aside such amount, which represents the Debtors' loan amount.

COUNT IV

Mandamus Under 28 U.S.C. §1361

101. The Debtors repeat and incorporate by reference each and every allegation set forth above as though fully set forth herein.

102. The SBA has a non-discretionary duty to comply with the CARES Act and the provisions of the PPP, to apply criteria to the PPP that are substantively and procedurally valid, and to avoid imposing criteria to the PPP that are substantively and procedurally *ultra vires*.

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

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

COUNT V

Declaration Regarding Interpretation of Ambiguous Language

105. The Debtors repeat and incorporate by reference each and every allegation set forth above as though fully set forth herein.

106. The PPP Applications state that any applicant “presently involved in any bankruptcy” is ineligible to participate in the PPP.

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

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

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

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

These loans will bring immediate economic relief and eight weeks of financial certainty to millions of small businesses and their employees,” SBA Administrator Carranza said. “We urge every struggling small business to take advantage of this unprecedented federal resource – their viability is critically important to their employees, their community, and the country.⁴

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

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

113. On the other hand, no principled distinction can be made between a chapter 11 debtor-in-possession and any other “struggling small business.” In fact, businesses having the characteristics of most debtors-in-possession are among the core targets of the PPP. Accordingly, the best-fit interpretation of the phrase “involved in any bankruptcy,” should not disqualify chapter 11 debtors-in-possession from the PPP.

⁴ SBA’s Paycheck Protection Program for Small Businesses Affected by the Coronavirus Pandemic Launches, April 3, 2020.

114. Accordingly, the Debtors respectfully request: (a) a declaratory judgment stating that the questions in the PPP Applications that ask whether the Applicant is “presently involved in any bankruptcy” shall be interpreted as asking only whether the applicant is a debtor in a case under chapter 7 of the Bankruptcy Code; (b) preliminary and permanent injunctive relief enjoining the SBA from applying any other interpretation; and (c) preliminary and permanent injunctive relief enjoining the SBA from disbursing or otherwise allocating \$3,681,759.86 from the PPP, i.e. setting aside such amount, which represents the Debtors’ loan amount.

PRAYER FOR RELIEF

WHEREFORE, the Debtors respectfully request the entry of judgment in their favor, and against the SBA, granting the following relief:

a. On Count I: (a) a declaratory judgment that the SBA’s implementation of the PPP in a manner that arbitrarily excludes debtors in bankruptcy, including the Debtors, violates section 525(a) of the Bankruptcy Code; (b) preliminary and permanent injunctive relief enjoining the SBA from denying the Debtors a loan under the PPP based on the Debtors’ status as debtors in bankruptcy; (c) preliminary and permanent injunctive relief compelling the SBA to remove from all PPP Applications its disqualification of bankruptcy debtors as viable applicants, compelling the SBA to instruct all lending institutions administering PPP loans that there is no exclusion from the PPP loan program on account of an applicant’s involvement in bankruptcy; (d) preliminary and permanent injunctive relief enjoining the SBA from disbursing or otherwise allocating \$3,681,759.86 from the PPP, i.e. setting aside such amount, which represents the Debtors’ loan amount; and (e) in the event that the Debtors are denied a PPP loan or are precluded from participation in the PPP based upon their status as bankruptcy debtors, judgment

against the SBA for compensatory damages in an amount to be determined at trial, plus costs and attorneys' fees as provided for and authorized by law.

b. On Count II: (a) a declaratory judgment that the SBA's implementation of the PPP in a manner that causes debtors in bankruptcy, including the Debtors, to be ineligible is "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right," in violation of the APA; (b) preliminary and permanent injunctive relief enjoining the SBA from denying the Debtors a loan under the PPP based on the Debtors' status as debtors in bankruptcy; (c) preliminary and permanent injunctive relief compelling the SBA to remove from all PPP Applications its disqualification of bankruptcy debtors as viable applicants, and compelling the SBA to instruct all lending institutions administering PPP loans that there is no exclusion from the PPP loan program on account of an applicant's involvement in bankruptcy; and (d) preliminary and permanent injunctive relief enjoining the SBA from disbursing or otherwise allocating \$3,681,759.86 from the PPP, i.e. setting aside such amount, which represents the Debtors' loan amount.

c. On Count III: (a) a declaratory judgment that the SBA's implementation of the PPP in a manner that causes debtors in bankruptcy, including the Debtors, to be ineligible is "arbitrary, capricious, [or] an abuse of discretion" in violation of the APA; (b) preliminary and permanent injunctive relief enjoining the SBA from denying the Debtors a loan under the PPP based on the Debtors' status as debtors in bankruptcy; (c) preliminary and permanent injunctive relief compelling the SBA to remove from all PPP Applications its disqualification of bankruptcy debtors as viable applicants, and compelling the SBA to instruct all lending institutions administering PPP loans that there is no exclusion from the PPP loan program on account of an applicant's involvement in bankruptcy; and (d) preliminary and permanent

injunctive relief enjoining the SBA from disbursing or otherwise allocating \$3,681,759.86 from the PPP, i.e. setting aside such amount, which represents the Debtors' loan amount.

d. On Count IV: a writ of mandamus under 28 U.S.C. §1361 to compel the SBA to remove from all PPP Applications all prohibitions against debtors in bankruptcy participating in the PPP.

e. On Count V: (a) a declaratory judgment stating that the questions in the PPP Applications that ask whether the Applicant is "presently involved in any bankruptcy" shall be interpreted as asking only whether the applicant is a debtor in a case under chapter 7 of the Bankruptcy Code; (b) preliminary and permanent injunctive relief enjoining the SBA from applying any other interpretation; and preliminary and permanent injunctive relief enjoining the SBA from disbursing or otherwise allocating \$3,681,759.86 from the PPP, i.e. setting aside such amount, which represents the Debtors' loan amount.

f. An award of costs in favor of the Debtors.

g. And, any such other relief in favor of the Debtors that may be appropriate.

Dated: April 28, 2020

COZEN O'CONNOR

/s/ Mark E. Felger

Mark E. Felger (No. 3919)
Simon E. Fraser (No. 5335)
1201 N. Market Street, Suite 1001
Wilmington, DE 19801
T: 302-295-2000 / F: 302-295-2013
Email: mfelger@cozen.com
sfraser@cozen.com

Attorneys for the Debtors