

CASE NO. 20-13462

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UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

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**USF FEDERAL CREDIT UNION**  
**Appellant**  
v.  
**GATEWAY RADIOLOGY CONSULTANTS, P.A.**  
**Appellee**

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ON APPEAL FROM THE UNITED STATES BANKRUPTCY COURT FOR  
THE MIDDLE DISTRICT OF FLORIDA

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Case. No. 19-bk-4971-MGW  
Adv. Pro. No. 19-ap-330-MGW

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**APPELLANT**  
**USF FEDERAL CREDIT UNION'S INITIAL BRIEF**

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**CERTIFICATE OF INTERESTED PERSONS  
AND CORPORATE DISCLOSURE STATEMENT**

Appellant, USF Federal Credit Union, hereby certifies that the following, pursuant to Rule 26.1, Fed. R. App. P., and the 11<sup>th</sup> Cir. Rule 26.1-1:

The name of the trial judge(s), all attorneys, persons, associations, or persons, associations of persons firms, partnerships, or corporations that have an interest in the outcome of this particular case or appeal, including subsidiaries, conglomerates, affiliates and parent corporations, including any publicly held entity that own 10% or more of the party's stock and other identifiable legal entities related to a party:

1. Achieva Credit Union
2. American Express (“AXP”)
3. Aresty, Joel
4. Bankruptcy Estate of Gateway Radiology Consultants, P.A.
5. Barnett, Denise
6. Beighley, Myrick, Udell & Lynne, P.A.
7. Boston Scientific Corp. (“BSX”)
8. Cherry Bekaert LLP
9. Chetan Raina
10. Choice Health
11. Emanuel & Zwiebel, PLLC
12. Emden, Christopher

13. Eric B. Zwiebel, P.A.
14. Everbank TIAA Commercial Finance, Inc.
15. FL Legal Group
16. Gagandeep S. Mangat MD
17. Gateway Holding LLC
18. Gateway Radiology Consultants, PA
19. Gilbert, Adam
20. Global Imaging Specialists, LLC
21. Gray Robinson, P.A.
22. Harish Patel
23. Henry Schein, Inc. (“HSIC”)
24. Hissing, Brad
25. Hunt, Joseph
26. Jensen, Paul
27. Joel Aresty, P.A.
28. Jovita Carranza, In Her Capacity as Administrator for The U.S.  
Small Business Administration
29. KK Real Estate LLC
30. Murray, Megan
31. Office of the United States Trustee

32. Philips Healthcare, a division of Philips North America, LLC  
("PHG")
33. Radiographic Engineering, Inc.
34. Ramsoft USA Inc. (CA)
35. Raymond James & Assoc ("RJF")
36. RH Fund XIV
37. S Jacob & Wolf LP
38. Saiber LLC
39. Sherman, Lynn
40. Small Business Administration
41. Socuis Marketing, Inc.
42. Solomon, Steven
43. The Hon. Mary S. Scriven
44. The Hon. Michael G. Williamson
45. The Hon. Thomas P. Barber
46. The Hon. Virginia M. Hernandez Covington
47. The United States of America on behalf of the Small Business  
Administration
48. Trenam Law
49. Trilogy Medwaste, Inc.

50. Udell, Maury
51. Underwood Murray, P.A.
52. United States Trustee – TPA
53. US Bank Equipment Finance (“USB”)
54. USF Federal Credit Union
55. Vimal H. Patel MD
56. Wetherington Hamilton, P.A.
57. Zeichman, Thomas
58. Zwiebel, Eric

/s/ Megan W. Murray  
Megan W. Murray, Esq.  
Attorney for USF Federal Credit Union

## TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT .....	i
TABLE OF CONTENTS.....	v
TABLE OF CITATIONS .....	vii
STATEMENT OF ORAL ARGUMENT .....	1
STATEMENT OF JURISDICTION.....	1
STATEMENT OF ISSUES .....	4
STATEMENT OF THE CASE.....	4
<i>Course of Proceedings and Statement of the Facts</i> .....	4
STANDARD OF REVIEW .....	9
SUMMARY OF THE ARGUMENT .....	9
ARGUMENT .....	10
A. The Bankruptcy Court Failed to Follow Precedent .....	10
B. The PPP Loan Was Approved by Fraud or Mistake, Without a Meeting of the Minds .....	14
C. The Bankruptcy Court Erred in its Administrative Procedures Act Ruling ....	16

D. There is a Great Risk of Irreparable Injury to USF .....17

E. The Threat of Harm Extends Beyond USF .....18

CONCLUSION .....19

CERTIFICATE OF 32(g)(1) COMPLIANCE .....20

CERTIFICATE OF SERVICE .....21

**TABLE OF CITATIONS**

**Cases**

*Bonner v. City of Prichard, Alabama*, 661 F.2d 1206, 1209 (11th Cir. 1981).....11

*Expedient Services, Inc v. Weaver*, 614 F.2d 56, 58 (5th Cir. 1980).....11

*Hidalgo County Emergency Service Foundation v. Carranza*, Case No. 20-40368,  
\*3 (5th Cir. June 22, 2020) .....11

*In re Optical Techs., Inc.*, 425 F.3d 1294, 1300 (11th Cir. 2005) .....8

*Jones v. Fransen*, 857 B.R. 843, 850 (11th Cir. 2017).....2

*King v. Cessna Aircraft Co.*, 562 F.3d 1374, 1380 (11th Cir. 2009).....2

*United States v. Appolon*, 715 F.3d 362, 368–69 (1st Cir. 2013).....9

*United States v. Rossomando*, 144 F.3d 197, 201 (2d Cir. 1998).....9

*United States v. Waters*, 937 F.3d 1344, 1357 (11th Cir. 2019), cert. denied,  
140 S. Ct. 2516, 206 L. Ed. 2d 467 (2020).....9

*Wortley v. Bakst*, 844 F.3d 1313, 1318 (11th Cir. 2017).....1

**Statutes**

§ 364(b) .....1

§1334(b) .....1

28 U.S.C. §157 .....1

28 U.S.C. §158(d)(2).....1



### **STATEMENT OF ORAL ARGUMENT**

All parties agreed to an expedited briefing schedule based on the time sensitive nature of the issues on appeal. To the extent the Court would permit oral argument and find it helpful in the resolution of this appeal, USF requests oral argument which may be facilitated by telephonic or video conferencing at the Court's pleasure.

### **STATEMENT OF JURISDICTION**

Gateway Radiology Consultants, P.A. (the “**Debtor**” or “**Gateway**”) is a debtor in bankruptcy in the United States Bankruptcy Court (“**Bankruptcy Court**”), Middle District of Florida (Case No. 19-bk-4791-MGW) (the “**Bankruptcy Case**”).

The issues on appeal relate the Debtor's acquisition of a Paycheck Protection Program (“**PPP**”) loan under the CARES Act (discussed below), obtained after the Debtor filed bankruptcy under Title 11 of the United States Code.

On July 1, 2020, Honorable Judge Michael G. Williamson certified his Approval Order and Injunction Order (defined below) to the Eleventh Circuit Court of Appeals because of the recurring issues that come before bankruptcy courts across the county and the urgent need to decide this issue in the uncertain times of COVID-19.

Following this direct certification to this Honorable Court of the Injunction Order (defined below), and the Debtor's Petition for Direct Appeal (*see* Case No.

20-90014), USF Federal Credit Union (“**USF**”) filed a Cross Petition for permission to take direct appeal from the following appealed orders from the Bankruptcy Court (*see* Case No. 20-90015, and with 20-90014 consolidated into the instant case):

- 1) Order Granting Preliminary Injunction (the “**Injunction Order**”)<sup>1</sup> (Doc. No. 29 in Adversary Proceeding No. 20-ap-330-MGW (the “**Adversary Proceeding**”));
- 2) related to that certain “**Memorandum Opinion**,” (Doc. No. 17 in the Adversary Proceeding);
- 3) Order Granting Motion for Approval to Borrow Paycheck Protection Program Loan (Doc. No. 266 in the Bankruptcy Case) (“**Approval Order**”);<sup>2</sup> and
- 4) Order Granting Motion for Stay Pending Appeal of Order Granting Motion for Injunction (Doc. No. 313 in the Bankruptcy Case) (“**Stay Order**”) (collectively the “**Orders**”).<sup>3</sup>

This Court has jurisdiction to review the Approval Order, a final order of the Bankruptcy Court, pursuant to 28 U.S.C. §158(d)(2), which governs certification of

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<sup>1</sup> Appealed by the SBA.

<sup>2</sup> Appealed by Gateway and USF.

<sup>3</sup> Appealed by Gateway. Due to the condensed timeframe for briefing, the Court does not yet have the record on appeal. All references are to the Bankruptcy Court Case and Adversary Proceeding unless otherwise indicated. USF will be filing an Appendix as required.

a judgment, order, or decree of a bankruptcy court for direct review in a court of appeals.

Because the Approval Order is dependent on, and inextricably intertwined with the Bankruptcy Court's Memorandum Opinion and Injunction Order, this Court may properly exercise pendant appellate jurisdiction to review these orders as well. *See Jones v. Fransen*, 857 B.R. 843, 850 (11th Cir. 2017) (internal alterations accepted) (noting the doctrine of pendent appellate jurisdiction permits this Court to “[a]ddress otherwise nonappealable orders if they are inextricably intertwined with an appealable decision or if review of the former decision [is] necessary to ensure meaningful review of the latter.”).

Two orders are inextricably intertwined where, as here, the Bankruptcy Court, issued the Approval Order by relying on separate orders (the Memorandum Opinion and the Injunction Order) as the basis for its decision. *See King v. Cessna Aircraft Co.*, 562 F.3d 1374, 1380 (11th Cir. 2009).

Likewise, this Court may properly exercise pendant appellate jurisdiction over the SBA even where the SBA is not a party to the Approval Order. *See Leslie v. Hancock*, 720 F.3d 1338, 1270 (2013) (pendent appellate jurisdiction over a party is appropriate when pendent jurisdiction over an otherwise nonappealable order is appropriate).

After considering these jurisdictional issues and requesting briefing from the

parties (See Case No. 20-90014, Response to Jurisdictional Question), the Court granted the Petition on September 16, 2020.

### **STATEMENT OF ISSUES**

Whether the Bankruptcy Court can order USF to fund an unsecured and non-underwritten Paycheck Protection Program loan obtained by a debtor in bankruptcy who provided false information in the loan application, if the loan is not guaranteed by the U.S. Small Business Administration?

Whether the Bankruptcy Court failed to follow binding precedent prohibiting a bankruptcy court from enjoining the SBA from making a rule prohibiting a debtor from participating in the Paycheck Protection Program.

### **STATEMENT OF THE CASE**

USF is caught in a dispute largely between Gateway Radiology Consultants, P.A. (“**Gateway**”) and the U.S. Small Business Administration (“**SBA**”) regarding whether Gateway is disqualified from a PPP loan under the CARES Act by virtue of its status as a debtor. USF seeks review of the Bankruptcy Court’s Approval Order, based on the Injunction Order, which requires USF to fund an unsecured, unguaranteed loan not underwritten, because the PPP did not require financial underwriting.

#### ***Course of Proceedings and Statement of the Facts***

Gateway operates a diagnostic imaging center that provides diagnostic

services to assist in the treatment of cancer and vascular diseases (Bankr. Case, Doc. 2).

On May 28, 2019, Gateway filed a voluntary petition for relief under chapter 11 of title 11 of the United States Code, commencing the Bankruptcy Case.

Nearly a year into the case, without seeking Bankruptcy Court approval<sup>4</sup> or even notifying its other creditors, on April 27, 2020, Gateway applied for a Paycheck Protection Program loan with the SBA from USF pursuant to the CARES Act (Coronavirus Aid, Relief, and Economic Security Act, H.R. 748)<sup>5</sup> (Adv. Doc. 14 at 1). The CARES Act provides for the “Paycheck Protection Program” (“PPP”), which provides hundreds of billions of dollars in funding to small businesses to cover expenses like payroll, benefits, mortgage interest, rent and utilities, with the goal of continuing business operations and minimizing job loss (Bankr. Case, Doc. 14 at 1).

A PPP loan functions somewhat like a grant insofar as, if the borrowing business utilizes the funds for covered expenses, the PPP loan is forgiven (Adv. Pro. Doc. 14 at 7-8). Recognizing the need to get much needed stimulus funds to struggling businesses quickly during the pandemic, Congress and the SBA dispensed with the underwriting typically required for SBA loans (Adv. Pro. Doc. 14 at 1). As

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<sup>4</sup> See 11 U.S.C. § 364.

<sup>5</sup> Citations referencing pleadings filed in the United States Bankruptcy Court, Middle District of Florida Case. No. 19-bk-4971-MGW are cited as “(Bankr. Case, Doc.)”

long as a business meets minimal eligibility requirements, none of which are financial in nature, it generally qualifies for the PPP.

This is not to say that all businesses are permitted to obtain a PPP Loan. The SBA promulgated a rule, for example, that disqualifies debtors already in bankruptcy from participating in the PPP. (Adv. Pro. Doc. 14 at 2).

Gateway's PPP loan application represented to the SBA and USF that it was *not* a debtor in bankruptcy and *not* in default of another SBA loan. (Adv. Pro. Doc. 1 at 14). Both representations were false. (Adv. Pro. Doc. 1 at 18-19). Unbeknownst to USF, Gateway already had been in bankruptcy for a year and was already in default on another SBA loan. (Bankr. Case, Doc. 289 at 4).

Gateway's PPP loan application in the amount of \$527,710 was thus approved by USF, without financial underwriting, based on its mistaken understanding that Gateway was not a debtor in bankruptcy and that therefore, the PPP loan would be guaranteed by the SBA. *Id.*

On or about May 13, 2020, USF funded into a sub-account the PPP loan with its own funds, not those of the SBA or the U.S. Department of Treasury, in the amount of \$527,710. *Id.*

The PPP loan is one of USF's largest loans, and risk of non-repayment would be financially disastrous for USF. *Id.* at 4-5.

On May 20, 2020, before USF disbursed the PPP loan proceeds to Gateway, Gateway revealed to USF by email that it was a debtor in bankruptcy. Apparently acknowledging it was not eligible for the PPP loan due to the SBA's Rule, Gateway suggested to USF that there was an "error" in the transfer of its application, the reason why it answered "No" to questions 1 and 2. *Id.* at 8.

Gateway requested that USF correct the loan documents to avoid risk of non-forgiveness of the loan. *Id.* at 9.

USF froze the PPP loan proceeds and declined to disburse the funds, as the loan was not eligible for forgiveness according to the SBA. *Id.* at 4.

On May 19, 2020, Gateway filed its Emergency Motion to Borrow PPP Loan ("**Motion to Borrow**") (Bankr. Case, Doc. 238). Parties in interest in the Bankruptcy Case attended hearings on the Motion to Borrow and some creditors objected (see Bankr. Case, Doc. 254 (objecting to the extent that the PPP Loan is found to be improper and therefore not subject to forgiveness, in part because the Debtor made no showing of its ability to repay the funds)).

On May 28, 2020, Gateway filed an adversary proceeding seeking emergency injunctive relief against the SBA to compel funding and guaranty of the PPP loan, despite being in bankruptcy (Adv. Doc. 1, 3).<sup>6</sup>

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<sup>6</sup> Citations referencing pleadings filed in the Adversary Proceeding are referred to as "(Adv. Doc. \_\_\_\_)."

On June 8, 2020, the Bankruptcy Court entered its Memorandum Opinion and on June 22, 2020, the Bankruptcy Court entered its Injunction Order (Adv. Doc. 29), which the SBA appealed<sup>7</sup> (Adv. Doc. 35).

On June 24, 2020, the Bankruptcy Court entered its Approval Order requiring the SBA to approve the PPP loan, if Gateway meets the PPP requirements, other than not being in bankruptcy, and finding that Gateway is eligible for forgiveness. (Bankr. Case, Doc. 266 at 2).

USF filed its Motion for Reconsideration to Clarify Terms of Order Granting Debtors Motion for Approval to Borrow from Paycheck Protection Program Loan and for Adequate Protection, seeking additional protections if there was no appeal of the Injunction Order (Bankr. Case, Doc. 270) (denied as moot after this appeal).

On June 25, 2020, Gateway filed an Emergency Motion to Compel Compliance with Order Granting Motion for Approval to Borrow Paycheck Protection Program Loan, seeking an order that USF disburse the PPP loan funds without first resolving this appeal (Bankr. Case, Doc. 271) (also denied as moot).

USF and the SBA both appealed the Approval Order<sup>8</sup> (Bankr. Case, Docs. 278, 279).

The Bankruptcy Court entered its Stay Order, which appeal by Gateway is not

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<sup>7</sup> This appeal was docketed as case number 8:20-cv-1420.

<sup>8</sup> USF's appeal was docketed as case number 8:20-cv-1491. The SBA appealed the Approval Order, and the appeal was docketed as case number 8:20-cv-1492.



before this Court<sup>9</sup> (Bankr. Doc. Nos. 332, 335).

On July 1, 2020, the Bankruptcy Court filed its Certification of Direct Appeal to this Court.<sup>10</sup> (Bankr. Case, Doc. 291, Adv. Doc. 42). This Court took up jurisdiction of USF's appeal of the Approval Order<sup>11</sup> and the parties agreed to an expedited briefing schedule. However, due to the Approval Order's integral reliance on the Injunction Order, this Court may consider the issues addressed by the Bankruptcy Court in the Injunction Order to the extent necessary to resolve the Approval Order.

### **STANDARD OF REVIEW**

This Court reviews a bankruptcy court's factual findings for clear error and the bankruptcy court's legal conclusions *de novo*. *In re Optical Techs., Inc.*, 425 F.3d 1294, 1300 (11th Cir. 2005). The legal issue before the Court of whether a debtor that filed a bankruptcy petition in the Eleventh Circuit is eligible to obtain a PPP loan (and eligible for forgiveness of that loan) should be reviewed *de novo*.

### **SUMMARY OF THE ARGUMENT**

USF appealed the Bankruptcy Court's Approval Order approving a PPP loan

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<sup>9</sup> This appeal was docketed as case number 8:20-cv-1716.

<sup>10</sup> USF filed its Motion to Transfer and Consolidate 8:20-cv-1491, 8:20-cv-1492 and 8:20-cv-1420 (District Court Case 8:20-cv-1491 Doc. No. 5) and the district court consolidated 8:20-cv-1716, 8:20-cv-1420, 8:20-cv-1491, and 8:20-cv-1492 into 8:20-cv-1420. (8:20-cv-1492, Doc. 4).

<sup>11</sup> Gateway's appeal of the Stay Order (8:20-cv-1716) has not been certified for direct appeal to this Court.

obtained by a debtor in bankruptcy through misrepresentation, because it would force USF to fund an unsecured, unguaranteed and non-underwritten loan.

The Approval Order, in turn, relied on the Bankruptcy Court's Injunction Order which required the SBA to allow a debtor to participate in the PPP, notwithstanding the SBA's rule to the contrary.

The threat of irreparable harm caused by the potential non-repayment of an unsecured \$527,710 loan would be financially devastating to USF, to no fault of USF. If Gateway is disqualified from participating in the PPP, USF seeks to avoid funding an unguaranteed loan to Gateway, as that was not the bargain USF struck.

Because the Bankruptcy Court did not follow Eleventh Circuit precedent and exceeded its authority in enjoining the SBA, the Court should reverse.

### **ARGUMENT**

The Bankruptcy Court's Approval Order forces USF into the untenable position of potentially having to fund an unsecured \$527,710 loan to Gateway, a debtor in bankruptcy, without any assurance of repayment. This "loan", (now facing the potential for forgiveness without the SBA's guaranty), is not a loan USF ever would have made but for the misrepresentations in the application.

#### **A. The Bankruptcy Court Failed to Follow Precedent**

Here the Bankruptcy Court was required to follow binding precedent which prohibits a bankruptcy court from enjoining the SBA, particularly its ability to make

rules and regulations necessity to carry out its lending program.

In 1953, Congress created the SBA but narrowed the United States' sovereign immunity, permitting the SBA to "sue and be sued." 15 U.S.C. § 634(b)(1); *see also Means v. United States*, 176 F.3d 1376, 1378 (11th Cir. 1999) ("It is well settled that sovereign immunity bars suit against the United States except to the extent that it consents to be sued.").

Since then, this Circuit has consistently opined that the SBA cannot be enjoined. *See Romeo v. United States*, 462 F.2d 1036, 1038 (5th Cir. 1972) ("Clearly, then, Romeo's suit is barred insofar as he seeks injunctive relief"); *Expedient Servs., Inc. v. Weaver*, 614 F.2d 56, 58 (5th Cir. 1980) ("a suit praying solely for injunctive relief against the [SBA] Administrator is barred by the language of section 634(b)(1)."); *Prothro v. United States*, 704 F. Supp. 226, 227 (N.D. Ga. 1988) ("Injunctive relief is not available against the [SBA]."); *Lloyd Wood Constr. Co. v. Sandoval*, 318 F. Supp. 1167, 1171 (N.D. Ala. 1970) ("[The] language [of section 634(b)(1)] is simple, plain and direct, and leaves no doubt that Congress has not granted a waiver of immunity as to injunction suits."); *Claxton v. SBA*, 525 F. Supp. 777, 785 (S.D. Ga. 1981) (noting injunctive relief is not available under section 634).

While other circuits may have decided the issue differently, binding precedent in this Circuit dictates that a court may not enter an injunction against the administrator of the SBA. *See Expedient* 614 F.2d at 58 (made applicable to the

Eleventh Circuit in *Bonner v. City of Prichard, Alabama*, 661 F.2d 1206, 1209 (11th Cir. 1981) (adopting as binding precedent those decisions of the Fifth Circuit issued prior to September 30, 1981 as binding precedent).

The Bankruptcy Court’s Approval and Injunction Orders ran afoul of this binding precedent.

Recently, the Fifth Circuit relied upon *Expedient* to overturn an injunction similar to the one in this case, entered by the bankruptcy court in *In re Hidalgo Cty. Emergency Serv. Found.*, 962 F.3d 838 (5th Cir. 2020). The debtor in Hidalgo, a privately owned ambulance operator, filed an adversary complaint against SBA contending its rule precluding debtors from obtaining PPP loans violated the Bankruptcy Code’s anti-discrimination provision under 11 U.S.C. § 525 and was “arbitrary and capricious.”

The United States Bankruptcy Court for the Southern District of Texas issued a preliminary injunction mandating that the SBA process the debtor’s PPP application without consideration of the bankruptcy. As here, after the SBA appealed, the preliminary injunction was certified for direct appeal to the Fifth Circuit.

The Fifth Circuit relied in part on *Expedient*, holding that enjoining the SBA was contrary to black letter law. *See Hidalgo*, at 840. *Hidalgo* correctly followed precedent and determined that all injunctive relief directed at the SBA is “absolutely

prohibited.” *Id.* (emphasis in original).

Other circuit courts have followed *Hidalgo*. See *Robinson v. Webster Cty., Mississippi*, 2020 WL 5160059, at \*3 (5th Cir. Aug. 31, 2020); *Tradeways, Ltd. v. United States Dep't of the Treasury*, 2020 WL 3447767, at \*9 (D. Md. June 24, 2020).

Since *Hidalgo*, several district courts outside the Eleventh Circuit, have found that § 634(b) does not bar a court from enjoining the SBA. See, e.g., *In re Vestavia Hills, Ltd.*, 618 B.R. 294 (Bankr. S.D. Cal. 2020); *Alaska Urological Inst., P.C. v. United States Small Bus. Admin.*, No. 3:20-CV-00170-SLG, 2020 WL 4910291 (D. Alaska Aug. 20, 2020). Notably these cases are not binding and are factually distinguishable because they do not involve a PPP loan obtained by fraud or misrepresentation, adding a public policy hurdle to the already insurmountable absolute ban on enjoining the SBA.

In *In re Vestavia Hills, Ltd*, for example, the borrower “truthfully answered ‘yes’ to the question on the PPP application, asking if [it] was presently involved in a chapter 11 bankruptcy.” *Id.*, at 297.

In *Alaska Urological Inst.*, the borrower’s “application was denied because AUI truthfully certified that it was in bankruptcy proceedings.” *Alaska Urological Inst.*, 2020 WL 4910291, at \*4.

Aside from the most critical obstacle for Gateway—that the Bankruptcy Court

violated binding precedent by exceeding its authority over the SBA—the present case is complicated further by the fact that the PPP loan was obtained by misrepresentation, or at a minimum, mistake.

Accordingly, this Court should reverse the Approval Order and the Injunction Order.

**B. The PPP Loan Was Approved by Fraud or Mistake, Without a Meeting of the Minds**

Based on the false representations of Gateway, USF assumed it was funding a PPP loan to a non-debtor with guaranteed repayment by the SBA. (Bankr. Case, 255 at 28:2-5). USF never would have made the forgivable loan without the SBA’s backing. (*Id.*, at 28:2-5). It is not disputed there was no meeting of the minds between Gateway and USF as to terms-based reality (that Gateway was a debtor). (Bankr. Case. 302 at 16:10-13).

This Court recently noted that a borrower’s creditworthiness affects the value of the transaction and is a material term of the bargain struck between a borrower and a lender. *United States v. Waters*, 937 F.3d 1344, 1357 (11th Cir. 2019), cert. denied, 140 S. Ct. 2516, 206 L. Ed. 2d 467 (2020). In *Waters*, this Court noted that “misrepresentations in loan applications used to assess a borrower’s creditworthiness were material because they were capable of influencing the lender’s decision.” *Id.* (citing *United States v. Appolon*, 715 F.3d 362, 368–69 (1st Cir. 2013); *see also United States v. Rossomando*, 144 F.3d 197, 201 (2d Cir. 1998) (“[W]here

a defendant deliberately supplies false information to obtain a bank loan ... the defendant's good-faith intention to pay back the loan is no defense because he intended to inflict a genuine harm upon the bank—i.e., to deprive the bank of the ability to determine the actual level of credit risk and to determine for itself on the basis of accurate information whether, and at what price, to extend credit to the defendant.”). *See also Berman v. Kafka*, 518 Fed. Appx. 783, 785 (11th Cir. 2013) (noting a contract may be rescinded if the meeting of the minds between the parties to the contract is premised on a material misrepresentation).

Even if the appropriate boxes were not checked due to no fault of Gateway, the lack of meeting of the minds would be a “mistake” which would justify rescission of the PPP loan agreement. *See LoFrese v. Hayes*, 240 F.2d 277, 280 (5th Cir. 1957) (noting contracts based on innocent misrepresentations may be rescinded); *Pritzker v. Jones*, 1985 WL 1122, (N.D. Ill 1985)(same, applying Florida law).

If allowed to stand, the Bankruptcy Court's entry of the Approval Order would prevent USF from seeking rescission of the PPP loan agreement or from determining the appropriate level of credit risk, and concomitant interest rate and credit support, that USF would otherwise require loan funds to a debtor in bankruptcy without the backing of the SBA.

Regardless of intention, permitting Gateway to obtain the PPP loan from USF without also finding the SBA was required to guaranty the debt (or that Gateway

were eligible for forgiveness) would result in a windfall to Gateway at the expense of its innocent creditors. Best stated by the Bankruptcy Court, “it's a precarious position for a lender to be in, and it's not their fault.” (Bankr. Case.. 302 at 21:15-16).

### **C. The Bankruptcy Court Erred in its Administrative Procedures Act Ruling**

The Bankruptcy Court also erred in determining the SBA exceeded its rule-making authority. Congress empowered the SBA with authority to ensure loans made under its oversight are of “sound value.” 15 U.S.C. § 636(a)(6).

Nothing in the CARES Act, however, suggests that a company's bankruptcy status cannot be a basis for determining that a loan is not of “sound value.” It was reasonable for the SBA to prohibit debtors from being applicants in a program that dispensed with underwriting while pumping trillions of dollars to qualified borrowers within in a matter of months.

The Bankruptcy Court's errors relating to the Administrative Procedures Act were compounded by its overstep of its authority, as discussed above. Thus, for the same reasons noted by the bankruptcy court in *Henry Anesthesia Assocs. v. Carranza*, 2020 WL 3002124, at \*7-11 (Bankr. N.D. Ga. June 4, 2020), the SBA acted well within its authority in excluding businesses such as Gateway from the PPP (noting “while the Court disagrees with the SBA in excluding debtors from the PPP-particularly one such as Plaintiff who is providing vital health care services



during the public health crisis-the Court cannot substitute [its] judgment for that of the agency. The exclusion of debtors from the PPP is supported by rational considerations and is consistent with the SBA's requirement to assure that loans issued under its Section 7(a) loan program are of "sound value").

**D. There is a Great Risk of Irreparable Injury to USF**

Unless the Approval Order is reversed, USF would be forced to fund a loan that it never would have agreed to but for the Gateway's misrepresentations. If USF were making a loan to a debtor in bankruptcy it would require collateral, a senior secured position, or some guaranty of repayment. (Bankr. Case, Doc. 302 16:13-16)

The current PPP loan provides no such guaranty and never was intended to be a windfall to Gateway at USF's expense. (Bankr. Case, Doc. 289 at 4). The unintended consequence of the Approval Order is that USF must shoulder the entirety of the risk if the SBA does not guarantee the loan. As the Bankruptcy Court noted,

[T]his Court can't get pas[t] the fact that the Debtor is asking the Court to compel the credit union to make a loan it never agreed to. . . . Had the Debtor correctly answered that question, we wouldn't be in the unique situation we are in, where loan proceeds sit frozen in an account because the loan application would have been denied. It would be inequitable to allow that now and let the Debtor take advantage of that misrepresentation and force the credit union to make a loan it never agreed to.

(Bankr. Case, Doc. 321).

USF's risk of loss substantial. (Bankr. Case, Doc. 289 at 4). The PPP loan is

one of the largest loans on USF's balance sheet, and a default, of some or all of it, could be catastrophic to USF's financial operations. *Id.*

This risk is more than speculative, given Gateway has already had significant difficulty reorganizing. (See Bankr. Doc. 238). The Bankruptcy Court's docket is demonstrative of Gateway's prior financial difficulties, none of which stem from the COVID-19 pandemic (see, e.g., Doc. No. 2, Gateways' Case Management Summary, filed in July of 2019 noting Gateway's financial difficulties arose from a disputes with equipment providers and a loan default with another SBA lender (also not disclosed in Gateway's PPP loan application)).

If the SBA does not guarantee the loan, and USF is still forced to fund, then non-payment would jeopardize USF's operations. It would be manifestly unjust to allow Gateway to shift its own financial woes onto USF through a surreptitious PPP loan application.

#### **E. The Threat of Harm Extends Beyond USF**

Forcing USF to fund under these circumstances also would further impair Gateway's creditors by adding additional debt to the front of the debtor's list of payments, pushing other creditors back.

In bankruptcy, a debtor's right to borrow funds is limited by 11 U.S.C. § 364, which has the effect of pushing other creditors back in line for only those new, post-petition financing sources who demonstrate their funds are of such importance that

they can prime other creditors' rights.

On May 19, 2020, Gateway sought approval under § 364 to obtain the PPP loan, representing to the Bankruptcy Court that, without the proceeds of a PPP loan, it would “not be able to readily meet current obligations or acquire goods and services necessary for their day-to-day operations.” (Bankr. Case, Doc. 238 at 1).

Without forgiveness, however, the PPP loan would, at best, become an administrative burden to Gateway's estate, before unsecured creditors (see 11 U.S.C. 364, 503), and at worse, an unsecured loan subject to potential repayment of pennies on the dollar.<sup>12</sup>

In this predicament, lending the funds without forgiveness would not promote an effective reorganization, as it would only add an additional, potentially unbearable, burden to the estate. (Bankr. Case. Doc. 273 at 31:10-22).

### **CONCLUSION**

The Bankruptcy Court erred in entering the Approval Order because there was no loan agreement to approve. First, in misrepresenting its financial condition to USF, Gateway prevented a meeting of the minds between USF and Gateway. Adding to the problem, the Approval Order was premised on the Injunction which was improperly entered in violation of binding precedent.

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<sup>12</sup> While a plan of reorganization has been filed, Gateway is nowhere close to confirmation, which has not yet been scheduled.

Finally, in entering the Approval Order, the Bankruptcy Court improperly condoned Gateways improper tactics, which should not be condoned as a matter of public policy.

Based on the foregoing, this Court should reverse the Bankruptcy Court's Approval Order and remand with instructions to re-consider the issues before the Bankruptcy Court in light of this Court's opinion and instructions.

**CERTIFICATE OF 32(g)(1) COMPLIANCE**

I certify that this brief complies with the type-volume limitations set forth in Fed. R. App. P. 32(a)(7). This brief contains 4393 words, including all headings, footnotes, and quotations, and excluding the parts of the brief exempted under Fed. R. App. P. 32(f) and 11th Cir. R. 35-1.

In addition, this brief complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in a proportionally spaced typeface using Microsoft Word for Office 365 in 14-point Times New Roman font.

Dated: October 9, 2020.

Respectfully submitted,

/s/ Megan W. Murray

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and accurate copy of the foregoing, that was filed with the Clerk of Court and has been furnished electronically to all those parties registered to receive service via ECF on this date of October 9, 2020.

/s/ Megan W. Murray  
Megan W. Murray