IN THE UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF ARKANSAS
FORT SMITH DIVISION

IN RE: DANCOR TRANSIT, INC., Debtor **No. 2:20-bk-70536**
Ch. 11

DANCOR TRANSIT, INC. **PLAINTIFF**

v. **No. 2:20-ap-07024**

UNITED STATES OF AMERICA; the SMALL BUSINESS ADMINISTRATION; and JOVITA CARRANZA, in her official capacity as ADMINISTRATOR for the SMALL BUSINESS ADMINISTRATION **DEFENDANTS**

ORDER AND OPINION DENYING DEBTOR'S REQUEST FOR PRELIMINARY INJUNCTION ON CORE CLAIMS AND REPORT AND RECOMMENDATIONS ON NON-CORE CLAIMS

On April 20, 2020, Dancor Transit, Inc. [Dancor or the debtor] filed this adversary proceeding against the United States, the Small Business Administration [SBA], and Jovita Carranza in her capacity as the Administrator for the SBA [referenced together as the SBA]. In its adversary proceeding, Dancor seeks declaratory and injunctive relief against the SBA because Dancor's loan application under the Paycheck Protection Program [PPP or the program] was denied as a result of the SBA's decision to disqualify all debtors in bankruptcy from participating in the program. On May 4, 2020, the debtor filed its *Emergency Motion for Temporary Restraining Order with Incorporated Brief in Support, and Request for Expedited Hearing Date and Briefing Schedule with respect to the Debtor's Request for Preliminary Injunction* [motion]. The Court scheduled a hearing on the motion for May 13, 2020. However, on May 12, 2020, the parties jointly requested that the hearing scheduled for May 13, 2020, be continued to a later date to allow the SBA to respond to the motion and the Court to hear the matter as a preliminary injunction rather than a temporary restraining order. On May 21, 2020, the SBA filed the *United States' Opposition to Plaintiff's Motion for a Preliminary Injunction* [SBA's response].

The Court held a telephonic hearing on May 27, 2020 [hearing]. Kevin Keech appeared on behalf of the debtor. Michael Tye appeared on behalf of the SBA. At the conclusion of the hearing, the Court took the matter under advisement. For the reasons stated below, the Court finds that debtor did not prove its entitlement to a preliminary injunction under 11 U.S.C. § 525(a) or the Administrative Procedure Act [APA]. Therefore, the Court denies the debtor's motion.

Jurisdiction

Before turning to an analysis of the substantive issues raised in the debtor's motion, the Court must first decide whether it has jurisdiction to hear these matters and, if it does, whether it may enter a final order. Under 28 U.S.C. § 1334(b) and the district court's order of reference, this Court has jurisdiction over all civil proceedings arising under title 11 or arising in or related to cases under title 11. The debtor's claims arise under and relate to its chapter 11 bankruptcy case and, accordingly, fall within the jurisdiction of this Court. However, whether a bankruptcy court can enter a final order to resolve all the debtor's claims requires further analysis. The Supreme Court has explained that

> [i]f a matter is core, the statute empowers the bankruptcy judge to enter final judgment on the claims, subject to appellate review by the district court. If a matter is non-core and the parties have not consented to final adjudication by the bankruptcy court, the bankruptcy judge must propose findings of fact and conclusions of law. Then, the district court must review the proceeding *de novo* and enter final judgment.

Executive Benefits Ins. Agency v. Arkison, 573 U.S. 25, 34 (2014). "It is the bankruptcy court's responsibility to determine whether each claim before it is core or non-core." *Id.* at 33. Core proceedings "are those which arise only in bankruptcy or involve a right created by federal bankruptcy law." *Specialty Mills v. Citizens State Bank*, 51 F.3d 770, 774 (8th Cir. 1995) (citations omitted). "Non-core, related proceedings are those which do not invoke a substantive right created by federal bankruptcy law and could exist outside of a bankruptcy, although they may be related to a bankruptcy." *Id.* at 773-74. Here, the debtor has asserted two bases for injunctive relief against the SBA, the first under § 525 of the bankruptcy code and the second under the APA. The SBA has not consented to this Court entering a final order on either of the debtor's claims. However,

the debtor's § 525(a) claim is expressly premised on and arises under the bankruptcy code; therefore, this Court may "hear and determine" and "enter appropriate orders and judgments" related to that claim. *See* 28 U.S.C. § 157(b)(1); *see also In re Hopkins*, 66 B.R. 828, 829 (Bankr. W.D. Ark. 1986). In other words, this Court may enter a final order on the debtor's § 525(a) claim—irrespective of whether the SBA withheld its consent. *See Morrow v. Bank*, 189 B.R. 793, 796 n.1 (Bankr. C.D. Cal. 1995) (whether party consents to bankruptcy court's entry of final order on core claim under 11 U.S.C. § 525(a) is irrelevant). The debtor's remaining claims under the APA are non-core because they did not originate under the bankruptcy code. Nonetheless, the Court has jurisdiction to hear the debtor's APA claims because they are related to the debtor's bankruptcy case. Although the parties litigated the debtor's APA claims in conjunction with its § 525(a) claim on May 27, the SBA did not consent to this Court entering a final order. Therefore, the Court will submit proposed findings of fact and conclusions of law on the debtor's APA claims to the United States District Court for the Western District of Arkansas for final disposition. *See* 28 U.S.C. § 157(c)(1), (2).[1]

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[1] The SBA argued that sovereign immunity precludes this Court from issuing an injunction against the SBA—regardless of whether the injunction was based on a violation of the APA or § 525(a) of the bankruptcy code. The SBA contended that 15 U.S.C. § 634(b)(1) provides only for a limited waiver of immunity and prohibits injunctive relief against the SBA. *See Enplanar, Inc. v. Marsh*, 11 F.3d 1284 (5th Cir. 1994); *J.C. Driskill, Inc. v. Abdnor*, 901 F.2d 383 (4th Cir. 1990). Contrary to the SBA's position, some courts have found that § 634(b)(1) does not bar injunctions against the SBA in all circumstances. *See Ulstein Mar., Ltd. v. United States*, 833 F.2d 1052 (1st Cir. 1987). The Eighth Circuit has not addressed the issue of whether the SBA is entitled to sovereign immunity under the precise circumstances now before the Court. However, the Eighth Circuit has said that "section 702 of the Administrative Procedure Act (APA) expressly waives sovereign immunity as to any action for nonmonetary relief brought against the United States." *Raz v. Lee*, 343 F.3d 936, 938 (8th Cir. 2003). Additionally, § 106 of the bankruptcy code explicitly abrogates a governmental unit's sovereign immunity with respect to § 525. *See* 11 U.S.C. § 106(a)(1), (2). As a result, the Court is disinclined to agree with the SBA's contention that 15 U.S.C. § 634(b) renders a bankruptcy court powerless to enjoin it from conduct that violates § 525(a). *See Penobscot Valley Hosp. v. Carranza (In re Penobscot Valley Hosp.)*, Adv. Proc. No. 20-1005, Adv. Proc. No. 20-1006, 2020 WL 3032939, at *3 n.2 (Bankr. Me. June 3, 2020). Because the Court concludes for the reasons discussed—that the debtor failed to prove the elements required for the issuance of a preliminary injunction against the SBA—the Court will not unnecessarily lengthen this opinion by analyzing whether § 634(b)(1) furnishes an additional basis for denying injunctive relief against the SBA.

Background of the SBA, the CARES Act, and the PPP[2]

When Congress created the SBA, it did so through the Small Business Act [SBA Act] to "aid, counsel, assist, and protect, insofar as is possible, the interests of small-business concerns[.]" 15 U.S.C. § 631(a). Congress placed the SBA under the management of a single administrator, who has the authority and power to "make such rules and regulations as deem[ed] necessary to carry out the authority vested in [her]" and to "take any and all actions . . . [determined to be] . . . necessary or desirable in making . . . loans." *See* 15 U.S.C. §§ 631(b)(1), 636(a), 634(b)(6), (b)(7); *see also Schuessler v. U. S. Small Bus. Admin. (In re Schuessler)*, Adv. Proc. No. 20-02065-bhl, Adv. Proc. No. 20-02068-bhl, Adv. Proc. No. 20-02069-bhl, 2020 WL 2621186, at *6. (Bankr. E.D. Wis. May 22, 2020). The SBA also has the power to establish general policies "which shall govern the granting and denial of applications for financial assistance by the Administration." 15 U.S.C. § 633(a).

In March 2020, Congress and the President of the United States began to address the negative effects resulting from shutdowns caused by the COVID-19 pandemic. *See In re Schuessler*, 2020 WL 2621186, at *6. On March 27, 2020, the President signed the Coronavirus Aid, Relief, and Economic Security Act [CARES Act] into law. Pub. L. No. 116-136, 134 Stat. 281 (2020). The CARES Act amended the SBA's existing "7(a) Loan Program" and created the PPP. *Id.* Section 1102(a)(2) of the CARES Act modified § 636(a)(36) of the SBA Act and provided for loans for eligible small businesses to cover certain approved uses, including "payroll costs," the "payments of interest on any mortgage obligation," and "rent." *See id.*; *see also* CARES Act § 1102(a)(2); 15 U.S.C. § 636(a)(36)(F)(i).

The CARES Act also authorized the Administrator of the SBA to issue emergency regulations to implement the PPP without complying with typical notice and comment requirements. CARES Act § 1114. The SBA posted its First Interim Final Rule [First

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[2] *See Schuessler v. U.S. Small Bus. Admin. (In re Schuessler),* Adv. Proc. No. 20-02065-bhl, Adv. Proc. No. 20-02068-bhl, Adv. Proc. No. 20-02069-bhl, 2020 WL 2621186, at *6 (Bankr. E.D. Wis. May 22, 2020) for a similar synopsis.

Interim Rule] implementing the PPP on the agency's website on April 3, 2020, and published the rule in the Federal Register on April 15, 2020. Business Loan Program Temporary Changes; Paycheck Protection Program, 85 Fed. Reg. 20,811 (Apr. 15, 2020) (to be codified at 13 C.F.R. pt. 120). While the First Interim Rule does not directly address the ability of a debtor in bankruptcy to participate in the PPP, it does refer to the SBA's Form 2483, the Paycheck Protection Program Borrower Application. *Id.* The application requires an applicant to certify that the applicant is not "presently involved in any bankruptcy." *Id.; see also In re Schuessler*, 2020 WL 2621186, at *6-7.

On April 24, 2020, the SBA posted its Fourth Interim Final Rule [Fourth Interim Rule], which specifically states in Section III(4) that a debtor in bankruptcy is not eligible for 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.

Business Loan Program Temporary Changes; Paycheck Protection Program—Requirements—Promissory Notes, Authorizations, Affiliation, and Eligibility, 85 Fed. Reg. 23,450, 23,451 (April 28, 2020) (to be codified at 13 C.F.R. pts. 120-121).

The PPP, contained in § 1102 of the CARES Act, was enacted to extend relief to small businesses experiencing economic hardship from public-health measures which had been implemented to minimize the public's exposure to the COVID-19 virus. *See* Business Loan Program Temporary Changes; Paycheck Protection Program, 85 Fed. Reg. 20,811 (April 15, 2020) (to be codified at 13 C.F.R. pt. 120). The CARES Act provides that the SBA may guarantee PPP covered loans under similar terms and conditions as a loan made under § 7(a). *See* 15 U.S.C. § 636(a)(36)(B). Section 636(a)(36)(D)-(R) details the precise ways in which PPP-guaranteed loans are different from other § 7(a) loans. However, the CARES Act did not alter the requirement that "[a]ll loans made under this subsection shall be of such sound value or so secured as reasonably to assure repayment." 15 U.S.C. § 636(a)(6). Additionally, under § 1114 of the CARES Act, the Administrator is authorized to issue emergency regulations to implement the PPP without the standard notice and comment requirements.

Factual Background

Dancor is a trucking company that hauls goods throughout the country and has been in business for over thirty years. According to Dancor's president, Dan Bearden [Bearden], Dancor began experiencing financial problems in early 2019. Bearden testified that the company's sudden economic decline began because Dancor's long-time operations manager started entering into what Bearden characterized as unauthorized, cut-rate contracts with Dancor's customers after Bearden told him that he could not become a partial owner in the company. Bearden testified that in October 2019, insurance rates drastically increased and, the same month, Dancor entered into a contract with Universal Truckloads, Inc. [UTI], a broker that immediately disqualified twenty-nine of Dancor's drivers, which, in turn, reduced the company's ability to take on business. Bearden also testified that the COVID-19 pandemic affected Dancor's business beginning in January 2020 because "the West Coast was starting to shut down before any other part of the country." Bearden said that New York and New Jersey were affected soon after the West Coast and when manufacturers shuttered their operations, trucking companies "were

scrambling to haul freight."[3] According to Bearden, all of these events contributed to Dancor's financial distress and ultimately led to its bankruptcy filing on February 27, 2020.

On March 9, 2020, Dancor entered into a contract with Fast Trac Transportation [Fast Trac] to replace UTI.[4] Bearden testified that Fast Trac has provided new opportunities for Dancor and made it possible for Dancor to get into different lines of transportation.

On April 3, 2020, Bearden submitted a PPP loan application on Dancor's behalf to a commercial lender, Seacoast Commerce Bank [Seacoast Bank].[5] The PPP borrower application reads, in relevant part, as follows:

> *If questions (1) or (2) below are answered "Yes," the loan will not be approved.*
>
> 1. 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.
>
> 2. Has the Applicant, any owner of the Applicant, or any business owned or controlled by any of them, ever obtained a direct or guaranteed loan from SBA or any other Federal agency that is currently delinquent or has defaulted in the last 7 years or caused loss to the government?

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[3] The Court takes judicial notice of the fact that the first case of coronavirus in the United States was confirmed on January 20, 2020, in Washington state. The Court also takes judicial notice that, although California was the first state to issue a "stay at home" order and curtail its residents' movement and certain business activities, the order did not go into effect until March 19, 2020—after Dancor had filed its chapter 11 case. *See* Fed. R. Evid. 201.

[4] Although it was not clear from Bearden's testimony when Dancor entered into an agreement with Fast Trac, the Court takes judicial notice of the contract between Dancor and Fast Trac that was dated March 9, 2020, and attached to Dancor's *Motion to Approve Agency Agreement* filed in Dancor's chapter 11 case on March 19, 2020.

[5] When Dancor submitted its PPP loan application to Seacoast Bank on April 3, 2020, the SBA had not yet issued its Fourth Interim Rule specifically addressing the ineligibility of debtors in bankruptcy for PPP funds.

On Dancor's application, the box next to "No" was checked in response to Questions 1 and 2. *See* Debtor's Ex. 1. Dancor's response to Question 1 was not accurate because Dancor was—unequivocally—a debtor in bankruptcy on the date of its PPP application. Whether Question 2 was also answered incorrectly is murkier.

Bearden testified on direct that he personally owned a terminal in Dallas that Seacoast Bank had planned to foreclose upon prior to Dancor filing bankruptcy. However, whether the SBA had guaranteed the Seacoast Bank loan secured by Bearden's Dallas terminal was never made clear by either side. Nonetheless, Bearden admitted on cross-examination that if he were to answer Question 2 truthfully and without regard to his understanding of whether the question was appropriate in relation to a PPP loan, he would "have to say yes" in response to the question. Bearden was quick to point out that although he signed the application on behalf of Dancor, it was Jerilynn Bearden [Jerilynn]—his daughter and Dancor's Vice President—that had filled out the application and checked the box next to "No" in response to Questions 1 and 2. Bearden indicated that Jerilynn had told him that she had contacted someone at the SBA who had advised her that "No" should be selected in response to both Questions 1 and 2.[6] Bearden admitted that he was concerned about answering the questions incorrectly in the light of his certification on the application that the information was true and accurate but that he believed Jerilynn had spoken to someone at the SBA that had advised her to answer the questions in the manner that they had answered them and he also thought that the loan form itself was outdated. Bearden maintained that he was not trying to mislead Seacoast Bank—nor could he have—when he submitted Dancor's application with "No" appearing in response to Question 1 because Seacoast Bank was aware that Dancor was a debtor in bankruptcy prior to the submission of the PPP loan application.

On April 9, 2020, Seacoast Bank denied Dancor's PPP loan application. In its denial form, Seacoast Bank checked two boxes under the heading Principal Reason(s) for

[6] Although Jerilynn testified at the May 27 hearing, she could provide neither the telephone number nor the name of the individual at the SBA that she contends told her to answer "No" to Questions 1 and 2 on Dancor's PPP loan applications.

Action Taken—"Bankruptcy" and "Garnishment, attachment, foreclosure, repossession, collection action or judgment." In addition, under the heading "Other," Seacoast Bank typed in "Ineligible for SBA financing."

On April 27, 2020—three days after the SBA issued its Fourth Interim Rule explicitly stating that debtors in bankruptcy are ineligible for PPP loans—Bearden submitted a second PPP loan application for Dancor to a different commercial lender—Bank OZK—again checking "No" in response to Questions 1 and 2. Bearden testified that Bank OZK, like Seacoast Bank, was aware that the debtor had filed bankruptcy prior to the submission of the PPP loan application. On May 4, 2020, Bank OZK denied Dancor's PPP loan application due to its pending bankruptcy. Bearden testified that but for its status as a debtor in bankruptcy, Dancor would otherwise meet the requirements of the PPP loan program: it is a small business, operated in the United States with less than 500 employees, and in operation as of February 15, 2020. The same day that Bank OZK denied Dancor's second PPP application, Dancor hired a new general manager, Kevin Rains [Rains]. Bearden testified that in the three weeks that Rains had been on board (as of the hearing date), he had put together loads that will provide Dancor with revenue that is "double and triple" what Dancor had previously earned.

Rains testified that he specializes in bringing companies out of distress. His professional experience includes working for thirteen distressed trucking companies—many of them in bankruptcy. Rains said, for those clients in bankruptcy, his goal was to make the companies profitable and get them out of bankruptcy within twelve months or, if that was not possible, close them down. Rains testified that in the three weeks since being hired by Dancor, he has changed Dancor's structure so that the company operates twenty-four hours a day, seven days a week rather than shutting down at 5:00 p.m. Rains has also started a flatbed division that is doing "very well." In addition, Rains said he has several new accounts lined up for Dancor and plans to hire approximately thirty additional drivers. With the PPP funds, Rains believes that Dancor could successfully reorganize within six months because the funds would afford Dancor the ability to perform overdue maintenance on the trucks and hire drivers and other personnel to take on the additional

business Rains has generated. However, Rains testified that even without the PPP funds, he is "sure that we can still make it work"—just not as quickly.

On May 4, 2020, the same day Dancor hired Rains and Bank OZK denied Dancor's second PPP loan application, Dancor—the debtor—filed the motion that is now before the Court. The debtor's motion seeks to have this Court impose a preliminary injunction against the SBA based on its allegation that the SBA's Fourth Interim Rule is discriminatory in violation of § 525(a) and arbitrary, capricious, and outside the scope of the SBA's statutory authority under 5 U.S.C. § 706. The debtor alleges that the SBA is prohibited from denying debtors in bankruptcy access to PPP funds available under the CARES Act because the PPP is silent as to whether debtors in bankruptcy should be excluded from accessing such funds. The debtor seeks an order granting various forms of injunctive relief against the SBA, including prohibiting the agency from denying the debtor's PPP loan based solely on its status as a debtor in bankruptcy and compelling the SBA to instruct the debtor's lender to ignore the debtor's bankruptcy case when considering the debtor's PPP application. The debtor seeks an order enjoining the SBA from denying or causing a commercial lender to deny an application of the debtor under the PPP on the basis that the debtor is in bankruptcy or based on the words "presently involved in any bankruptcy" contained in Question 1 on the SBA's PPP loan application.

Law and Analysis

The only issue before the Court at this juncture is whether Dancor has proven its entitlement to a preliminary injunction based on the SBA's rule excluding debtors in bankruptcy from obtaining PPP loans, which resulted in the denial of Dancor's application. The Court must consider the following factors to determine whether a preliminary injunction should issue: (1) the probability of success on the merits; (2) the threat of irreparable harm to the movant; (3) the balance between harm to the movant and the injury that granting the injunction will inflict on other interested parties; and (4) the public interest. *Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 114 (8th Cir. 1981) (en banc). Although "no single factor is determinative," in the Eighth Circuit, the movant must show the threat of irreparable harm to prevail. *Dataphase Sys., Inc.*, 640 F.2d at

113-14. "A preliminary injunction is an extraordinary remedy and the burden of establishing the propriety of an injunction is on the movant." *Watkins, Inc. v. Lewis*, 346 F.3d 841, 844 (8th Cir. 2003).

I. The debtor's probability of success on the merits

The debtor contends that it is likely to succeed on the merits of its claim against the SBA under two separate statutes. First, the debtor claims that the SBA's denial of the debtor's application for PPP funds based on the debtor's bankruptcy violated the anti-discrimination provision of the bankruptcy code found in 11 U.S.C. § 525(a). Second, the debtor argues that the SBA's denial of the debtor's application based on its involvement in bankruptcy was arbitrary, capricious, and outside the SBA's authority under § 706(2)(A).

A. 11 U.S.C. § 525(a)

Section 525(a) prohibits governmental units from denying, revoking, suspending or refusing to renew "a license, permit, charter, franchise, or other similar grant" based on a person being or having been a debtor in bankruptcy. 11 U.S.C. § 525(a). Dancor wants the Court to adopt a broad definition of the term "other similar grant" and determine that funds available under the PPP should be deemed "grants" rather than loans. The SBA argues that the term "other similar grant" should not include loans and nothing in the bankruptcy code requires a lender to make a loan or extend credit to a debtor in bankruptcy.

Because the words "license," "permit," "charter," and "franchise" are not defined in the code, the Court must look elsewhere for their meanings.

> A "license" is a "revocable permission to commit some act that would otherwise be unlawful" or an "agreement . . . that it will be lawful for the licensee to do some act that would otherwise be illegal, such as hunting game." Black's Law Dictionary 931 (7th ed. 1999). A "permit" is a "certificate evidencing permission" or "a license." Id. at 1160. A "charter" is an instrument by which a governmental entity . . . grants rights, liberties, or powers to its citizens." Id. at 228. And finally, the term "franchise" is defined as "[t]he right conferred by the government to engage in a specific business or to exercise corporate powers." Id. at 668. Each of the

> enumerated items is a type of grant from a governmental actor that involves some permission for the holder of the grant to act in some particular way.

In re Penobscot Valley Hosp., 2020 WL 3032939, at *10 (citing *Watts v. Pa. Hous. Fin. Co.*, 876 F.2d 1090, 1093 (3d Cir. 1989) (a mortgage assistance loan "simply is not" one of the items listed in § 525(a)).

Neither is the term "other similar grant" defined in the bankruptcy code. Some courts have opined that the "use of the word 'similar' limits the universe of 'grants' to which § 525(a) applies, ensuring that only grants bearing a family resemblance to licenses, permits, charters, and franchises enjoy the anti-discrimination protections of the Bankruptcy Code." *In re Penobscot Valley Hosp.*, 2020 WL 3032939, at *12 (citing *Ayes v. U.S. Dep't of Veterans Affairs*, 473 F.3d 104, 108 (4th Cir. 2006) ("[T]he veteran [home loan] guaranty entitlement bears no such resemblance to the items listed in § 525(a)."); *see also Toth v. Michigan State Hous. Dev. Auth.*, 136 F.3d 477, 480 (6th Cir. 1998) (the items enumerated in the statute are not related to extensions of credit but rather are benefits conferred by government). On the other hand, the Second Circuit Court of Appeals defined the scope of § 525(a) more broadly than the Third, Fourth and Sixth Circuits. It said that "other similar grant" would include "property interests" that are "unobtainable from the private sector and essential to a debtor's fresh start." *Stoltz v. Brattleboro Hous. Auth.* (*In re Stoltz*), 315 F.3d 80, 90 (2d Cir. 2002).

Bankruptcy courts are split on whether the SBA's Fourth Interim Rule—which expressly precludes debtors in bankruptcy from accessing PPP loan funds—violates § 525(a). Some bankruptcy courts have adopted the view that PPP funds are really grants rather than loans and are analogous to "other similar grant;" therefore, they have found that the SBA's policy is discriminatory, violating § 525(a). *See Hidalgo County Emer. Serv. Found. v. Carranza,* Adv. No. 20-2006, 2020 WL 2029252 (Bankr. S.D. Tex. Apr. 25, 2020); *Roman Catholic Church of the Archdiocese of Santa Fe v. U.S. Small Bus. Admin.* (*In re Roman Catholic Church of the Archdiocese of Santa Fe*), No. 18-13027 t11, Adv. No. 20-1026 t, 2020 WL 2096113 (Bankr. N.M. May 1, 2020); *Skefos v. Carranza* (*In re Skefos*), Adv. Proc. No. 20-00071, 2020 WL 2893413 (Bankr. W.D. Tenn. June 2, 2020).

Other bankruptcy courts have determined that the term "grant" must be within the realm of "licenses," "permits," "charters," or "franchises," and because PPP funds are distributed through loans, then the SBA's denial of PPP eligibility to debtors in bankruptcy is not a violation of the anti-discrimination provisions of § 525(a). *In re Schuessler*, 2020 WL 2621186, at *9; *see also In re Penobscot Valley Hosp.*, 2020 WL 3032939, at *14; *Henry Anesthesia Assocs., LLC., v. Carranza* (*In re Henry Anesthesia*), Adv. Proc. No. 20-06084-LRC, 2020 WL 3002124, at *5 (Bankr. N.D. Ga. June 4, 2020).

The Eighth Circuit has not addressed the text of § 525(a) or whether the term "other similar grant" would include any "property interest" not obtainable from the private sector and essential to a debtor's fresh start. Barron's Law Dictionary defines a loan as "delivery of a sum of money to another under a contract to return at some future time an equivalent amount with or without an additional sum agreed upon for its use." Barron's Law Dictionary 297 (1996). Section III(2)(i) of the First Interim Rule recites the interest rate that will be charged on a PPP loan*;* section III(2)(j) recites a maturity date of two years on a PPP loan; and section III(2)(m) tells a borrower when repayment of a PPP loan must begin. *See* First Interim Rule, 85 Fed. Reg. 20,811, 20,813. A promissory note—the contract—is required to be executed by the borrower for the benefit of the lender. Furthermore, the PPP application uses the terms "borrower" and "lender," and the term "loan" is used no less than twelve times in the two-page application. While there are many features that distinguish PPP loans from § 7(a) loans, "a distribution of PPP funds initially assumes the form of a loan." *In re Penobscot Valley Hosp.*, 2020 WL 3032939, at *9. Finally, there is absolutely no mention of the term "grant" or any other similar term either in the application or the PPP statutes.

This Court agrees with the reasoning of the *Schuessler, Penobscot,* and *Henry Anesthesia* courts and reaches the same conclusion as those courts: PPP funds are distributed through loans rather than grants. In addition, the Court adopts the same interpretation of the text of § 525(a) as the appellate courts in the Third, Fourth and Sixth Circuits.

> Congress limited the scope of section 525(a) to denials of certain types of government authorizations or permissions—denials of a "license, permit, charter, franchise, or other similar grant." The PPP is a heavily subsidized

> loan guarantee program; it is not a license, permit, charter, franchise or other similar grant. Accordingly, the SBA's denial of PPP participation based on the plaintiffs' bankruptcies does not run afoul of section 525(a).

In re Schuessler, 2020 WL 2621186, at *9. It is undisputed that Congress created the PPP as an amendment to the SBA's pre-existing *loan* program and both the statute and agency regulations refer to the funds distributed as "loans." *Id.* The PPP loans, made through private lenders, are subject to SBA guarantees. "While it is certainly true that Congress created the program to make the funds readily available, even where market loans would not be, and the SBA has adopted regulations allowing the loans to be made with little-to-no underwriting, these attributes do not alter the fact that the program results in an actual loan." *Id.* at 10. Although the PPP loans can be forgiven if the funds are used in approved ways, forgiveness is conditioned on future events. Furthermore, loan forgiveness is just that—it is a *loan* forgiveness. *Id.* "The exclusion of persons involved in bankruptcy from the PPP does not conflict with the fresh start or otherwise frustrate the operation of the Bankruptcy Code" and is "not similar to denying a debtor a license to operate in his chosen field and thereby denying the debtor the opportunity to pursue economic betterment." *In re Penobscot Valley Hosp.*, 2020 WL 3032939, at *14.

Although the government agrees to guarantee loans for eligible borrowers, through the PPP, and if certain conditions are met, agrees to forgive those loans, "no legislative authority is required to contract for a loan, a loan guarantee, or even forgiveness of a loan, and all of these transactions can be obtained in the private market." *In re Henry Anesthesia*, 2020 WL 3002124, at *7. Participation in the PPP is not similar to any of the property interests recited in § 525(a). *Id.* In sum, § 525(a) does not preclude the SBA from denying government-subsidized PPP loans to debtors in bankruptcy. This Court finds that the SBA's rule is not discriminatory under § 525(a), making it improbable that the debtor will ultimately succeed on the merits of its claim under this section of the bankruptcy code.

B. Claims under the APA

In order to succeed on its claim that the SBA has acted arbitrarily and capriciously as defined in § 706(2)(A) of the APA, the debtor must show:

> [T]he agency has relied on factors which Congress has not intended it to consider, entirely failed to consider 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 product of agency expertise.

Diocese of Rochester, 2020 WL 3071603, at *****11, (W.D. N.Y June 10, 2020) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43 (1983)).

The Eighth Circuit has provided guidance when the Court is considering an administrative decision. It has said:

> Judicial review of administrative decisions is governed by the Administrative Procedures Act ("APA"). 5 U.S.C. § 706. Under the APA, our review of an agency decision is limited. We are only permitted to set aside agency action that is "arbitrary, capricious, and an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Our review standard requires that we give "agency decisions a high degree of deference." *Sierra Club v. Envtl. Prot. Agency*, 252 F.3d 943, 947 (8th Cir. 2001).
> …
>
> If an agency's determination is supportable on any rational basis we must uphold it. (citation omitted). This is especially true when an agency is acting within its own sphere of expertise. *Friends of the Boundary Waters Wilderness v. Dombeck,* 164 F.3d 1115, 1128 (8th Cir. 1999) ("[w]hen the resolution of the dispute involves primarily issues of fact and analysis of the relevant information requires a high level of technical expertise, we must defer to the informed discretion of the responsible federal agencies.") (citations omitted).

Voyageurs Nat'l Park Ass'n v. Norton, 381 F.3d 759, 763 (8th Cir 2004); *see also Org. for Competitive Mkts. v. U.S. Dep't of Agric.*, 912 F.3d 455 (8th Cir. 2018).

The SBA argues that this Court should afford the SBA's decisions, which preclude debtors in bankruptcy from obtaining PPP loans, the deference espoused in *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.,* 467 U.S. 837 (1984). The "*Chevron* deference applies when Congress has, either explicitly or implicitly, left a gap in a statute

to be filled by a particular agency." *Teambank, N.A. v. McClure*, 279 F.3d 614, 618 (8th Cir. 2002) (citing *Chevron*, 467 U.S. at 843-45). "*Chevron* requires courts to give 'considerable weight … to an executive department's construction of a statutory scheme it is entrusted to administer.'" *Teambank*, 279 F.3d at 618 (quoting *Chevron*, 467 U.S. at 844). "Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." *Chevron*, 467 U.S. at 844. If a statute is silent or ambiguous regarding a particular issue and the agency's construction of that statute is permissible, then it must be upheld. *Chevron*, 467 U.S. at 843.

While the debtor is correct that the CARES Act itself does not directly provide that debtors in bankruptcy cannot participate in PPP loans, "statutory silence" does not mean that the SBA is acting outside its authority. *In re Schuessler*, 2020 WL 2621186, at *10. The fact that the CARES Act is silent on the eligibility of a debtor in bankruptcy is not dispositive on whether the SBA's actions are arbitrary, capricious, or discriminatory. *See id.* "Nothing in the statutory text suggests that the [sic] Congress was intending to limit the SBA's rulemaking authority or that Congress was providing an exhaustive list of eligibility requirements that the SBA could not augment through rulemaking." *Id.* The Fourth Interim Rule explains the agency's position on non-participation in PPP loans by debtors in bankruptcy. *Id; see also* Fourth Interim Rule, 85 Fed. Reg. 23,450, 23,451.

The SBA also stated in its Fourth Interim Rule that it was proceeding under the emergency provision at Executive Order 12866 Section 6(a)(3)(D) based on the need to move expeditiously to mitigate the current economic conditions arising from the COVID-19 emergency. *See* Fourth Interim Rule, 85 Fed. Reg. 23,450, 23,452. During the May 27 hearing, the SBA insisted that the rule is consistent with its authority granted by Congress and that the bar of PPP funds to debtors in bankruptcy is rational and corresponds with the terms and policies governing its § 7(a) loan program—the section to which the PPP has been added.

The SBA argues that upon its creation Congress gave it broad rulemaking authority and contends "that Congress built upon that authority when it authorized the SBA to set the terms and conditions on which PPP loans are issued." *See In re Schuessler*, 2020 WL 2621186, at *10. In § 1114 of the CARES Act, Congress authorized and directed the SBA Administrator to issue emergency rules without the normal notice and comment period in order to implement the PPP quickly. Further,

> [t]he SBA has offered a reasoned explanation for the bankruptcy exclusion. As set forth in its papers, under normal circumstances, the SBA fulfills [its] statutory mandate to ensure that Section 7(a) loans are of sound value by performing individual credit reviews. However, in order to ensure that PPP loans are processed expeditiously, as the CARES Act clearly intended, the SBA decided to streamline processing by imposing a bright line exclusion of debtors in bankruptcy. The SBA explained in the Fourth Interim Rule that it had adopted this bright line rule because it had 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."

Diocese of Rochester, 2020 WL 3071603, at *8 (internal citations omitted). "The SBA's bankruptcy exclusion was a reasonable effort to accommodate the conflicting policies committed to the SBA's care, and one that Congress might reasonably have sanctioned." *In re Penobscot Valley Hosp.*, 2020 WL 3032939, at *9. "Boiled to its essence," Dancor alleges that it has been "unfairly and illegally denied [its] spot in the 'corporate breadline.'" *Id.* at *1. "Although there is room for disagreement on the law," this Court believes, as did the *Penobscot* court, that "the better view is that the [SBA]—armed with a mandate from Congress and facing an economic crisis of unprecedented magnitude—made reasonable choices about how to allocate a large but finite amount of aid among struggling businesses. Those choices may produce seemingly harsh results, but they are not illegal." *Id.* For all these reasons, the Court finds that Dancor is unlikely to prevail on its claim that the SBA acted arbitrarily, capriciously, or in excess of its delegated authority when it chose to exclude debtors in bankruptcy from the pool of eligible applicants for PPP loans. Therefore, the Court finds that the debtor failed to prove the first element necessary for an injunction.

II. The threat of irreparable harm

In order to issue a preliminary injunction against the SBA, the Court must find that there is a threat of irreparable harm to Dancor. *See Roudachevsky v. All-American Care Centers, Inc.*, 648 F.3d 701, 706 (8th Cir. 2011) ("preliminary injunctive relief is improper absent a showing of a threat of irreparable harm."). To establish irreparable harm, "a party must show that the harm is certain and great and of such imminence that there is a clear and present need for equitable relief." *Iowa Utils. Bd. v. F.C.C.*, 109 F.3d 418, 425 (8th Cir. 1996)). "A mere possibility of irreparable harm is not enough" to issue an injunction. *Superior Edge, Inc. v. Monsanto Co.*, 964 F.Supp.2d 1017, 1046 (D. Minn. 2013). Although Rains testified that the PPP funds would allow the debtor to reorganize within six months, he also testified that the debtor is likely to be able to reorganize even if the PPP loan does not materialize—it would just be a longer process. Both Bearden and Rains testified that operations were already improving as a result of the increased number and different types of loads that Rains had negotiated for Dancor to haul. Neither of them testified that without the PPP funds the business would certainly collapse.[7] Therefore, the Court finds that Dancor did not prove that it will be irreparably harmed without a preliminary injunction against the SBA.

III. Balancing the harm to each party and the public interest

The final two of the four injunction factors—balancing the harm to each party and the public interest—"merge when the Government is the opposing party." *Nken v. Holder*, 556 U.S. 418, 435 (2009). However, because Dancor failed to demonstrate that it would suffer irreparable harm, it is unnecessary for the Court to analyze the remaining requirements. *See Dataphase*, 640 F.2d at 114; *see also Baker Elec. Coop. v. Chaske*, 28 F.3d 1466, 1472 (8th Cir. 1994) (without proof of irreparable harm, a court cannot issue a preliminary injunction).

[7] In addition, because the debtor filed its chapter 11 case prior to the enactment of the CARES Act, it had presumably believed it could reorganize without government aid.

Conclusion

For all the above-stated reasons, the Court finds that the debtor failed to prove that it is entitled to the extraordinary remedy of a preliminary injunction against the SBA. Therefore, the Court denies the debtor's motion.[8]

IT IS SO ORDERED.

Ben Barry
United States Bankruptcy Judge
Dated: 06/22/2020

cc: Kevin Keech, attorney for debtor
Michael Tye, attorney for SBA
United States Trustee
All interested parties

[8] In the event the debtor's complaint survives the motion to dismiss filed by the SBA on June 12, 2020, the Court will set the trial of the adversary proceeding by subsequent notice.