

SBA Consent to PPP Debtor Loan Provisions Under CARES Act II: Just Do It, Already!!!!

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“Just Do It!”
— Nike ad (Timeless)¹

As discussed in “The ‘New and Improved’ PPP Loan Package! Part 3”² (the “CARES II Article”), CARES Act II³ finally provided for *some* eligibility for *some* debtors to *finally* have access to PPP loans under CARES Act II (“PPP III Loans”). Under CARES Act II, at least subchapter V, chapter 12 and chapter 13 debtors have eligibility for PPP III Loans (providing amendments to Bankruptcy Code § 364). Champagne corks had barely finished popping when bankruptcy lawyers read the full text of CARES Act II, which has the extraordinary “Mother, may I” clause that provides as follows:

- (1) **EFFECTIVE DATE.** — **The amendments made** by subsections (a) through (e) [*i.e. the 364 amendments and related amendments*] **shall** — (A) **take effect on the date on which the [SBA] Administrator submits to the Director of the Executive Office for United States Trustees a written determination that, subject to satisfying any other eligibility requirements,** any debtor in possession or trustee that is authorized to operate the business of the debtor under section 1183, 1184, 1203, 1204, or 1304 of title 11, United States Code, would be eligible for a loan under paragraphs (36) and (37) of section 7(a) of the Small Business Act (15 U.S.C. 636(a)); and (B) apply to any case pending on or commenced on or after the date described in sub-paragraph (A)(2).

CARES Act II, Section 320(f)(1) (emphasis added).

While hope sprung eternal with a changing of the guard at the Department of the Treasury (with Janet Yellen now confirmed as Secretary) and the pending nomination of Isabella Guzman for Administrator of the SBA⁴ (replacing Mr. Mnuchin and Ms. Carranza from the prior administration), at least this author optimistically hoped that these changes would also bring about a shift in anti-debtor sentiment at both Treasury and the SBA.⁵

¹ Special thanks to Jeffrey M. Sklarz of Green & Sklarz, PC in New Haven, Conn., for alerting me to the development referenced in this alert. Special thanks to Nathaniel Peter Holzer of Jordan, Holzer & Ortiz, PC of Corpus Christi, Texas, for his input as well.

² Salerno, “The ‘New and Improved’ PPP Loan Package! Part 3,” *ABI Journal* at 8 (February 2021).

³ Combined Consolidated Appropriations Act, 2021, which includes the Coronavirus Economic Relief for Transportation Services Act and Coronavirus Response and Relief and Relief Supplemental Appropriations Act (H.R. 133) (CARES ACT II). Text is *available at* <https://www.congress.gov/bill/116th-congress/house-bill/133?r=1&s=2>.

⁴ Ms. Guzman has not yet been confirmed, leaving Tami Perriello as acting administrator of the SBA. On Feb. 24, 2021, Senate Committee on Small Business and Entrepreneurship Chair Ben Cardin (D-Md.) announced that the committee had advanced the nomination of Isabella Guzman to be U.S. Small Business Administration (SBA) Administrator on a bipartisan vote of 15-5.

⁵ See CARES II at 53-54. Mnuchin and Carranza created the infamous April 24, 2020, SBA rule (“SBA Rule”) that essentially said that (1) no debtors would be eligible for PPP Loans because they could not be trusted to use the

CARES Act II is set to expire on March 27, 2021. While there is recently introduced legislation to extend the provisions through year's end,⁶ one would think Treasury and the SBA might act on this invitation from Congress to give its consent to have PPP III Loans available to those debtors outlined in CARES Act II before the program expired. Such assumptions would be justified. After all, then-President-Elect Joe Biden's professed goal in his administration, and one of his guiding principles in assembling his team, was stated as follows:

This team will help us emerge from the most inequitable economic and jobs crisis in modern history by building an economy *where every American is in on the deal*.⁷

So, with weeks left before CARES Act II's PPP loan program is set to expire (barring extension), what has the SBA done? Well, nothing. Nothing at all. The SBA (either through oversight or intentional policy) has "pocket-vetoed" this part of CARES Act II and done nothing. In this instance, inaction is a definitive action: The PPP III Loans of CARES Act II cannot legally go into effect without affirmative SBA consent, and time is most certainly running out.

Debtor cases are always time-sensitive. Time is, both figuratively and literally, money, after all. Hence, the SBA's refusal to give consent carries on (if not through design, undeniably in impact) the SBA's prior anti-debtor bias.

Most debtors are waiting, anxiously awaiting, some blessing from the hallowed halls of D.C. for help in their distress — but not everyone. One debtor in Connecticut decided to take the battle to the SBA.⁸ On March 2, 2021, Chip's Southington LLC decided to force the issue and is seeking (in the form of a *mandamus*/injunction action) an order requiring the SBA to give its consent under § 320(f), thereby fulfilling CARES Act II's stated purpose.⁹ One suspects this will be decided quickly. The district court has put this on a fast track, with SBA responses due March 16 and a telephonic status hearing set for March 18, 2021.¹⁰

The bankruptcy world awaits some decision by the SBA and/or the district court. There are four possible outcomes of this: (1) The district court could punt this *sua sponte*, saying the federal courts cannot issue injunctions against the SBA;¹¹ (2) the SBA might take the position

funds properly; (2) making such loans somehow increased the risk that such loans would not be forgiven (see point 1); and (3) the loans therefore would not be forgiven. The taxpayers would suffer! Thankfully, the Department of the Treasury and SBA are ever-vigilant. For that they have my eternal gratitude.

⁶ See Bill to Amend the CARES Act to Extend the Sunset for the Definition of Small Business Debtor, and for Other Purposes, introduced March 1, 2021, by Sens. Durbin and Grassley.

⁷ "Biden Builds Out Cabinet," *USA Today* (Jan. 7, 2021) (emphasis added).

⁸ See *Chip's Southington LLC v. Perriello*, Case No. 20-21458 (D. Conn.), docket numbers 1, 2 and 3.

⁹ Those on the debtors' end of this argument certainly wish Jeff Sklarz and his colleagues luck on this litigation!

¹⁰ At least one branch of the government understands time sensitivities.

¹¹ See, e.g., *Hidalgo Cty. Emergency Serv. Found. v. Carranza (In re Hidalgo Cty. Emergency Serv. Found.)*, 962 F.3d 838 (5th Cir. 2020) (reversed bankruptcy court's injunction against SBA based on provisions of anti-injunction act protecting SBA, without otherwise expressly opining on anti-discrimination or lawfulness of SBA Rule). See also Bill Rochelle, "Eleventh Circuit Bans Chapter 11 Debtors from Receiving 'PPP' Loans," *Rochelle's Daily Wire* (Dec. 29, 2020). That said, the Fifth Circuit is in the minority on this issue. There is no controlling decision on this question from the Supreme Court, and there is a split of authority among the circuits on this issue. The Fifth Circuit has held, without any substantive discussion of the history and purpose of the injunctive bar, that injunctive relief against the SBA is prohibited. *Enplanar Inc. v. Marsh*, 11 F.3d 1284, 1290 n. 6 (5th Cir. 1994); *Valley Const. Co. v. Marsh*, 714 F.2d 26, 29 (5th Cir. 1983). Conversely, the First, Sixth, Seventh and Federal Circuits allow injunctive relief against the SBA in certain circumstances. *Ulstein Maritime Ltd. v. United States*, 833 F.2d 1052, 1056 (1st Cir. 1987); *Cavalier Clothes Inc. v. United States*, 810 F.2d 1108 (Fed. Cir. 1987); *Camelot Banquet Rooms Inc. v. U.S. Small Business Administration*, 2020 WL 2088637 (E.D. Wis. 2020) (§ 634(b)(1) does not preclude an injunction against the SBA in its regulation of the PPP program.); *Camelot Banquet Rooms Inc. v. U.S. Small*

that it can and will make its decision in its own time, and defend strictly on the basis of the anti-injunction act;¹² (3) if the inaction was due to inadvertence, perhaps this will act as a wake-up call and prompt the SBA to give its consent as required under CARES Act II; or (4) Chip's may have awakened a surly giant that winds up saying, "You want an answer? How about no!"¹³

While hope does indeed spring eternal, the betting odds (1 in 4, all other things being equal) are not great for Chip's for a favorable result. Of course, if the SBA does anything but give its consent, the litigation will go on (at least in those jurisdictions where it has not been foreclosed by binding precedent).

In the memorable words of Nike, "Just do it!" It is time for the SBA to stop its pocket veto. Take a position, and let's get on with this.

Our tax dollars at work.

Business Administration, Order dated May 20, 2020, Case: 20-1729 (7th Cir.) (SBA's request for stay of injunction regarding PPP is denied); *DV Diamond Club of Flint LLC, et al. v. SBA et al.*, Order dated May 15, 2020, Case No. 20-1437 (6th Cir.) (SBA's request for stay of injunction regarding PPP is denied). *See also Canterbury Career School Inc. v. Riley*, 833 F. Supp. 1097, 1103 (D.N.J. 1993) (injunctive relief would be permissible if the agency actions exceed its statutory authority); *CBM Education Center of San Antonio Inc. v. Alexander*, 1992 WL 551256 (Bankr. S.D. Tex. Feb. 14, 1992) (same).

¹² *See* n. 8.

¹³ In the immortal words of Jack Nicolson: "You want the truth? You can't handle the truth!" *A Few Good Men* (1992).