

considered the arguments and briefing of counsel for the Plaintiff and counsel for Defendant Jovita Carranza, in her capacity as Administrator for the U.S. Small Business Administration (“*SBA*”); and having considered the SBA’s Interim Final Rules for implementing the PPP, this Court finds and concludes that the Plaintiff would suffer immediate and irreparable harm without issuance of a temporary restraining order. The Court incorporates by reference all its oral findings and rulings made on the record at the hearing, and also finds as follows:

1. Plaintiff, debtor and debtor-in-possession in this chapter 11 proceeding, is entitled to issuance of a temporary restraining order pursuant to Federal Rule of Bankruptcy Procedure Rule 7065 (incorporating Rule 65, Federal Rules of Civil Procedure).

2. Plaintiff has shown a substantial likelihood of success on the merits on its claims that the SBA has violated 11 USC §525(a) and the Administrative Procedures Act with respect to the SBA requiring participating lenders to consider loan applications using a form that says PPP loans will not be approved if the applicant or any owner of the applicant is presently involved in any bankruptcy.

3. Plaintiff states that it otherwise meets all other requirements for receipt of a PPP loan; however the Court make no ruling on whether or not the Plaintiff otherwise qualifies for a PPP loan.

4. On April 14, 2020, Plaintiff requested a Borrower PPP Application from its regular lender, Texas Capital Bank (“*TCB*”), but was informed on April 15, 2020 that: (i) Plaintiff “would not be eligible because of the first question on the SBA form”; and (ii) TCB is “not accepting applications from entities that we know are not eligible - you can simply use the form as evidence - it clearly shows that an entity in bankruptcy is not eligible.”

5. Plaintiff testified that, on April 24, 2020, the same day that this Court issued a TRO in the *Hidalgo County* case, Plaintiff submitted a completed Borrower PPP Application to American National Bank & Trust (“**AMBT**”).² On April 27, 2020, AMBT issued a letter denying Plaintiff’s application and eligibility for the PPP on grounds that it is a Debtor in the Bankruptcy Cases.

6. The Debtors have been steadily working toward a successful reorganization and emergence from chapter 11. This has included filing on February 28, 2020 a proposed Joint Chapter 11 Plan of Reorganization (“**Plan**”) [ECF # 437] and a proposed Disclosure Statement in Support of Joint Chapter 11 Plan (“**Disclosure Statement**”) [ECF # 438]. Since that time, the Debtors have filed two amendments to each of the Plan and the Disclosure Statement [ECF #s 487, 488, 496, 497]. The Court subsequently entered an order approving the Debtors’ Second Amended Disclosure Statement [ECF # 494].

7. In or about mid-March 2020, state and federal governmental agencies in many parts of the world began implementing safety precautions relating to the Coronavirus pandemic. At that time, a significant number of Plaintiff’s resources were devoted to providing engineering, procurement, and construction management of a Renewable Diesel Unit in Artesia, New Mexico (the “**RDU Project**”).

8. Since February 2020, Plaintiff’s compensation for the RDU Project has been based on achieving certain project milestones. To achieve those milestones, Plaintiff relies in many respects upon third parties who manufacture or supply components, equipment, or services that are intended to be integrated into the RDU Project. As a result of the pandemic-related safety

² At the time, the Plaintiff’s representative did not understand that the *Hidalgo County* ruling would be limited to the plaintiff in that proceeding. As such, it struck out the words “or presently involved in any bankruptcy” and answered Question No. 1 “no” in the AMBT Borrower PPP Application. Regardless, that application was denied because Plaintiff is a Debtor in this Bankruptcy Case.

measures implemented throughout the world, many of these third parties have been unable to timely deliver (or deliver at all) these materials and services. For example, the shop of one of Plaintiff's major fabricators on the RDU Project is in northern Italy. It has been closed for several weeks and unable to progress major fabrication components Plaintiff needs for the RDU Project.

9. The pandemic-related business interruptions and shutdowns of Plaintiff's suppliers have caused a substantial delay and extension of the RDU Project schedule milestones. This, in turn, has pushed out the expected milestone payments to Plaintiff. As a result, Plaintiff is approximately \$800,000.00 behind in projected receivables on the RDU Project, and currently expects to be forced by pandemic-related circumstances to move approximately \$1.5 to \$2 million in anticipated RDU Project fees from calendar year 2020 to calendar year 2021.

10. Plaintiff currently has 60 employees. To date, it has been able to meet its payroll obligations due in large part to the present Court-ordered stay on payment of bankruptcy professional fees and income from a number of smaller projects relating to work performed pursuant to previous purchase orders. However, due to the current pandemic-related business environment, many of those smaller project partners have either postponed or cut altogether their near-term capital expenditures. As such, until the pandemic-related safety measures are eased and the business climate improves, Plaintiff's ability to obtain new purchase orders from these business partners is severely diminished.

11. In light of the present circumstances, the next three months will be very difficult for Plaintiff as it works toward confirming the Plan and emerging from this Bankruptcy Case as a reorganized operating entity. Obtaining funds from the PPP will contribute to the success of those efforts and help ensure that Plaintiff is able to meet its obligations along the way.

12. Plaintiff further testified that if it is permitted to re-apply for funds from the PPP without consideration by a lender or the SBA of Plaintiff's or KP Engineering, LLC's ("**KPE LLC**")³ status as a bankruptcy Debtor or involvement in the Bankruptcy Cases, Plaintiff will do so immediately. Plaintiff intends to only seek PPP funds in an amount that can be forgiven and use those funds in complete compliance with the program's criteria for forgiveness of any obligation to repay them.

13. Plaintiff also testified that it continues to understand and acknowledge that as a Debtor in the Bankruptcy Cases, it remains subject to this Court's supervision and authority, including the Court's authority to ensure that Plaintiff complies with the PPP loan forgiveness criteria.

14. The risk of harm to Plaintiff outweighs the harm to SBA if a temporary restraining order is granted.

15. Issuance of this temporary restraining order is in the public interest. The continued gainful employment of the Plaintiff's 60 employees benefits the public interest as a whole. Furthermore, injunctions that facilitate reorganizations serve the public interest. Chapter 11 expresses the public interest of preserving the going-concern values of businesses, protecting jobs, ensuring the equal treatment of and payment of creditors, and if possible saving something for the equity holders. In addition, entering this temporary restraining order furthers the policy behind the PPP that it provide much-needed funds to struggling small businesses.

16. The Debtor is a debtor-in-possession, and it is not required to post a bond. FED. R. BANKR. P. 7065 See, e.g. *Mississippi Power & Light Co. v. United Gas Pipe Line Co.*, 760 F.2d 618 (5th Cir 1985).

³ KPE LLC owns 1% of Plaintiff.

Based on the findings and conclusions set forth above, it is hereby ORDERED, ADJUDGED AND DECREED as follows:

1. The Plaintiff's request for a temporary restraining order is hereby GRANTED as set forth herein.

2. A temporary restraining order is hereby issued, with notice, and directed to Jovita Carranza in her capacity as Administrator for the SBA, and all agents, servants, employees, and any parties acting in concert with any of the foregoing parties (collectively "*Restrained Parties*"). Until the expiration of this temporary restraining order, its scope is as follows:

a. Plaintiff is authorized to submit a Borrower PPP Application to any lender with the words "or presently involved in any bankruptcy" stricken from the SBA's form, and, if Plaintiff satisfies all the other conditions in question #1 to the loan application form, mark the box answering question #1 "no." The Restrained Parties shall consider such Borrower PPP Application and fully implement all aspects of the PPP with respect to Plaintiff without any consideration of the involvement of Plaintiff or any owner of Plaintiff in any bankruptcy. A copy of this order shall be attached to the application.

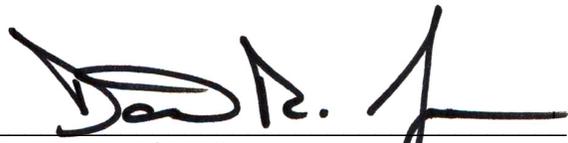
b. To the extent any bank requires Plaintiff to execute any other forms, applications, or other documents for a PPP loan that include any language about whether Plaintiff or any owner of Plaintiff is involved in any bankruptcy, Plaintiff is authorized to strike the portion of such language about involvement in any bankruptcy and the Restrained Parties shall process the forms, applications, or other documents without any consideration of the involvement of Plaintiff or any owner of Plaintiff in any bankruptcy.

c. The Restrained Parties shall not make or condition the approval of any PPP loan guaranty to the Plaintiff contingent on the Plaintiff or any owner of the Plaintiff not being "presently involved in any bankruptcy."

d. IT IS FURTHER ORDERED that the Court will conduct a hearing on Plaintiff's Application for a Preliminary Injunction at 9 a.m./~~p.m.~~, on the 20th day of May 2020. The purpose of the hearing shall be to determine whether this Temporary Restraining Order should be made a Preliminary Injunction.

e. This temporary restraining order shall remain in full force and effect until it expires at 5:00~~a.m.~~/p.m. on May 20, 2020, unless either (a) terminated earlier by court order, or (b) further extended as provided by law or agreement of the parties.

Signed: May 06, 2020.



DAVID R. JONES
UNITED STATES BANKRUPTCY JUDGE