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IT IS SO ORDERED.

Dated: May 20, 2020



**ALAN M. KOSCHIK**  
**U.S. Bankruptcy Judge**

**UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION**

In re	)	
	)	Case No. 19-52957
WEATHER KING HEATING & AIR, INC.,	)	
	)	Chapter 11
Debtor.	)	
	)	Adversary Proceeding No. 20-05023
_____	)	
	)	Judge Alan M. Koschik
WEATHER KING HEATING & AIR, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
U.S. SMALL BUSINESS ADMINISTRATION, <i>et al.</i> ,	)	
	)	
Defendants.	)	

**AMENDED TEMPORARY RESTRAINING ORDER**

This Amended Temporary Restraining Order (“Amended TRO”) amends and supersedes the Temporary Restraining Order (Docket No. 18) (the “TRO”) entered on May 13, 2020. This

Amended TRO is identical to the TRO except for the decretal paragraphs and the last recital paragraph.

On May 5, 2020, debtor-plaintiff Weather King Heating & Air, Inc. (the “Debtor”) filed this adversary proceeding against the U.S. Small Business Administration and Jovita Corranza, solely in her capacity as administrator of the Small Business Administration (collectively, the “SBA”). The Complaint seeks declaratory and injunctive relief against the SBA, declaring that its exclusion of debtors in bankruptcy from eligibility to receive loans guaranteed and forgiven pursuant to the Paycheck Protection Program (the “PPP”) established pursuant to the Coronavirus Aid, Relief, and Economic Security Act, Pub. L. 116-136 (the “CARES Act”), and the Paycheck Protection Program and Health Care Enhancement Act, Pub. L. 116-139 (the “CARES Act II”), violated federal law.

On May 7, 2020, the Debtor filed a motion for a temporary restraining order and preliminary injunction (Docket No. 6) (the “Motion”) against the SBA (i) declaring that the SBA’s disqualification of bankruptcy debtors as eligible applicants is beyond its statutory and regulatory authority, is arbitrary and capricious, and violates section 525(a) of the Bankruptcy Code, 11 U.S.C. §§ 101 *et seq.*, and section 706(A), (C) and (D) of the Administrative Procedures Act, 5 U.S.C. §§ 500 *et seq.*; (ii) enjoining the SBA from denying the Debtor from participating in the PPP based on the Debtor’s status as a debtor in bankruptcy, and (iii) providing such further relief as the Court may deem just and proper. The same day, the Court set a hearing on the Motion for May 12, 2020, at 10:00 a.m., specifically to consider the Debtor’s request for a temporary restraining order.

The SBA filed a brief in response to the Motion at 4:53 a.m. on May 12, 2020 (Docket No. 13), and then filed amended brief at 5:10 a.m. (Docket No. 15) (the “Response”). The Response, including exhibits, is 271 pages.

The Court held a telephonic hearing on the Motion at 10:00 a.m. on May 12, 2020 (the “Hearing”). Counsel for the Debtor appeared, as did the Debtor’s principal. Co-counsel for the SBA, Assistant U.S. Attorney Suzana K. Koch, appeared. Lead counsel for the SBA, Marc S. Sacks, was unavailable because he was appearing on behalf of the SBA in another hearing—also in the U.S. Bankruptcy Court for the Northern District of Ohio, also scheduled for 10:00 a.m. on May 12, 2020, and also concerning a bankruptcy debtor’s motion for a temporary restraining order in an adversary proceeding against the SBA seeking declaratory and injunctive relief invalidating the SBA’s prohibition against debtors qualifying for PPP funds. *See Areway Acquisition, Inc. v. U.S. Small Business Administration (In re Areway Acquisition, Inc., et al.)*, Adv. No. 20-1037 (Bankr. N.D. Ohio).

Both parties agreed that the Debtor had already applied for PPP funds in the amount of \$109,200 from Dollar Bank, that the SBA and/or Dollar Bank approved the application, and that the Debtor received the funds on April 25, 2020 (the “PPP Funds”). In this respect, this case appears factually distinct from the other cases involving debtors’ eligibility for PPP participation that the parties cited in their briefs; at the Hearing, neither party could point to any case in which PPP funds had already been distributed to a debtor in bankruptcy. The SBA argues that the Debtor obtained the funds inappropriately, not that a PPP application should be denied because the applicant is excluded from the program because it is a debtor in bankruptcy.

The Debtor is currently holding the PPP Funds pending resolution of the legal uncertainty regarding its right to possession and proposed use of those funds. Because the Debtor has

already received the PPP Funds, the Court has not been asked to compel the SBA to process or accept an application from the Debtor, or the Debtor's lender, disregarding the debtor-in-bankruptcy exclusion. However, because the Debtor is in possession of the PPP Funds, temporary restraint *is* necessary to preserve the Debtor's rights in the event that the Court ultimately denies the declaratory and injunctive relief that the Debtor seeks in its Complaint.

On April 24, 2020, the SBA issued an interim final rule, which was subsequently published in the Federal Register on April 28, 2020, three calendar days and one business day after the Debtor received the PPP Funds. *See Business Loan Program Temporary Changes; Paycheck Protection Program—Requirements—Promissory Notes, Authorizations, Affiliation, and Eligibility*, 85 Fed. Reg. 23450 (Apr. 28, 2020) (to be codified at 13 C.F.R. pt. 120-121) (the "Fourth Interim Final Rule"<sup>1</sup>). The Fourth Interim Final Rule provided for a regulatory safe harbor for borrowers that repay their loans in full by a certain date (the "Safe Harbor"):

Consistent with section 1102 of the CARES Act, the Borrower Application Form requires PPP applicants to certify that "[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant."

Any borrower that applied for a PPP loan prior to the issuance of this regulation and repays the loan in full by May 7, 2020 will be deemed by SBA to have made the required certification in good faith.

*Id.* at 23451. On May 6, 2020, the SBA extended the Fourth Interim Rule's Safe Harbor deadline from May 7, 2020, to Thursday, May 14, 2020—two days after the Hearing and one day after entry of this Order. *See Paycheck Protection Program Loans Frequently Asked Questions (FAQs)* (May 6, 2020), <https://home.treasury.gov/system/files/136/Paycheck-Protection->

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<sup>1</sup> The SBA posted its first interim final rule on its Web site on April 2, 2020, and published it in the Federal Register on April 15, 2020. 85 Fed. Reg. 20811. The SBA issued second and third interim final rules to implement the PPP regarding other subjects that no party has asserted are directly relevant here.

[Program-Frequently-Asked-Questions.pdf](#), Question 43 (retrieved May 12, 2020) (the “May 6 FAQ”).<sup>2</sup>

The loss of the Safe Harbor would cause irreparable injury to the Debtor. Under the status quo, the Debtor would have had until Thursday, May 14, 2020, to avail itself of the Safe Harbor if the Court were to rule that the Debtor should not have received the PPP Funds and cannot legally keep them. After May 14, the Debtor might face a new possibility: that its continued retention of the PPP Funds exposes it to additional liability due to the loss of the Safe Harbor. The Court’s inability to resolve this issue five hours after the SBA filed its brief, or by the end of the day on Thursday, May 14, might place the Debtor in additional legal jeopardy.

The balance of harms favors temporarily restraining enforcement of the Safe Harbor deadline. The Debtor has represented that it is currently holding the PPP Funds and can return them if the law requires it. The SBA, and even Dollar Bank, which did not have counsel present and may not have known of the Hearing, will not be materially harmed by the temporary retention by the Debtor of the PPP Funds pending the resolution of this legal dispute. By contrast, if the Debtor were compelled to return the PPP Funds immediately in order to avoid missing the Safe Harbor deadline, and this Court were later to determine that the Debtor’s status as a debtor in bankruptcy should have been no bar to obtaining, retaining, and using the PPP

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<sup>2</sup> The introductory paragraphs of the May 6 FAQ include the following:

... This document will be updated on a regular basis.

Borrowers and lenders may rely on the guidance provided in this document as SBA’s interpretation of the CARES Act and of the Paycheck Protection Program Interim Final Rules (“PPP Interim Final Rules”) (link). The U.S. government will not challenge lender PPP actions that conform to this guidance, and to the PPP Interim Final Rules and any subsequent rulemaking in effect at the time.

May 6 FAQ at 1. *But see id.* at n.1 (“This document does not carry the force and effect of law independent of the statute and regulations on which it is based.”)

Funds according to the other rules of the PPP, the Debtor might be unable to reacquire the funds and thereby lose the favorable attributes of the PPP, including likely forgiveness of the loan and, at the very least, six months of repayment deferral, a one percent interest rate, and a two-year repayment term. The CARES Act and CARES Act II contained only limited appropriations authority for the PPP, and it could easily be exhausted by the time the federal courts have made a final determination of this legal dispute. The Fourth Interim Final Rule notes that that it applies to “applications submitted under the Paycheck Protection Program through June 30, 2020, or until funds made available for this purpose are exhausted.” 85 Fed. Reg. 23450.

Public policy favors restraining the enforcement of the Safe Harbor deadline against the Debtor. The Safe Harbor deadline has already been extended once by the SBA and there is no obvious public policy urgency inherent in the current deadline of May 14. Meanwhile, allowing that Safe Harbor deadline to remain in place would force this Court to rush to judgment—on a matter on which the SBA filed 271 pages of briefing and exhibits five hours before the Hearing—in order to avoid placing the Debtor in an untenable position if it does not prevail. This is precisely the kind of situation that temporary restraining orders are intended to prevent. “The purpose of a TRO under Rule 65 is to preserve the status quo so that a reasoned resolution of a dispute may be had.” *Procter & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219, 226 (6th Cir. 1996). The Court will preserve the status quo, including the availability of the Safe Harbor, until a reasoned resolution of this dispute can be had.

Pursuant to the TRO, the Court held a further telephonic hearing on the Motion on Monday, May 18, 2020, at 2:00 p.m. Counsel for the Debtor and SBA appeared. The arguments from both sides were extensive. The Court announced its intention to issue its oral ruling during

a telephonic conference on May 21, 2020. The Court enters this Amended TRO solely to preserve the status quo until the Court issues its oral decision.

Based on the foregoing,

**IT IS HEREBY ORDERED THAT:**

1. The Debtor's Motion for a Temporary Restraining Order (Docket No. 6) is

**GRANTED.**

2. Effective May 12, 2020, at 12:30 p.m., the U.S. Small Business Administration and Jovita Corranza, solely in her capacity as administrator of the Small Business

Administration, are **TEMPORARILY RESTRAINED** as follows:

- a. The currently-existing Safe Harbor deadline of May 14, 2020, shall not apply to the Debtor, on the terms set forth in this Order.
- b. Unless the SBA, by agency action, otherwise extends the Safe Harbor beyond May 22, 2020, for all PPP applicants and recipients, including the Debtor, the SBA is directed to extend the Debtor's Safe Harbor deadline to May 22, 2020, at 11:59 p.m., according to the procedures set forth in the May 6 FAQ.

3. This Temporary Restraining Order expires at 11:59 p.m., May 22, 2020, unless further extended by order of this Court.

4. The Court has scheduled a hearing to render its oral decision on **Thursday, May 21, 2020, at 3:00 p.m.**

5. Pursuant to the **Notice of Telephonic Hearing Procedures for Judge Alan M. Koschik**, dated March 23, 2020 (the "Telephonic Hearing Notice"), the further hearing will be exclusively telephonic.

6. Parties wishing to appear telephonically may dial into the hearing conference call as follows:

**Dial-In Information**

Telephone: **(866) 434-5269**  
Access Code: **2469740#**

7. Parties who choose to participate must review and comply with the Telephonic Hearing Notice. The Telephonic Hearing Notice is available on the Court's Web site, <https://www.ohnb.uscourts.gov>, under Judges' Info > Judge Alan M. Koschik > Docket Information. The direct URL of the Telephonic Hearing Notice is [https://www.ohnb.uscourts.gov/sites/default/files/docket-information-amk/covid-19-notice-change-procedure-032320-pdf\\_0.pdf](https://www.ohnb.uscourts.gov/sites/default/files/docket-information-amk/covid-19-notice-change-procedure-032320-pdf_0.pdf).

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