

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re:)	
)	Chapter 11
United States of America Rugby Football)	
Union, Ltd.,)	Case No. 20-10738 (BLS)
)	
Debtor.)	
_____)	

**UNITED STATES’ LIMITED OBJECTION TO DEBTOR’S
MOTION FOR ENTRY OF AN ORDER AUTHORIZING DEBTOR TO OBTAIN POST-
PETITION FINANCING VIA THE PAYCHECK PROTECTION PROGRAM**

The United States of America (the “United States”), on behalf of the Small Business Administration (“SBA”) and Jovita Carranza, solely in her capacity as Administrator of the SBA, objects to Debtor’s motion (“Motion”). Dkt. 101; *see* Dkt. 110 (revised proposed order).

As an initial matter, the United States objects to the extent that any proposed order may purport to grant relief on claims that are not properly before the Court, not within the Court’s subject matter jurisdiction or for which there is no sovereign immunity waiver permitting a claim for such relief against the SBA.

In its Motion, Debtor requests that this Court enter an order pursuant to 11 U.S.C. § 364(b) authorizing the Debtor to “accept funding” under a new SBA loan and guarantee program titled the “Paycheck Protection Program” or “PPP,” enacted as part of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act).

The United States has no objection to the Debtor obtaining post-petition financing, or to this Court’s entry of a narrowly tailored order generally authorizing the debtor to apply for such post-petition financing. However, the United States objects to the entry of a post-petition financing order that may be presumed to require the SBA to guarantee funds that appear to have been inappropriately obtained pursuant to the PPP.

The PPP excludes bankrupt debtors from obtaining a PPP loan. The PPP Application Form requires the borrower to certify, among other things, that it is not a debtor in bankruptcy in order to obtain a PPP loan. SBA Form 2483, available at <https://www.sba.gov/sites/default/files/2020-04/PPP-Borrower-Application-Form-Fillable.pdf>.

The first question on the form asks: “Is the Applicant or any owner of the Applicant . . . presently involved in any bankruptcy?” Just above Question one, Form 2483 states: “If questions (1) or (2) below are answered “Yes,” the loan will not be approved.” *Id.*

The SBA explained the exclusion in the Fourth Interim Final Rule implementing the PPP:

4. Eligibility of Businesses Presently Involved in Bankruptcy Proceeding.

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.

Fourth Interim Final Rule. 85 Fed. Reg. at 23,451.

It appears that the Debtor improperly obtained a PPP loan. The Debtor filed for bankruptcy on March 31, 2020. In a declaration submitted on May 11, 2020, Debtor’s CEO (Mr. Young) states that the PPP application was filed on April 8, 2020. Dkt. 110 at 4, ¶ 4. Chase

indicated the application was filed on April 8, 2020. *Id.* at 6. Thus, the documentation and information provided by the Debtor indicates that it applied for and obtained the PPP loan after filing for bankruptcy, in contravention of program guidelines.¹

Whether the Debtor incorrectly completed Form 2483 accidentally or with fraudulent intent, or whether Chase incorrectly completed Form 2484², which must be submitted to the SBA and which contains the same exclusion (at Section I) for an “Applicant . . . presently involved in any bankruptcy” is not properly before this Court or appropriate for this Court to determine. However, it appears that if Debtor and Chase accurately completed Forms 2483 and 2484, Debtor would not have obtained a PPP loan.³ Given these fundamental questions about the eligibility of the Debtor and the Debtor and Chase certifications that seem to have resulted in a PPP loan to the Debtor, it is particularly important in this case for the Court to acknowledge the authority of SBA or other governmental enforcement agencies to determine in the first instance whether the PPP loan should not have been granted.

¹ Mr. Young offers this confusing explanation: “I was aware that the Debtor could not secure credit without Bankruptcy Court approval and would not have authorized this application had I believed that it would be considered initially filed on April 8, 2020. Rather, I believed that I was taking steps to advance and update an application that was filed before the petition date.” Dkt. 110 at 5 (¶ 5). But the PPP did not start until April 3, 2020 and the application was not available until April 2, 2020. And while Mr. Young attaches what appears to be an application indicating that he did check “Yes” in response to Question one, he concedes that the application is only “his notes regarding the application” – and not the actual application submitted to the bank. Dkt. 110 at 5 (¶ 7), 8.

² Available at <https://home.treasury.gov/system/files/136/PPP-Lender-Application-Form-Fillable.pdf>.

³ The SBA has provided a “safe harbor” for any borrower who applied for a PPP loan prior to April 24, 2020 and repays the loan in full by May 14, 2020. SBA will deem such a borrower to have made the Form 2483 certifications in good faith. Paycheck Protection Program Loans Frequently Asked Question No. 43, available at <https://home.treasury.gov/system/files/136/Paycheck-Protection-Program-Frequently-Asked-Questions.pdf>.

On May 9, 2020, DOJ counsel e-mailed counsel for Debtor, explaining that DOJ is “representing the SBA in PPP-related matters in bankruptcy proceedings.” DOJ counsel asked: “When did your client apply for the PPP loan, when did it get it (if it had indeed received it), and when did it file for Ch. 11? Please provide documentation regarding the loan, including the application form and communication with the bank demonstrating when the application was made.” Debtor’s counsel did not respond. But on May 11, 2020, Debtor filed a revised proposed order, adding the following language:

Notwithstanding the *Interim Final Rule on the Paycheck Protection Programs*, or any like or analog provision, the Debtor's use of these funds shall not be deemed unauthorized, nor shall the Debtor be otherwise disqualified from the benefits under the Paycheck Protection Program or any associated, related or otherwise applicable benefit available to other similarly situated entities because of the Debtor's bankruptcy filing and/or the entry of the associated order for relief.

First, the United States objects to an entry of an order that grants Debtor’s request to “utilize” the unauthorized PPP Loan as post-petition financing due to the Debtor’s apparently unclean hands in the application process.

Second, the United States objects to the now-paragraph 5 of the proposed order containing the sweeping language above, which is not commensurate with the relief offered by section 364(b). This Court has no jurisdiction or basis to rule that Debtor’s receipt of a PPP loan was not “unauthorized,” particularly when Debtor concedes that it sought and received the funds while in bankruptcy. Furthermore, the Court has no jurisdiction or authority to determine who is “qualified” or “disqualified” under the PPP or to override any SBA authority to decide, now or later if the loan was improvidently granted.⁴ This paragraph should be stricken from any order,

⁴ “[T]he [SBA] administrator has, in fact, determined to exclude debtors from participation in the PPP. . . . I do not agree with that decision. I am dismayed by the consequences of that decision here, . . . but the SBA is entitled to a measure of deference and, again, I’m not authorized to

and replaced with the following language: “Nothing in this order shall be construed as requiring or otherwise compelling SBA to approve the loan or to have made any ultimate determination of eligibility.

Moreover, should the Court grant the motion over the United States’ objection, the Court should, at least: (1) explicitly allow an administrative expense claim for the issuing bank; (2) acknowledge SBA’s right to be subordinated to the bank’s claim if SBA does step into the bank’s shoes under a PPP guarantee; and (3) direct that the Debtor place the PPP loan proceeds into a separate, segregated DIP account and hold it there to maintain the status quo⁵ at least until the United States can determine the circumstances under which Debtor obtained the loan.

substitute my preference or judgment for those of the SBA.” *COSI, Inc. v. SBA*, Adversary No. 20-50591 (BLS) (Bankr. D. Del. April 30, 2020); Tr. at 58:11-17.

⁵ “T]here is at least a possibility here . . . that PPP funds could go to uses that were not intended by the CARES Act; for example, to a secured lender in the event of a post-loan default.” *Cosi, Inc.* Tr. at 58:24 – 59:2.

Dated: May 12, 2020

Respectfully submitted,

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ATTORNEYS FOR THE UNITED
STATES

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 12, 2020, I electronically filed the foregoing UNITED STATES' LIMITED OBJECTION TO DEBTOR'S MOTION FOR ENTRY OF AN ORDER AUTHORIZING DEBTOR TO OBTAIN POST-PETITION FINANCING VIA THE PAYCHECK PROTECTION PROGRAM with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to all CM/ECF participants.

/s/ Marc S. Sacks
MARC S. SACKS
Commercial Litigation Branch
Civil Division
United States Department of Justice