

IN THE UNITED STATES BANKRUPTCY COURT FOR
THE DISTRICT OF PUERTO RICO

IN RE:

ORGANIC POWER LLC

Debtor

ORGANIC POWER LLC

Plaintiff

V.

SMALL BUSINESS ADMINISTRATION

JOVITA CARRANZA

Defendants

CASE NO. 19-01789-EAG11

Chapter 11

ADVERSARY NUMBER: 20-00055-EAG

FILED & ENTERED ON MAY/08/2020

Temporary Restraining Order

On April 27, 2020, plaintiff Organic Power LLC filed an application for temporary restraining order and preliminary injunction against Jovita Carranza, in her capacity as Administrator of the U.S. Small Business Administration. Organic Power submitted applications for financial help under the Paycheck Protection Program (PPP) to Banco Popular de Puerto Rico and Oriental Bank. Both banks denied the applications because Organic Power is in bankruptcy. The SBA form used to process applications for the PPP states that applicants “presently involved in any bankruptcy” are ineligible for the PPP. Organic Power requests that this court declare the decision to exclude bankruptcy applicants from the PPP beyond the SBA’s statutory and regulatory authority, as arbitrary and capricious under the Administrative Procedures Act (APA), and contrary to the anti-discrimination provision of the Bankruptcy Code. Organic Power further requests that the court enjoin the SBA from denying its PPP application based on its status as a chapter 11 debtor and that the court compel the SBA to remove the language in all PPP applications which disqualifies bankruptcy applicants.

At the hearing held on May 6, 2020, the court heard arguments from the parties and considered the contents of Organic Power’s motions and the SBA’s opposition. The court also considered the Coronavirus Aid, Relief, and Economic Security Act, H.R. 748, P.L. 115-136 (CARES Act); the PPP enacted in section 1102 of the CARES Act; section 7(a) of the Small

1 Business Act (15 U.S.C. § 636(a)); the SBA’s interim final rules promulgated on April 15, 2020
2 and April 24, 2020 and published in the Federal Register (Docket Nos. SBA-2020-0015 and SBA-
3 2020-0021); and the relevant provisions of the APA (5 U.S.C. §§ 701-706.).

4 The court also examined the temporary restraining orders issued by several bankruptcy
5 courts across the nation in cases filed by debtors against the SBA for similar denials of PPP
6 applications: Springfield Medical Care Systems, Inc. v Carranza, Ch. 11 Case No. 19-10485, Adv.
7 Proc. 20-01004, slip op. (Bankr D. Vt. May 7, 2020); Springfield Hospital Inc. v Carranza, Ch. 11
8 Case No. 19-10283, Adv. Proc. 20-01003, slip op. (Bankr D. Vt. May 4, 2020); Roman Catholic
9 Church of the Archdiocese of Santa Fe v. Carranza, Ch. 11 Case No. 18-13027, Adv. Proc. 20-
10 01026, slip op. (Bankr. D.N.M. May 1, 2020); Penobscot Valley Hospital v. Carranza, Ch. 11
11 Case No. 19-10034, Adv. Proc. 20-01005, slip op. (Bankr. D. Me. May 1, 2020); Calais Regional
12 Hospital v. Carranza, Ch. 11 Case No. 19-10486, Adv. Proc. 20-01006, slip op. (Bankr. D. Me.
13 May 1, 2020); and Hidalgo County Emergency Service Foundation v. Carranza, Ch. 11 Case No.
14 19-20497, Adv. Proc. 20-02006, slip op. (Bankr. W.D. Tex. April 25, 2020).

15 First, the court addresses the SBA’s claim to sovereign immunity under the Small Business
16 Act, which provides that the SBA may:

17 sue and be sued in any court of record of a State having general jurisdiction, or in any
18 United States district court, and jurisdiction is conferred upon such district court to
19 determine such controversies without regard to the amount in controversy; but no
20 attachment, injunction, garnishment, or other similar process, mesne or final, shall be
21 issued against the [agency] or [its] property. . . .

22 15 U.S.C. §634(b)(1). This section precludes suits for injunctive or any similar relief against the
23 SBA. But, section 106(a) of the Bankruptcy Code allows this court to protect debtors from
24 discrimination made illegal by section 525(a) of the Code notwithstanding an assertion of
25 sovereign immunity. 11 U.S.C. §§ 106(a) & 525(a).

26 The sovereign immunity defense has already been expressly rejected in two cases by
27 another bankruptcy court in this Circuit. Penobscot Valley Hospital, slip op. at 2 and Calais
28 Regional Hospital, slip op. at 2. The bankruptcy court in Vermont also rejected the defense in two
29 more similar cases. Springfield Medical Care Systems, Inc., slip op. and Springfield Hospital Inc.,
slip op.

The Maine court interpreted binding case law in this Circuit, Ulstein Mar., Ltd. V. United
States, 833 F.2d 1052 (1st Cir.1987), as allowing the same, carefully tailored injunctive relief

1 against the SBA sought by Organic Power here. See Penobscot Valley Hospital, slip op. at 3-4
2 and Calais Regional Hospital, slip op. at 3-4. This court agrees with and adopts the reasoning of
3 the Maine court in Penobscot and Calais. In this case, as in the cases in the Districts of Maine and
4 Vermont, the debtor seeks to invalidate as unlawful the SBA’s decision to disqualify it from the
5 PPP. As such, this court may under section 106(a) of the Bankruptcy Code enter a carefully tailored
6 temporary restraining order against the SBA, notwithstanding the anti-injunction provision of 15
7 U.S.C. § 634(b).

8 The court now turns to the SBA’s argument that Organic Power’s anti-discrimination claim
9 under section 525(a) of the Bankruptcy Code fails because PPP money is a loan and section 525(a)
10 does not protect loans. Section 525(a) provides that:

11 a governmental unit may not deny, revoke, suspend, or refuse to renew a license, permit,
12 charter, franchise, or other similar grant to, condition such a grant to, discriminate with
13 respect to such a grant against . . . a person that is or has been a debtor under this title or a
14 bankrupt or a debtor under the Bankruptcy Act. . . .

15 11 U.S.C. § 525(a). As mentioned, the SBA argues that section 525(a) does not protect “PPP
16 loans.” It further argues that, even if PPP money is a grant, it is not a grant similar to “a license,
17 permit, charter, [or] franchise,” and thus likewise not protected by section 525(a).

18 But this court agrees with the bankruptcy court in New Mexico that the PPP is not a loan
19 program, rather a grant or support program offered by the government to small businesses in
20 financial distress without regard to creditworthiness. See, Archdiocese of Santa Fe, slip op. at 11.
21 Under section 1106 of the CARES Act, if 75% or more of PPP money is used for payroll and the
22 rest for mortgage interest, rent, and utilities, none of it must be repaid. See First Interim Final Rule
23 § 2(o). As Organic Power has committed to using 100% of any PPP money received for payroll,
24 the “loan” will be forgivable and is best characterized as an “other similar grant” under section
25 525(a) of the Bankruptcy Code for the reasons stated in the Archdiocese of Santa Fe opinion and
26 in open court. And, we note that the court has imposed restrictions in this Order to enforce Organic
27 Power’s commitment.

28 The SBA also argues that this court cannot issue a temporary restraining order for claims
29 under the APA, because those claims are non-core and the court cannot order injunctive relief in a
non-core matter. We disagree. The SBA’s exclusion of Organic Power from the PPP is a core
matter under section 525 of the Bankruptcy Code. See, Penobscot Valley Hospital, slip op. at 2;

1 Calais Regional Hospital, slip op. at 2; Archdiocese of Santa Fe, slip op. at 9. And, the SBA's
2 exclusion of bankruptcy debtors from the PPP is central to the administration of the case as the
3 funds, if disbursed, would replace Organic Power's lost revenue caused by the government
4 lockdown. Archdiocese of Santa Fe, slip op. at 9.

5 The court finds that the SBA's exclusion of applicants in bankruptcy from the PPP is
6 arbitrary and capricious in violation of section 706(2)(A) of the APA for the reasons stated in open
7 court and in the Archdiocese of Santa Fe opinion. Id. slip op. at 11. Congress knew how to and
8 did expressly exclude mid-size businesses in bankruptcy from loan help under the CARES Act but
9 did not exclude small businesses in bankruptcy from the PPP under the CARES Act. Section
10 4003(c)(3)(D) of the CARES Act. Thus, the arguments of the SBA to justify its decision to do so
11 are not convincing.

12 The SBA argues that section 525 of the Bankruptcy Code does not protect PPP money
13 because Congress gave qualifying student loans section 525 protection but did not give it to PPP
14 money. Though the SBA rejects that same logic -- a traditional rule of statutory interpretation --
15 in construing the CARES Act. Rather the SBA justifies doing what Congress did not because,
16 given the need for speed, the bankruptcy exclusion is an easy-to-apply and expeditious litmus test
17 for creditworthiness. But because Congress created the PPP plainly to assist non-creditworthy
18 small businesses, we find the SBA's arguments frivolous. See Archdiocese of Santa Fe, slip op.
19 at 11. And we note that many creditworthy recipients of PPP monies have been publicly shamed
20 and even threatened with legal action by members of Congress and the Executive into returning
21 PPP monies received by them because, being creditworthy, they either have sufficient money on
22 hand or can access money from private sources to weather the Covid-19 pandemic.

23 Now we turn to consideration of the four factors that govern requests for preliminary
24 injunctions: (1) whether there is a likelihood of success on the merits; (2) whether the moving
25 party will suffer irreparable harm in the absence of interim relief; (3) whether preliminary relief
26 will injure other parties; and (4) whether the public interest supports granting the injunction.
27 Arborjet, Inc. v. Rainbow Treecare Sci. Advancements, 794 F.3d 168, 171 (1st Cir. 2015). The
28 critical factor of the four is the likelihood to succeed on the merits. Borinquen Biscuit Corp. v.
29 M.V. Trading Corp., 443 F.3d 112, 115 (1st Cir. 2006). "The balancing of harm is weighed in light
of the likelihood to succeed." Arroyo v. Scotiabank de P.R. (In re Arroyo), 2013 Bankr. LEXIS
2683, at *4 (Bankr. D.P.R. June 28, 2013).

1 The court finds that Organic Power would suffer immediate and irreparable harm without
2 the issuance of a temporary restraining order.¹ And further finds the following:

3 1. Organic Power is entitled to issuance of a temporary restraining order under Federal
4 Rule of Civil Procedure 65 and Federal Rule of Bankruptcy Procedure 7065.

5 2. Organic Power has shown a substantial likelihood of success on the merits on its claims
6 that the SBA discriminated against Organic Power in violation of section 525(a) of the Bankruptcy
7 Code by excluding Organic Power from the PPP and that in so doing the SBA exceeded its
8 statutory and regulatory authority in an arbitrary and capricious manner in violation of the APA.

9 3. The lockdown orders in Puerto Rico commenced on March 16, 2020, have been
10 subsequently extended until May 25, 2020, and are subject to further extensions.

11 4. Organic Power is an energy recycling company which employs at least 25 people. Its
12 operations has been impacted by the crisis. It will need to terminate jobs and close parts of its
13 operations if it does not receive PPP money. The shutdown of operations would pose a potential
14 environmental hazard because organic waste and methane gas is stored in its facilities.

15 5. PPP money is available on a first come, first served basis. Organic Power's PPP
16 application with Banco Popular de Puerto Rico and Oriental Bank were both denied because it is
17 in bankruptcy. If Organic Power is not permitted to reapply for PPP money in the very near term,
18 PPP funding may be exhausted.

19 6. Organic Power states that it otherwise meets all other requirements of the PPP. But the
20 court is not ruling on whether Organic Power otherwise meets the requirements of the PPP.

21 7. The risk of harm to Organic Power if a temporary restraining order is not granted
22 outweighs the risk of any harm to the SBA if a temporary restraining order is granted, and this
23 particularly so given the restrictions imposed below on the use of PPP money.

24 8. Given the purpose Congress had in enacting the CARES Act and establishing the PPP
25 and the nature of the national crisis that led to its enactment, the public interest is served by issuing
26 a temporary restraining order so that Organic Power has an opportunity to continue its operations
27 and paying wages to its employees.

28 ¹ Due to the preliminary nature of the relief and the need for a speedy resolution, the court's findings and
29 conclusions on a request for a TRO do not represent an adjudication on the merits and are not binding on
the parties in the later action. See, Narragansett Indian Tribe v. Guilbert, 934 F.2d 4, 6 (1st Cir. 1991)
("[A] court's conclusions as to the merits of the issues presented on preliminary injunction are to be
understood as statements of probable outcomes.")

1 9. Organic Power is a debtor-in-possession and no bond is required under Federal Rule of
2 Civil Procedure 65.

3 Based on the foregoing, it is hereby ORDERED, ADJUDGED and DECREED as
4 follows:

- 5 1. Organic Power's request for a temporary restraining order is GRANTED on the terms
6 and conditions set forth herein.
- 7 2. A temporary restraining order is hereby issued, with notice, and directed to Jovita
8 Carranza in her capacity as Administrator of the SBA and all agents, servants,
9 employees, and any persons acting in concert with any of the foregoing (collectively,
10 the "Restrained Parties"). The court intends that Banco Popular de Puerto Rico,
11 Oriental Bank, or any other financial institution participating in the PPP with respect
12 to Organic Power shall be one of the Restrained Parties upon actual notice of this order
13 being provided to such financial institution.
- 14 3. Until the expiration of this temporary restraining order, its scope shall be as follows:
 - 15 i. Organic Power LLC is authorized to submit a PPP application to any participating
16 financial institution with the words "or presently involved in bankruptcy" stricken
17 from the SBA's application form.
 - 18 ii. The Restrained Parties shall not deny or cause any participating financial
19 institution to deny an application of Organic Power under the PPP solely on the
20 basis that Organic Power is a debtor in bankruptcy or based on the words "or
21 presently in bankruptcy" on the SBA's application form.
 - 22 iii. The Restrained Parties shall not refuse to guaranty a loan sought by Organic
23 Power under the PPP solely on the basis that Organic Power is a debtor in
24 bankruptcy or because of a "yes" answer in response to question 1 on the PPP
25 application form.
 - 26 iv. The SBA shall not authorize, guaranty, or disburse funds appropriated for the PPP
27 without reserving sufficient funds or guaranty authority within the scope of the
28 second appropriation to fund the PPP to provide Organic Power with access to
29 funds under the PPP if Organic Power is eligible after implementation of the terms
of this temporary restraining order and any appellate or judicial process with
respect to any application filed by Organic Power. Rather, the SBA shall ensure

1 that it has sufficient authority within the scope of amounts appropriated for the PPP
2 as of April 27, 2020 to guaranty a loan to Organic Power in an amount it may be
3 qualified to obtain, if Organic Power is eligible subject to the terms of this Order
4 and after consideration of any administrative and judicial appeals and resolution of
5 the claims in Organic Power's complaint.

- 6 v. Organic Power shall be authorized to submit a PPP application to a participating
7 financial institution of its choosing—or a participating financial institution may
8 consider any pending application—with the words “or presently involved in any
9 bankruptcy” stricken from the application form and, if Organic Power satisfies all
10 other conditions in question 1 of the application form, to mark the box answering
11 question 1 “no” or, with respect to any pending application, for the participating
12 financial institution to treat question 1 as if it was answered “no”. The Restrained
13 Parties shall consider the application submitted by Organic Power and fully
14 implement all aspects of the PPP with respect to Organic Power without any
15 consideration of the involvement of Organic Power in bankruptcy. The application
16 shall be considered an initial application of the submission if a subsequent
17 application would adversely impact Organic Power's ability to qualify for PPP
18 money.
- 19 vi. To the extent that any participating financial institution requires Organic Power to
20 execute other forms, applications, or documents for PPP money that include any
21 language about whether Organic Power is involved in bankruptcy, Organic Power
22 is authorized to strike the portion of such language about involvement in
23 bankruptcy and the Restraining Parties shall process the other forms, applications,
24 or documents without any consideration of the involvement of Organic Power in
25 bankruptcy.
- 26 vii. Nothing in this order obligates Banco Popular de Puerto Rico, Oriental Bank, or
27 any other participating financial institution to accept or submit a PPP application
28 on behalf of Organic Power.
- 29 viii. Upon receipt of any PPP money, Organic Power must:
- a) deposit those monies in a specially designated, interest bearing account,
titled as a DIP account;

- 1 b) immediately file a notice on the docket of this adversary proceeding and the
2 docket of main chapter 11 case stating that its PPP application has been
3 granted and disclosing both the name of the financial institution that granted
4 the application and the amount of the monies received;
- 5 c) refrain from disbursing any of the PPP monies until it has court approval to
6 do so; and
- 7 d) within two days after receipt of the PPP monies, file either a motion on
8 shortened (seven-day) notice to the 20 largest unsecured creditors, all
9 secured creditors, and the U.S. Trustee, or a stipulation showing the consent
10 of the U.S. Trustee, that (i) requests authority to disburse PPP monies, (ii)
11 sets forth the proposed distribution of the PPP monies, and (iii) affirms that
12 the proposed distribution meets all requirements for loan forgiveness of the
PPP.

13 ix. If the Court authorizes Organic Power to disburse the PPP monies, Organic
14 Power must:

- 15 a) create a spreadsheet showing how PPP monies have been disbursed, that
16 includes:
- 17 1. the date and purpose of each disbursement (e.g., payroll, mortgage
18 interest, rent, utilities);
 - 19 2. the section of the CARES Act which authorizes loan forgiveness of the
20 PPP monies used for that purpose;
 - 21 3. the remaining balance of PPP monies; and
 - 22 4. any other information Organic Power would find useful for its record
23 keeping or for purposes of demonstrating the entire PPP monies are
24 eligible for forgiveness if and when the SBA audits Organic Power's use
of the PPP monies; and
- 25 b) file on the docket of this adversary proceeding and the docket of Organic
26 Power's chapter 11 case an updated version of the PPP funds spreadsheet
27 within three business days of each disbursement of PPP monies.
28
29

1 4. The parties shall appear at a status conference at 1:00 p.m. (AST) on Tuesday, May 19,
2 2020, on Organic Power's request for a preliminary injunction. At that status
3 conference:

- 4 a) the SBA shall describe, in reasonable detail, the steps it has taken to comply
5 with the terms of this TRO;
- 6 b) Organic Power shall report on the status of its efforts to implement the terms
7 of this TRO and shall present, in reasonable detail, the contours of the relief
8 it seeks in the form of a preliminary injunction, based on the current status of
9 this proceeding and any pending PPP application;
- 10 c) the parties shall present to the court any additional conditions they propose
11 with respect to Organic Power's receipt, distribution, or accounting of PPP
12 monies in order to ensure the maximum protection of Organic Power's
13 bankruptcy estate and creditors, the SBA, and the participating financial
14 institution; and
- 15 d) the parties shall jointly propose a timeline and litigation schedule (if needed)
16 for a determination of whether this temporary restraining order should be
17 converted to a preliminary injunction and final adjudication of this adversary
18 proceeding. (If the parties cannot reach agreement on these terms, each party
19 shall certify they have made a diligent effort to do so and present their
20 competing proposals.)

21 5. This temporary restraining order shall remain in full force and effect until it expires at
22 the conclusion of the status conference set for May 19, 2020 unless either (a) terminated
23 earlier by the court or (b) further extended by applicable law, by order of this court, or
24 by written agreement between Organic Power and the SBA.

25 IT IS SO ORDERED.

26 In San Juan, Puerto Rico, this 8 day of May, 2020.

27 
28 Edward A. Godey
29 United States Bankruptcy Judge