

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN**

J.R. SCHUSTER, LLC

Plaintiff,

v.

Case No. 2:20-cv-634

UNITED STATES SMALL BUSINESS
ADMINISTRATION;

JOVITA CARRANZA, in her Official Capacity
as Administrator of the Small Business
Administration;

UNITED STATES OF AMERICA;

and

STEVE MNUCHIN, in his Official Capacity
as United States Secretary of Treasury,

Defendants.

VERIFIED COMPLAINT

As for its Complaint against Defendants, Plaintiff J.R. Schuster, LLC, by and through his undersigned attorneys, alleges as follows:

INTRODUCTION

1. This civil action is brought by Plaintiff to obtain emergency declaratory and injunctive relief prohibiting Defendants from discrimination against Plaintiff on the basis of the content of protected speech and/or damages resulting from discrimination already done. Plaintiff seeks to enjoin Defendants from discriminating against it with respect to its eligibility for loans provided by the Small Business Administration (“SBA”) including traditional loans offered by the SBA pursuant to section 7(a) of the Small Business Act (“7(a) Loans”), the Paycheck Protection

Program (“PPP”) of the Coronavirus, Aid, Relief, and Economic Security Act (the “CARES Act”), and Economic Injury Disaster Loan (“EIDL”). These programs are designed to provide small businesses economic relief. However, exclusionary eligibility criteria developed by the SBA for all loan programs unconstitutionally restricts access to SBA programs and loans to businesses engaged in speech protected by the First Amendment.

2. The United States Congress approved \$349 billion in funds to the SBA and its approved lenders to fund the PPP loans in response to the COVID-19 pandemic. After the program ran out of funds within a little over two weeks, Congress is set to approve approximately \$300 billion in additional funds for the PPP. That money is disbursed first-come, first-served. Given the success of the PPP loan program and the quick drain of the initial allotment, an emergency injunction is necessary to prevent injury to the Plaintiff and its constitutional rights.

PARTIES

3. Plaintiff J.R. Schuster, LLC is a limited liability company, organized under the laws of the State of Wisconsin; it owns and operates “The Vegas Gentlemen’s Club,” also known as “The Vegas Club,” with a principal place of business located at W9031 US Highway 14 in the Town of Darien, Walworth County, State of Wisconsin.

4. Plaintiff holds a Class B liquor license and is authorized to serve alcoholic beverages on its premises

5. Plaintiff also holds a Sexually Oriented Business license, granted to it by the Township of Darien, which allows it to present semi-nude adult entertainment on its premises.

6. Both Plaintiffs liquor license and the S.O.B. license are up for renewal every year at which time the Township of Darien conducts additional background checks on the business. The Plaintiff has always been renewed.

7. Plaintiff has never been ticketed, cited, charged, or convicted of any obscenity related crime and no such crimes are currently pending.

8. Defendant United States Small Business Administration (the “SBA”) is an independent federal agency created and authorized pursuant to 15 U.S.C § 633. The SBA maintains a branch office at 310 W. Wisconsin Avenue, #580W in the City of Milwaukee, Wisconsin.

9. Defendant Jovita Carranza (“Carranza” or the “Administrator”) is the Administrator of the SBA, a Cabinet-level position, and is sued in her official capacity of the SBA.

10. Authority to sue the Administrator is granted by 15 U.S.C. § 634(b) which states, in part: “In the performance of, and with respect to, the functions, powers, and duties vested in him by this chapter the Administrator may—(1) sue and be sued in any court of record of a State having general jurisdiction, or in any United States district court, and jurisdiction is conferred upon such district court to determine such controversies without regard to the amount in controversy...”

11. Steven Mnuchin (the “Secretary”) is the Secretary of the Treasury Department of the United States of America, and is sued in his official capacity only as the Secretary of the Treasury Department.

12. The United States of America is a sovereign nation dedicated to the protection of life, liberty, and property, as set forth in the Bill of Rights and other provisions and amendments to the Constitution of the United States of America.

JURISDICTION AND VENUE

13. Jurisdiction is conferred on this Court for the resolution of the questions presented here by virtue of 28 U.S.C. § 1331; 28 U.S.C. § 1343(a)(1), (3), (4); 28 U.S.C. § 1346(a)(2); and 28 U.S.C. § 1361.

14. Authority for judicial review of agency action is further provided by 5 U.S.C. § 702.

15. The prayer for declaratory relief is founded in part on Rule 57 of the Federal Rules of Civil Procedure, as well as 28 U.S.C. § 2201.

16. The jurisdiction of this Court to grant injunctive relief is conferred upon this Court by Rule 65 of the Federal Rules of Civil Procedure, as well as 29 U.S.C. §2202.

17. The Eastern District of Wisconsin is the proper venue for this action because the Plaintiff's claims arose within the geographical boundaries of the Eastern District of Wisconsin within the meaning of 28 U.S.C. § 1391(b).

RELEVANT STATUTORY PROVISIONS AND ADMINISTRATIVE REGULATIONS

18. The Small Business Act was passed by Congress as a recognition that private enterprise and free competition are the essence of the American economy and to assure the "free entry into business, and opportunities for the expression and growth of personal initiative and individual judgment." (15 U.S.C. § 631(a))

19. Pursuant to that declaration of policy, the SBA administers loans to small business concerns that have trouble finding credit elsewhere and passing a criminal background check. (15 U.S.C. §636(a); Section 7(a) of the Small Business Act)

20. The Small Business Act also authorizes it to provide direct loans (or in coordination with approved lenders) loans to small businesses that have suffered economic injury due to a declared disaster (15 U.S.C. § 636(b)(2); Section 7(b) of the Small Business Act).

21. The CARES Act was signed into law by the President of the United States on March 28, 2020; it is currently in effect.

22. The CARES Act created the PPP and allotted \$349 billion to it for the purpose of providing loans administered by the SBA and its approved lenders.

23. The PPP loans were to be partially-forgivable loans for employers to cover costs like payroll, salaries, group healthcare, rent, and utilities, in order to help offset losses that employers incur due to the COVID-19 pandemic of 2020.

24. Section 1114 of the CARES Act instructs the SBA to promulgate rules for the PPP not later than 15 days after the enactment of the CARES Act.

25. The CARES Act specifically tasks the SBA with administering the PPP and considers that the Administrator has delegated her authority to any lender approved to make and approve covered PPP loans.

26. On April 1, 2020, The SBA released guiding regulations for the PPP, RIN 3245-AH34, Interim Final Rule Apr. 1, 2020 (“SBA 3245”).

27. SBA 3245 provides, in relevant part that: “Businesses that are not eligible for PPP loans are identified in 13 CFR 120.110 and described further in SBA’s Standard Operating Procedure (SOP) 50 10, Subpart B, Chapter 2, except that nonprofit organizations authorized under the Act are eligible.”

28. SBA 3245 further provides that PPP loans will be provided on a first-come, first-served basis until funds are exhausted. The PPP has a total monetary limit of \$349,000,000,000.00 (\$349 Billion).

29. 13 C.F.R § 120.110(p) states that any business which presents live performances of a “prurient sexual nature” or derives more than de minimis gross revenue through the sale of products or services of a “prurient sexual nature” are ineligible for loans administered by the SBA. (hereinafter “Regulations”)

30. These Regulations which apply to the PPP loans are the same Regulations which apply to traditional section 7(a) Loans under the Small Business Act.

31. The SBA Standard Operating Procedure 50 10 5(K) – Lender and Development Company Loan Programs (Apr. 1, 2019) provides, in part, at Ch.2 (III)(A):

“15. Businesses Providing Prurient Sexual Material (13 CFR § 120.110 (p))

a. A business is not eligible for SBA assistance if:

i. It presents live or recorded performances of a prurient sexual nature; or

ii. It derives more than 5% of its gross revenue, directly or indirectly, through the sale of products, services or the presentation of any depictions or displays of a prurient sexual nature.

b. SBA has determined that financing lawful activities of a prurient sexual nature is not in the public interest. The Lender must consider whether the nature and extent of the sexual component causes the business activity to be prurient.

c. If a Lender finds that the Applicant may have a business aspect of a prurient sexual nature, prior to submitting an application to the LGPC (non-delegated) or requesting a loan number (delegated), the Lender must document and submit the analysis and supporting documentation to the Associate General Counsel for Litigation at PSMReview@sba.gov for a final Agency decision on eligibility. Upon approval by SBA, the Lender may submit the application to the LGPC or may proceed to process the loan under its delegated authority. A non-delegated Lender must submit a copy of SBA's approval with the application to the LGPC. A delegated Lender must retain its analysis, supporting documentation, and evidence of SBA's approval in its loan file and must submit the analysis and supporting documentation to SBA with any request for guaranty purchase. SBA also may review such documentation when conducting Lender oversight activities."

(These provisions are hereinafter referred to as "SOP.")

32. Defendant SBA is responsible for formulating, issuing, and enforcing the Regulations and the SOP.

33. The application for the PPP requires Plaintiff to self-certify, upon penalty of perjury, that Plaintiff "is eligible to receive a loan under the rules...that have been issued by the Small Business Administration (SBA)".

34. The SBA can also disburse, and set eligibility criteria for disbursement of Economic Injury Disaster Loans ("EIDL") under section 7(b) of the Small Business Act.

35. The Regulations involving eligibility of small business for EIDL are identical to those for the PPP and traditional 7(a) Loans, pursuant to 13 C.F.R. 123.201(f), 123.301.

36. After the COVID-19 pandemic was declared an emergency, the SBA allowed small businesses to apply, directly from its website, for an immediate EIDL of \$10,000 for affected small businesses impacted by COVID-19 related closures.

37. These EIDL funds were available on a first-come, first-serve basis.

38. The online coronavirus-related EIDL application required an applicant to certify that it did not “present live performances of a sexual prurient nature or derive directly or indirectly more than de minimis gross revenue through the sale of products or services, or the presentation of any depictions or displays, or a prurient sexual nature” before it would even allow an applicant to continue to the second step of the application.

FACTUAL ALLEGATIONS

39. The Vegas Club is open to the consenting adult public and is licensed by its municipality to serve alcoholic beverages and to provide adult entertainment of semi-nude or nude dancers.

40. The entertainment provided by The Vegas Club is authorized by Chapter 28 of the Town of Darien Ordinances and its duly authorized Sexually Oriented Business license.

41. The entertainment provided by The Vegas Club consists of semi-nude performers on a stage with a vertical pole that spins which the entertainers use during their performance, colloquially referred to as “pole dancing.”

42. At least ten different entities in Wisconsin offer pole-dancing classes for physical fitness.

43. Multiple pole dancing federations exist in the United States, one of which describes pole dancing as a competitive “athletic art form”. The Global Association of International Sports Federation (GAISF)—the umbrella organization that houses all Olympic and non-Olympic sports federations—has granted the International Pole Sports Federation official observer status. This is an important step in becoming an Olympic sport, and grants pole dancing the same status as sports like rugby, dodgeball, and rafting.

44. The adult entertainment provided by the The Vegas Club is non-obscene, appeals to healthy human interests and desires, and is in compliance with the numerous licenses and permits that it holds which are annually reviewed by the Town of Darien.

45. None of the live performances at The Vegas Club are obscene or unlawful in any way.

46. On March 12, 2020, Wisconsin Governor Tony Evers issued Executive Order #72, declaring a State of Emergency in Wisconsin due to the COVID-19 outbreak.

47. On March 13, 2020, President Donald Trump declared a national state of emergency throughout the United States due to the COVID-19 outbreak.

48. On March 17, 2020, Governor Evers authorized Emergency Order #5, which banned gatherings of 10 or more people.

49. On March 24, 2020, Andrea Palm, the Secretary-designee for the Department of Health Services for the State of Wisconsin issued Emergency Order #12, a “Safer-at-Home” order akin to a shelter-in-place order, shutting down all non-essential businesses and ordering all Wisconsinites to remain at home except for essential travel through April 24, 2020.

50. On April 16, 2020, Secretary-designee Palm extended the “safer-at-home” order through May 26, 2020.

51. On April 20, 2020, Governor Evers announced Emergency Order 31 the “Badger Bounce Back Plan,” which was executed by Secretary-designee Palm. The plan calls for a three phased plan for reopening Wisconsin businesses. Before moving from one phase to the next, the state must see a 14-day decline in reported symptomatic cases and positive tests of COVID-19.

52. Bars are not scheduled to reopen until Phase Two. Even then they will be required to keep occupancy under 50 total persons and maintain social distancing. It is not until Phase 3 that all business activities and gatherings will continue with minimal protective and preventative measures.

53. In other words, The Vegas Club, and similar establishments, will be the last to return to normal business operations under the plan and, therefore, will be hardest hit.

54. Since Governor Evers’s Emergency Order 5 banning mass gatherings, The Vegas Club has been closed for business since 5:00 p.m. on March 17, 2020 and it is likely to remain closed at least through May 26, 2020, if not longer given the Governor’s plan.

55. The initial \$349 billion of funds for the PPP were exhausted on April 16, 2020.

56. Congress and the White House have agreed in principle to funding the PPP loan program for an additional \$300 billion.

57. As a direct and proximate result of the Wisconsin state-mandated closure, the Plaintiff has suffered significant business losses, but plans to reopen when legally permitted to do so.

58. In order to mitigate business losses and to provide monetary relief to employees, Plaintiff sought out avenues of financing and applied, or attempted to apply, for an EIDL loan and PPP loan.

59. On April 1, 2020, Plaintiff attempted to apply online for a direct coronavirus-related EIDL loan.

60. The online SBA application prevented Plaintiff from completing the online application unless Plaintiff certified it did not present live performances of a “prurient sexual nature” or receive no more than de minimis gross revenue from the sale of products and services of a “prurient sexual nature.”

61. On April 6, 2020, Plaintiff inquired with its banker, Kyle Lamb of First National Bank and Trust in Walworth, Wisconsin, about applying for a PPP loan; Lamb forwarded Plaintiff information to submit a PPP loan application with First National Bank and Trust.

62. On April 8, 2020, Lamb and Plaintiff emailed back-and-forth with additional information needed for the loan application and the bank told Plaintiff he was “looking into eligibility for your industry as well.”

63. On April 9, 2020, Lamb emailed Plaintiff telling him that he could not proceed with processing Plaintiff’s PPP application specifically attaching to the email SBA SOP 50 10(K) and citing to page 114 which includes the SOP regarding “Businesses Providing Prurient Sexual Material.”

64. On April 20, 2020, Lamb informed Plaintiff that the same SOP would bar any application for a traditional SBA loan under section 7(a) for the Small Business Act.

65. First National Bank and Trust operates as a delegate of the SBA in processing and approval or disapproval of PPP loans and 7(a) loans for the SBA.

66. The Plaintiff is otherwise qualified for these loans under all relevant statutes, regulations, and procedures.

67. Plaintiff fears that the SBA Regulations and SOPs will cause their PPP application to be delayed while the additional \$300,000,000,000 in funds are exhausted a pace just as fast as the original \$349 billion in funds were exhausted, thus rendering any later request for relief moot.

68. The SOP requires that if a lender finds that an applicant may be a business under the “prurient sexual nature” exception to eligibility, the lender is to request a final determination on eligibility by the SBA.

69. Again, Plaintiff fears that the SBA will be overworked processing applications and funding PPP loans that any such determination will come well after funds are depleted.

70. If the Plaintiff is not able to obtain relief from the SBA either through the PPP, EIDL, or traditional loan programs, it will not likely be able to survive the COVID-19 pandemic and will be unable to engage in its First Amendment protected activity and its staff, entertainers, and customers will be unable to engage or view in protected First Amendment activity.

COUNT I - VIOLATION OF FIRST AMENDMENT FREE EXPRESSION

71. Plaintiff incorporates herein by reference paragraphs 1 through 70 above as fully set forth herein.

72. The Regulations and the SOP violate and are contrary to the First Amendment of the United States Constitution, on their face and as applied to Plaintiff, for numerous and various reasons including but not limited to:

- a. They are impermissible content-based restrictions on protected speech and expression that cannot pass muster under strict scrutiny;
- b. They are impermissible content-neutral restrictions on protected speech and expression that cannot pass muster under intermediate scrutiny;

- c. They fail to conform to the constitutional standard regarding obscenity;
- d. They violate the doctrine of constitutional conditions; and
- e. They are unconstitutionally vague under the vagueness standards for matters impacting speech and expression.

73. As a direct and proximate result of the unconstitutional aspects of the eligibility criteria defined by the Regulations and SOP and the Defendants' and their delegates' application of the eligibility criteria against Plaintiff and its interests, Plaintiff's employees, and the entertainers who perform on Plaintiff's premises have suffered and will continue to suffer irreparable injuries, including but not limited to economic loss, business dissolution, and the inability to present protected First Amendment protected entertainment.

COUNT II – VIOLATION OF FIFTH AMENDMENT DUE PROCESS

74. Plaintiff incorporates herein by reference paragraphs 1 through 73 above as fully set forth herein.

75. The Regulations and the SOP violate and are contrary to the Fifth Amendment of the United States Constitution, on their face and as applied to Plaintiff, for numerous and various reasons including but not limited to:

- a. They treat establishments presenting certain forms of performance dance entertainment, such as Plaintiff, differently from establishments presenting other forms of entertainment or no entertainment, for no compelling, important, or rational reason;
- b. They treat workers at establishments presenting certain forms of performance dance entertainment, such as Plaintiff, differently from establishments presenting

other forms of entertainment or no entertainment, for no compelling, important, or rational reason;

- c. They violate Plaintiff's, its employees', and the entertainers' who perform on its premises rights under the occupational liberty component of the Fifth Amendment;
- d. They are impermissibly vague.

76. As a direct and proximate result of the unconstitutional aspects of the eligibility criteria defined by the Regulations and SOP and the Defendants' and their delegates' application of the eligibility criteria against Plaintiff and its interests, Plaintiff's employees, and the entertainers who perform on Plaintiff's premises have suffered and will continue to suffer irreparable injuries, including but not limited to economic loss, business dissolution, and violation of the rights protected by the Fifth Amendment of the United States Constitution.

COUNT III – THE INVALIDITY OF THE REGULATIONS AND SOP

77. Plaintiff incorporates herein by reference paragraph 1 through 77 above as though fully set forth herein.

78. Because it is clear and unambiguous as to which businesses are eligible for PPP loans under the CARES Act, including this Plaintiff, the SBA lacked authority to promulgate regulations with restricted or otherwise 'clarified' what businesses were eligible for PPP Loans.

79. As a direct and proximate result of the invalid portions of the Regulations and SOP and the Defendants' and their delegates' application of the Regulations and the SOP against Plaintiff and its interests, its employees, and the entertainers who perform on its premises have suffered and will continue to suffer irreparable injuries including but not limited to financial ruin and business ruination.

PRAYER FOR RELIEF

WHEREFORE, for the reasons set forth above, Plaintiff prays that the Court grant judgment against Defendants as follows:

- A. Issue orders granting a Temporary Restraining Order, Preliminary, and Permanent Injunction enjoining the Defendants, as well as their employees, agent and representatives, including the SBA's lending banks, from enforcing or utilizing in any fashion or manner whatsoever, 13 C.F.R. § 120.110(p) and SBA SOP 50 10 5(K), Ch. 2(III)(A)(15) in regard to loan applications made pursuant to the Payroll Protection Program of the CARES Act;
- B. As part of those orders, order the Defendants, as well as their employees, agent and representatives, to notify, as expeditiously as possible, all SBA lending banks to immediately discontinue utilizing 13 C.F.R. § 120.110(p) and/or SBA SOP 50 10 5(K), Ch. 2(III)(A)(15) as criteria for determining PPP loan application eligibility and to fully process all PPP loan applications without reference to such regulations and procedures;
- C. Also as part of those orders, order the Defendants, as well as their employees, agent and representatives, including the SBA's lending banks, to restore Plaintiff to its place in the application queue as it was at the time of application in the event that its application has already been formally denied, derailed, or paused because of the challenged regulations and procedures challenged here;
- D. Issue Orders granting a Permanent Injunction enjoining Defendants, as well as their employees, agents and representatives, including SBA's approved lending banks, from enforcing or utilizing in any fashion or manner, 13 C.F.R. §§ 120.110(p), 120.201(f), 120.301 and/or SBA SOP 50 10(K), Ch. 2(III)(A)(15) in regard to traditional loan

applications or EIDL loan applications previously authorized by sections 7(a), (b) of the Small Business Act and codified at 15 U.S.C. 636(a), (b).

- E. Enter an award of attorneys' fees and costs against the Defendants and in favor of the Plaintiff; and
- F. Enter such other and further relief as this Court may find to be warranted in these circumstances.

DATED: April 21, 2020

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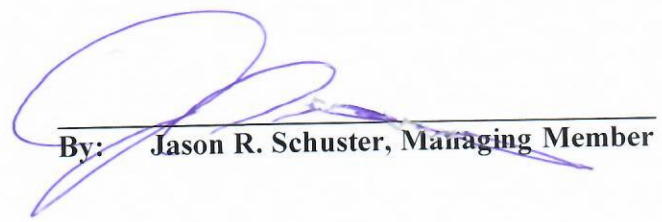
VERIFICATION OF COMPLAINT

1. I, Jason R. Schuster, am the Managing Member of J.R. Schuster, LLC.
2. I make this verification upon my personal knowledge, unless specifically stated to the contrary.
3. I have reviewed the foregoing *VERIFIED COMPLAINT* (the "Complaint") in its entirety.
4. The factual statements in the Complaint are true and accurate to the best of my information, knowledge and belief.
5. Except, any matters stated to be upon "information and belief" I verily believe to be true.

I VERIFY UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT.

J.R. SCHUSTER, LLC

4/21/20
Date


By: Jason R. Schuster, Managing Member