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May 26, 2021

Via CM/ECF
Deborah S. Hunt
Clerk of Court
U.S. Court of Appeals for the Sixth Circuit
540 Potter Stewart U.S. Courthouse
100 E. Fifth Street
Cincinnati, OH 45202-3988

Re: *Antonio Vitolo, et al. v. Isabella Casillas Guzman*, Case No. 21-5517

Dear Ms. Hunt:

At 1pm on May 24, 2021, the Government provided an update as to the status of the Restaurant Revitalization Fund per this Court's direction. I write to provide further updates as to the status of the Restaurant Revitalization Fund based on developments that have occurred since 1pm on May 24. I have attached to this letter a declaration from John A. Miller, Deputy Associate Administrator of the Small Business Administration's Office of Capital Access, providing additional updates on the Fund's status.

As explained in the attached declaration, per the American Rescue Plan Act, the priority period that plaintiffs' challenge was to run only "[d]uring the initial 21-day period in which [SBA] awards grants under this sub-section." ARPA § 5003(c)(3)(A). "SBA began processing and awarding grants on May 3, 2021," meaning that "21-day priority period began that day and ended on May 24, 2021." Miller Decl. ¶ 16. Because the priority period had now ended, as of yesterday SBA began processing non-priority claims for businesses with gross receipts of less than \$500,000 in 2019. Miller Decl. ¶ 22. And as of today, "SBA will begin processing all claims based on the order in which they were received regardless of priority status." Miller Decl. ¶ 23.

This case is therefore moot. The statutory provision that plaintiffs challenge—the priority period subsection of § 5003—expired by its own terms on May 24, 2021. Furthermore, as plaintiffs explained to this Court, they “ultimately seek an injunction requiring Defendants to process applications in the order that they were received, without regard to the race or gender of the applicant.” Mot. 3. Consistent with the expiration of the priority period, SBA will, as of today, “begin processing all claims based on the order in which they were received regardless of priority status.” Miller Decl. ¶ 23. In other words, the relief that plaintiffs seek is now the status quo, and there is therefore no longer any basis for the Court to grant plaintiffs the preliminary injunction that they seek. The Government would be happy to submit additional briefing on the mootness question if it would be helpful to the Court.

Sincerely,

/s/ Jack Starcher

Jack Starcher

Attorney for the Defendant-Appellee

Attachment

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ANTONIO VITOLO, et al.,)	
)	
Plaintiffs-Appellants,)	
v.)	No. 21-5517
)	
ISABELLA CASILLAS GUZMAN,)	
Administrator,)	
U.S. Small Business Administration,)	
)	
Defendant-Appellee.)	

DECLARATION OF JOHN A. MILLER

I, JOHN A. MILLER, hereby declare as follows:

1. I have worked at the United States Small Business Administration (“SBA”) for over twenty years. I currently hold the position of Deputy Associate Administrator for Capital Access. The Office of Capital Access is responsible for the operation development of policy for the SBA’s business loan programs authorized under the Small Business Act and the Restaurant Revitalization Fund (“RRF”) program authorized under the American Rescue Plan Act, among others. I am the highest-ranking career official in the Office of Capital Access and am knowledgeable about the RRF program.

2. My declaration is intended to explain the basic structure of the RRF program and also to explain that SBA is no longer prioritizing processing claims from women-owned, veteran-owned, and socially and economically disadvantaged-individual owned businesses. Instead, as of May 26, 2021, SBA is processing RRF claims from eligible entities based on the order in which they are received regardless of the applicant’s priority status. I further seek to provide clarification on the disbursement of RRF funds as discussed in my May 24, 2021 declaration in the above captioned matter

I. RRF Program Background and Prioritizing Period

3. The RRF was enacted as part of the American Rescue Plan Act (“ARPA”), which Congress passed into law on March 11, 2021. *See* American Rescue Plan Act, Pub. L. No. 117-2 (2021). The RRF is codified in Section 5003 of ARPA. *Id.*

4. Congress allocated \$28.6 billion for RRF. *See* ARPA § 5003(b)(2)(B). Of this sum, \$5 billion was set aside specifically for eligible entities with gross receipts of not more than \$500,000 for the year 2019. *Id.* § 5003(b)(2)(B)(i)(I) (“Set Aside Fund”).

5. Subject only to the prioritization period, ARPA requires that SBA “award grants to eligible entities in the order in which applications are received by the [agency].” ARPA § 5003(c)(1).

6. SBA announced on April 19, 2021 that the RRF’s application portal would open on May 3, 2021 at 12:00pm ET. The announcement explained that “all eligible applicants are encouraged to submit applications.” App. 036.

7. On the same day, SBA also released guidance on its website about how to apply for RRF grants. The guidance explained “SBA will accept applications from all eligible applicants.” App. 043.

8. Subsequent SBA announcements in the run up to the May 3, 2021 launch of the RRF application portal similarly encouraged all eligible entities to immediately apply. An April 27, 2021 press released explained “[a]ll eligible applicants are encouraged to submit applications as soon as the portal opens” and that, excepting the prioritization period, “all eligible applications will be funded on a first-come, first-served basis.” App. 053.

9. Based on the overwhelming demand for RRF grants, the application portal closed on May 24, 2021. *See* SBA, *Last Call: Administrator Guzman Announces Final Push for Restaurant Revitalization Fund Applications* (May 18, 2021), <https://www.sba.gov/article/2021/may/18/last-call-administrator-guzman-announces-final-push-restaurant-revitalization-fund-applications>.

10. To address the failure of earlier COVID-19 relief efforts to equitably distribute funds to all small businesses, ARPA created a priority period for awarding grants. *See* ARPA § 5003(c)(3).

11. The priority period provision required that “[d]uring the initial 21-day period in which [SBA] awards grants under this sub-section, the [SBA] shall prioritize awarding grants to

eligible entities that are small business concerns owned and controlled by women . . . , small business concerns owned by veterans . . . , or socially and economically disadvantaged small business concerns.” ARPA § 5003(c)(3)(A). ARPA incorporates the Small Business Act to define these terms. *See generally* 15 U.S.C. §§ 632, 637.

12. SBA began processing and awarding grants on May 3, 2021, and accordingly the 21-day priority period began that day and ended on May 24, 2021.

II. The SBA’s Application Processing and Expiration of Priority Period

13. During the application process, applicants were asked if they qualify as small business concerns owned by women, veterans, or socially and economically disadvantaged individuals. *See* RRF Program Guide at 15-16 (App. 026-027). Applicants were asked to self-certify whether they meet the requirements, discussed above, for prioritization. *Id.*

14. The RRF Program Guide anticipated that processing individual claims would take approximately 14 days per application. App. 024.

15. Applications are not all processed at the same rate, as some claims may be more complicated than others and take longer to review. Accordingly, a complicated, earlier-filed application may not be approved and paid out until after a later-filed, but simpler, claim. But the actual order in which processing a claim begins is determined by the order in which they were received, subject only to the priority period rules.

16. Between May 3 and May 24, 2021, SBA held applications from otherwise eligible entities that did not self-certify as women-owned, veteran-owned, or as owned by socially and economically disadvantaged individuals, but retained their place in the processing queue based on the order in which they were received. During this time period SBA initiated the processing of applications self-certified as qualifying for prioritization based on the order in which they were received.

17. Beginning on May 25, 2021, consistent with the expiration of the priority period on May 24, 2021, SBA began processing non-priority claims specifically for the Set Aside Fund, assisting the “smallest of the small” restaurants.

18. Beginning on May 26, 2021, consistent with the expiration of the priority period on May 24, 2021, SBA will begin processing all claims based on the order in which they were received regardless of priority status, starting with applications received on May 3, 2021.

19. In other words, SBA will no longer consider whether an eligible entity is woman-owned, veteran-owned, or owned by socially and economically disadvantaged individuals (as those terms are defined by ARPA and other federal laws) when beginning to process an otherwise eligible claim.

20. In my May 24, 2021 declaration, I informed the Court that as of May 23, 2021, the SBA has disbursed approximately \$11,345,177,844 of the total \$28.6 billion in appropriated RRF funds. I further informed the Court that there is approximately \$17,254,822,156 in funds remaining to be disbursed. This information remains accurate.

21. I write to clarify that disbursed funds are those funds that have left SBA's accounts and been transmitted to the bank accounts of approved RRF small business applicants. Further, during the RRF application review process, once SBA has determined that an RRF applicant satisfies all the requirements for RRF funding, SBA approves the application and the fund request. The approval of funds indicates that SBA has reserved a specific amount of RRF funds for an approved applicant. However, the approved funds are not disbursed until SBA transmits the funds from SBA to the bank account of the small business applicant.

22. As of May 25, 2021, SBA has approved a total of approximately \$15,599,702,967 in RRF funds. This total includes the previously mentioned \$11,345,177,844 in disbursed RRF funds.

Pursuant to the provisions of 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 26th day of May, 2021 in Washington, DC.

JOHN MILLER Digitally signed by JOHN MILLER
Date: 2021.05.26 13:52:03 -04'00'

John A. Miller
Deputy Association Administrator for Capital Access
U.S. Small Business Administration