**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

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| CONCERT INVESTOR, LLC,<br><br>Plaintiff,<br><br>v.<br><br>SMALL BUSINESS ADMINISTRATION, and ISABELLA CASILLAS GUZMAN,<br><br>Defendants. | Civil Action No. 1:21-cv-03150-CJN<br><br>Judge Carl J. Nichols |

## AMENDED COMPLAINT

Plaintiff Concert Investor, LLC ("Concert Investor"), by and through its attorneys, alleges and states as follows:

## INTRODUCTION

1. This is an action under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(1), for unreasonable delay by Defendants Small Business Administration ("SBA") and its Administrator, Isabella Casillas Guzman on Concert Investor's application for emergency financial assistance.

2. The Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act, as amended, 15 U.S.C. § 9009a, ("Economic Aid Act") established the Shuttered Venue Operators Grant ("SVOG") Program to provide emergency financial assistance to eligible entertainment businesses impacted by the global COVID-19 pandemic. The SVOG Program is administered by the SBA and Administrator Casillas Guzman.

3. In passing the Economic Aid Act with a deadline of December 31, 2021 for eligible businesses to incur costs that may be paid with an SVOG award, Congress plainly intended for the SBA to decide applications sometime before the December 31, 2021 statutory deadline.

4. The SBA has not resolved Concert Investor's SVOG application that has been pending for ten months, and has indicated that it does not intend to resolve it until May 16, 2022, well beyond the time that Congress intended. May 16, 2022 is also well beyond the date by which Concert Investor needs a decision in order to be able to meet the statutory deadline to incur costs applicable to supplemental-eligible businesses like Concert Investor, June 30, 2022.

5. May 16, 2022 would be too late for Concert Investor to use the SVOG award funds for which it qualifies to incur costs by June 30, 2022. Concert Investor needs to know whether it will receive award funds at least three months before that statutory deadline to incur enough allowable costs to use all of the award funds.

6. Defendants' unreasonable delay warrants an order compelling Defendants to decide Concert Investor's application as soon as possible and no later than March 30, 2022, so that the Company can use the emergency assistance as Congress provided.

7. Furthermore, SVOG funds are limited, and once the SBA has depleted the appropriated amount through awards, eligible businesses may not be able to receive the emergency assistance. Thus, even though Concert Investor demonstrated that it is an eligible live performing arts organization operator, it may receive no assistance if SVOG funds are depleted before the SBA decides its application and awards the requested SVOG funds.

## JURISDICTION AND VENUE

8. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 because it presents a federal question under the APA.

9. Venue lies in this district under 28 U.S.C. § 1391(e)(1).

10. This Court has authority to issue injunctive relief under 5 U.S.C. § 706(1).

## PARTIES

11. Plaintiff Concert Investor, LLC, a Tennessee corporation, is a company specializing in the custom design and production of live concerts and preforming artist tours.

12. Defendant Small Business Administration is an independent agency of the federal government. The SBA's mission is to help Americans start, build and grow businesses.

13. Defendant Isabella Casillas Guzman is the Administrator of the SBA and oversees its operations. Administrator Casillas Guzman is sued in her official capacity.

## BACKGROUND

### A. Shuttered Venue Operators Grant Program

14. The Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act (the "Act"), signed into law December 27, 2020, included $15 billion for grants to operators of shuttered venues. Pub. L. No. 116-260 § 324. The American Rescue Plan, enacted March 11, 2021, amended the Act by providing an additional $1,249,500,000 for SVOG awards. Pub. L. No. 117-2 § 5005(a).

15. SVOG awards may be used for specified business expenses, including payroll, rent and utility payments, that are incurred between March 1, 2020, and December 31, 2021. 15 U.S.C. § 9009a(d)(1)(A)(i).

16. An eligible entity may receive a SVOG award in an amount equal to 45 percent of its gross earned revenue in 2019 or, if it began operations after January 1, 2019, in an amount equal to its average 2019 monthly gross earned revenue multiplied by 6, up to a maximum award of $10 million. 15 U.S.C. § 9009a(c).

17. Eligible businesses with 2021 first quarter revenues of no more than 30% of their 2019 first quarter revenues are eligible for supplemental grants in the amount of 50 percent of the original award amount, up to a maximum combined initial and supplemental SVOG award amount of $10 million. 15 U.S.C. § 9009a(b)(3)(A); SBA, *SBA Opens Supplemental Grant Applications for Shuttered Venue Operators Grant Awardees* (Aug. 27, 2021), https://www.sba.gov/article/2021/aug/27/sba-opens-supplemental-grant-applications-shuttered-venue-operators-grant-awardees. Supplemental awards can be used for costs incurred through June 30, 2022. 15 U.S.C. § 9009a(d)(1)(A)(i).

18. Eligible entities under the Act include live performing arts organization operators, as well as theatrical producers, live venue operators and promoters, museum operators, motion picture theatre operators, and talent representatives. 15 U.S.C. § 9009a(a)(1)(A).

19. In addition to falling within an eligible business category, to qualify for a SVOG award a business must meet general eligibility criteria including, *inter alia*, that the business was fully operational on February 29, 2020, suffered at least a 25% reduction of gross earned revenue during at least one quarter of 2020 as compared to 2019, and has reopened or intends to reopen. 15 U.S.C. § 9009a(a)(1)(A). The Act lists a number of characteristics that would render an entity ineligible, including, *inter alia*, issuance of securities on a national securities exchange, employing more than 500 employees, and presenting live performances of a prurient sexual nature. *Id.* § 9009a(a)(1)(A)(vi), 9009a(a)(1)(B).

20. The Act defines live performing arts organization operator to include an entity that as a principal business activity organizes, promotes, produces or hosts "live concerts" for which there is a ticketed cover charge, performers are paid, and not less than 70 percent of revenue of the

entity is generated through "production fees or production reimbursements". 15 U.S.C. § 9009a(a)(3)(A)(i).

21. The Act specifies that for a live performing arts organization operator (as well as a live venue operator, live venue promoter, or theatrical producer) to be eligible, it must have additional characteristics. It must put on events with a defined performance and audience space; use mixing equipment, a public address system and a lighting rig; engage one or more individuals to carry out at least two of the following roles—sound engineer, booker, promoter, stage manager, security personnel, or box office manager; sell tickets or impose a cover charge for most performances; fairly pay artists; and market its events including through print or electronic publications, websites, mass email, or social media. 15 U.S.C. § 9009a(a)(1)(A)(iii).

**B. Concert Investor's SVOG Application and the SBA's Denial**

22. On April 26, 2021, Concert Investor applied for a SVOG award of $4,946,650.35.

23. In its application, Concert Investor demonstrated that it satisfied the eligibility criteria for a SVOG award. Concert Investor demonstrated that its losses in 2020 exceeded the 25% statutory threshold by submitting its federal tax returns for 2019 and 2020. It submitted invoices between performing artists and Concert Investor for production reimbursements as well as documentation showing that it met the other application criteria. Concert Investor also provided the certifications of eligibility required by the SBA's guidance on SVOG applications.

24. On July 10, 2021, Concert Investor learned from the SBA's portal that its application was denied. The portal's denial notice gave no explanation of the reason why the SBA found Concert Investor ineligible.

25. On August 13, 2021, Concert Investor submitted an administrative appeal of the denial to the SBA in which it changed its eligibility category to live performing arts organization operator from theatrical producer, as permitted by the SBA's procedures.

26. Concert Investor's application and appeal explained in detail and with supporting documentation how the company meets each of the general eligibility requirements for a SVOG award and each of the specific eligibility requirements for a live preforming arts organization operator. Concert Investor's supporting documentation included photographs of the Company's productions depicting lighting and sound systems, detailed stage design plans (including lighting plots, speaker stacks, and video walls), and a venue floorplan designating seating for audience members and stages for performers. Concert Investor also supplied invoices with numerous live performing artists for production reimbursements, as well as invoices for engagements between Concert Investor and individuals for various roles, including stage manager, sound engineer, lighting technician, and video crew chief. Concert Investor similarly supplied evidence depicting media materials (providing tour dates and ticket links), venue promoters, event dates, and ticket releases, prices, and gross. In 2019, every venue that Concert Investor operated in was a professional music venue with a public address system, sound mixing equipment, a box office manager, and security personnel.

27. That SBA has approved SVOG awards for Concert Investor's competitors, including:

- $7,453,158 to Beaver Productions, Inc. on June 25, 2021
- $1,181,749 to Matt Davenport Productions, Inc. on June 28, 2021
- $3,837,482 to Digital Sound Systems, Inc. on July 3, 2021
- $5,929,161 to Activated Events, LLC on July 6, 2021

- $2,751,170 Silent House Productions, Inc. on July 12, 2021
- $10,000,000 to Blackbird Production Partners, LLC on July 15, 2021
- $9,187,800 to ClearWing Productions Arizona, LLC on August 12, 2021

28. On August 25, 2021, Concert Investor received notice from SBA that its appeal was denied. SBA provided no explanation for the decision: "[y]our appeal of your SVOG application decision is denied based on the additional and/or updated information you provided."

29. On September 3, 2021, Concert Investor received an email from SBA indicating SBA was conducting "a more comprehensive evaluation of the applications for those, including yours, who already had an appeal decision….to ensure we are making every effort to determine your eligibility and potential for an SVOG."

30. On November 2, 2021, the SBA again notified Concert Investor by email that its appeal remained denied. The SBA provided a conclusory statement with the appeal denial that fails to explain the agency's reasoning: "Applications were declined for one or more of the reasons provided below….Your application was declined, at least in part, based on numbers 10 and 11." "Number 10" in the SBA's list provides only limited information: "[d]id not meet the principal business activity standard for the entity type under which applied." "Number 11" similarly lacks explanation: "[d]id not meet one or more of the eligibility criteria specific to the entity type under which applied." SBA also included in the denial that the email "may not be a comprehensive list of reasons for your decline", directed Concert Investor to fill out a form to obtain "additional information", and added that "[t]he SBA will aim to provide this more specific detail on appeal declines once the SVOG initial application reviews are complete."

31. On December 1, 2021, Concert Investor filed this action seeking judicial review of the November 2 appeal denial.

32. On February 11, 2022, the SBA rescinded the November 2 appeal denial.

33. On February 14, 2022, Defendants moved for a stay of this action and stated therein that the SBA "needs until May 16, 2022, to issue a new decision."

34. To be able to use an SVOG award to incur allowable costs before the June 30, 2022 deadline for supplemental-eligible businesses to incur costs, Concert Investor would need to know by March 30, 2022 that it will receive an SVOG award and supplemental award.

35. Concert, tour, and festival planning requires months of planning in advance of the event, and three months is typically necessary to plan and design a tour. Before tour and event planning can begin, a production company needs to locate a business opportunity, design a custom bid, pitch the proposal, and negotiate an agreement.

36. Tour production companies must advance costs for a concert, tour, or festival, so sufficient capital is a necessity before a company can accept any new engagement. For a major tour like the one Concert Investor designed and produced for twenty øne piløts in 2018-2019, the production company must advance in the neighborhood of $1 million in design costs, equipment deposits (for lighting, audio, video, and special effects), and independent contractor staffing including engineers, electricians, programmers, and technicians. This funding must be expended months before the date of the first tour stop.

37. While Concert Investor has already incurred some costs that are payable with an SVOG award, and will incur more before June 30, 2022, it will not have enough to equal the initial and supplemental SVOG awards for which it qualifies if it does not receive a decision on the awards by March 30, 2022. The Company has already exhausted its capital reserves and its owners have spent a substantial amount of their personal savings. Concert Investor cannot incur the

substantial costs necessary to produce a concert, tour or festival until it knows that it will receive SVOG award funding.

38. While Concert Investor waits for resolution of its April 2021 SVOG application, it continues to operate at a competitive disadvantage relative to its competitors that received awards and the Company's financial condition continues to deteriorate.

**CLAIM FOR RELIEF**

39. The APA authorizes the Court to "compel agency action unlawfully withheld or unreasonably delayed." 5. U.S.C. § 706(1).

40. In passing the Economic Aid Act with a December 31, 2021 deadline to incur costs that are payable with SVOG award funds, Congress intended for the SBA to decide SVOG applications sometime before that deadline.

41. Defendants' failure to decide Concert Investor's SVOG application by December 31, 2021 constitutes unreasonable delay.

42. Defendants' intention to wait until May 16, 2022 to decide Concert Investor's SVOG application constitutes unreasonable delay.

**PRAYER FOR RELIEF**

For the foregoing reasons, Concert Investor respectfully requests that this Court:

1. Enter an order compelling Defendants to decide Concert Investor's SVOG award application and the Company's eligibility for a supplemental award as soon as possible and no later than March 30, 2022.

2. Award Plaintiff its costs and reasonable attorney fees; and

3. Grant such other and further relief as the Court deems just and proper.

Dated: February 21, 2022

Respectfully submitted,

/s/ Caroline L. Wolverton

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