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5

6 **UNITED STATES DISTRICT COURT**
7 **NORTHERN DISTRICT OF CALIFORNIA**
8

9 AMERICAN SMALL BUSINESS LEAGUE

CASE NO.

10 Plaintiff,

**COMPLAINT FOR INJUNCTIVE
RELIEF**

11 v.

12
13 MARIA CONTRERAS-SWEET, IN HER
14 CAPACITY AS ADMINISTRATOR OF THE
15 UNITED STATES SMALL BUSINESS
ADMINISTRATION

16 Defendant.
17

18 **COMPLAINT FOR INJUNCTIVE RELIEF**

19 **SUMMARY OF THE CASE**
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21 1. This is an action for injunctive and other appropriate relief to prevent the United
22 States Small Business Administration ("SBA") from continuing to misrepresent the attainment
23 of small business contracting goals to Congress and the American public.

24 3. This court has both subject matter jurisdiction over this action and personal
25 jurisdiction over the parties pursuant to 5 U.S.C. § 702. Venue lies in this district under 28
26 U.S.C. § 1391 (a)(2) ; (b)(2)
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THE PARTIES

4. Plaintiff is the American Small Business League (“ASBL”), an organization incorporated in California which has its principal place of business in Sonoma County, California. ASBL is a national organization established to research and focus public attention on emerging small business issues and to otherwise promote the interests of small businesses. ASBL’s activities include the review of evolving federal and state government policy and procedures to determine possible impact on small business.

5. Defendant SBA is an agency of the United States government. Defendant Maria Contreras-Sweet is sued herein solely in her capacity as Administrator of the SBA.

ALLEGATIONS OF FACT

6. The United States Government is the largest purchaser of good and services in the world. The Small Business Act was originally enacted in 1953 to promote the public policy of "preserving and promoting a competitive free enterprise economic system” by ensuring that a reasonable amount of federal procurement contracts are awarded to small businesses, and small enterprises owned by women, minorities, veterans, and disadvantaged entrepreneurs. 15 U.S.C. 631a(a) The Small Business Act is enforced by the Small Business Administration ("SBA").

7. The Small Business Act provides:

The Government-wide goal for participation by small business concerns shall be established at not less than 23 percent *of the total value of all prime contract awards* for each fiscal year. 15 U.S.C 644(g)(A)(i). (emphasis added)

The Act further directs the Administrator of the SBA to annually report to the President, Congress, and the public the extent to which the government, and each agency therein, met or failed to reach the small business participation goal set by statute. 15 U.S.C 644 (h)(2)(a-e).

8. On or about April, 28, 2016, pursuant to the Small Business Act, the SBA issued it annual "goaling report" purporting to set forth the extent to which federal agencies, and the federal government as a whole, met the goal for participation by small business concerns in federal contract awards, reporting that small business contracts awarded for FY 2015 were 25.75 percent of the total value of all prime contract awards as mandated by Congress.

1 8. As has been the case in all previous years in which the SBA has released an
2 annual goaling report, the SBA's assertion that the percentage of the total value of all prime
3 contract awards awarded to small businesses met or exceeded the congressional mandate of 23
4 percent is false. SBA can only make this statement by creating, through agency fiat, a class of
5 government contracts which are, solely in the view of the SBA, subject to exclusion from being
6 considered as part of "*the total value of all prime contract awards*" as stated in the Small
7 Business Act. Although the language of the statue is crystal clear, every year the SBA redefines
8 "total value" as meaning total value minus the contracts SBA decides to exclude from the
9 equation.

10 9. Among the types of contracts defined as "excluded" are those involving contracts
11 performed outside of the United States, acquisitions by agencies on behalf of foreign
12 governments, entities or international organizations, and all contracts involving the following
13 agencies:

- 14 - FDIC
- 15 - Postal Service
- 16 - Bureau Of Engraving And Printing
- 17 - United States Mint
- 18 - Office Of The Comptroller Of The Currency
- 19 - Office Of Thrift Supervision
- 20 - Transportation Security Administration
- 21 - Federal Aviation Administration
- 22 - Tennessee Valley Authority
- 23 - Administrative Office of the US Courts
- 24 - Architect of the Capitol
- 25 - Bankruptcy Courts
- 26 - Central Intelligence Agency
- 27 - Congressional Budget Office
- 28 - Court Services and Offender Supervision Agency
- Pretrial Services Agency
- Federal Judicial Center
- Overseas Private Investment Corporation
- Supreme Court of US
- US Courts of Appeals-Judicial Circuits
- US District and Territorial Courts
- Acquisitions with a Reason Not Competed value of for Resale
- Product Services for Leases
- Product Services for Utilities
- Tricare DODAAC (Health care services for active and retired military personnel)
- Centers for Medicare & Medicaid Services (CMS)

1 - Department of Education's Not-for-Profit(NFP) Loan Servicing
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3 10. As is apparent, the above identified contracts would comprise a significant
4 contribution to the "total value of all prime contract awards" if they were included, as is
5 required by the clear language of the Small Business Act. However, as the SBA cannot claim it
6 has met its small business participation goals unless a significant portion of the total contracts
7 are ignored, some contracts are declared "exempt", despite the Act's crystal clear use of the
8 phrase "*all* prime contracts".

9 11. Using this deceptive practice, the SBA has, for years, been able to boast that the
10 government has attained or exceeded the 23 percent minimum goal based on "all prime contract
11 awards" when in fact, it hasn't. This creative accounting will continue to thwart the purposes of
12 the statute. Under the Small Business Act, if a federal agency *fails* to meet its small business
13 participation goal, the agency is required to file with its annual report any justifications for a
14 failure to achieve the goals, a remediation plan with proposed new practices to meet the goals,
15 and an analysis of factors leading to the failure to achieve such goals. 15 U.S.C 644(h)(1)(C-D).
16 In addition, the SBA is required to submit, as part of its annual report to Congress, the reasons
17 for any failure to achieve a small business contracting goal and a description of actions planned
18 to address such failure, including the Administrator's comments and recommendations on the
19 proposed remediation plan. 15 U.S.C. 644(h)(2)(C-D)

20 12. Through its creative accounting, the SBA and its reporting agencies avoid these
21 burdensome requirements of identifying, analyzing, and developing remedial plans triggered
22 when the government fails to meet its goals. Instead, the SBA simply declares a significant
23 portion of "the total value of *all* prime contract awards" as "exempt", thus artificially inflating
24 the percentage of small business contract awards by reducing the total value of "all" awards. As
25 a result, failed goals are not reported, no analysis is done, no remediation plans are created, and
26 Congress's clear directive that the SBA continue to monitor and improve its small business
27 participation programs is left unheeded.
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1 13. In addition to inflating the percentage dollar amount awarded to small
 2 businesses by arbitrarily reducing the total amount of federal acquisition spending, the SBA
 3 has adopted a practice of identifying contracts awarded to large businesses as going to
 4 small businesses, thus further misrepresenting the percentage of contracting dollars actually
 5 received by small businesses. SBA characterizes contracts awarded to Fortune 500
 6 corporations as "small business contracts" for the purpose of claiming federal agencies have
 7 attained their small business contracting goals. As examples, for FY 2015, the SBA
 8 included contracts awarded to Verizon Communications (\$108,742,478.00), Lockheed
 9 Martin (\$2,241,065.00), Raytheon (\$1,891,266.00), and Johnson Controls (\$2,987,330.00).
 10 In FY 2015, SBA characterized 151 Fortune 500 companies as "small businesses" in order
 11 to claim that 25.75 percent of the total value of all prime contract awards went to small
 12 businesses.

13 14. As is in the case of the SBA's redefining the statutory "all prime contracts" to
 14 mean "some prime contracts", the inclusion of contracts awarded to Fortune 500 companies in
 15 order to appear to meet the 23 percent goal has the effect of freeing the SBA and contracting
 16 agencies from the burden of justifying failures to achieve small business contracting goals,
 17 identifying actions planned to address such failures, and recommending a proposed remediation
 18 plan as is required by 15 USC 644(h)(2)(C-D).

19 **CAUSE OF ACTION**

20 15. The SBA's exclusion of certain government contract awards from calculation of
 21 the percentage of the total value of *all* prime contracts awarded to small businesses is arbitrary,
 22 contrary to the clear directive of the Small Business Act, and thus exceeds the SBA's authority.

23 16. The SBA's inclusion of contracts awarded to businesses that are not "small
 24 businesses" as defined by the Small Business Act and regulations promulgated there under, is
 25 arbitrary, contrary to the clear directive of the Small Business Act, and thus exceeds the SBA's
 26 authority.

27 17. As a result of the SBA's unlawful actions, small businesses may not be receiving
 28 the percentage of total government prime contract awards which they would otherwise receive
 under the mandates of the Small Business Act. Congress, The President , and the American

1 public are not receiving accurate information regarding small business participation in federal
2 contracting, as is required by the Small Business Act.

3 18. Plaintiffs have no adequate remedy at law.
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5 WHEREFORE, ASBL prays that this Court:

6 A. Issue an injunction barring the SBA from excluding any prime contract
7 when calculating the total value of prime contract awards for the purpose of determining
8 the dollar amount of contracts awarded to small businesses;

9 B. Issue an injunction barring the SBA from including contracts awarded to
10 businesses which are not "small businesses" as defined by the Small Business Act, and
11 regulations established thereunder, when calculating the dollar amount of prime contracts
12 awarded to small businesses.

13 C. Issue an injunction requiring the SBA to amend its FY 2015 Goaling Report(s) in
14 conformance with the Small Business Act and the relief requested herein;

15 D. Provide for expeditious proceedings in this action;

16 E. Award ASBL its costs and reasonable attorneys' fees incurred in this action;
17 and

18 F. Grant such other relief as the Court may deem just and proper.
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20 Dated: May 3, 2016
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22 By: _____/S/_____
23 ROBERT E. BELSHAW
24 Attorneys for Plaintiff ASBL
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