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5 IN THE UNITED STATES DISTRICT COURT
6 FOR THE EASTERN DISTRICT OF CALIFORNIA
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8 MANBINDER SINGH MINHAS,)
9 Plaintiff,) 2:11-cv-03200-GEB-EFB
10 v.) ORDER
11 TOM VILSACK, in his capacity as)
12 Secretary of the United States)
13 Department of Agriculture,)
14 Defendant.)
_____)

15 Plaintiff filed a motion on December 9, 2011, in which he
16 seeks to "stay enforcement of the administrative determination of
17 Defendant . . . to disqualify Plaintiff from participating in the
18 Supplemental Nutrition Assistance Program ('SNAP') . . . for six
19 months." (Mot. 1:4-7.) Defendant opposes the motion, arguing Plaintiff
20 "cannot satisfy [the applicable stay factors in] 7 U.S.C. § 2023, the
21 judicial review provision for Food Stamp enforcement actions, which
22 requires him to show both irreparable injury and a likelihood of
23 prevailing on the merits" (Opp'n 2:8-10.)

24 Plaintiff is the owner of Dawes Wine & Spirits, which, prior
25 to its six-month disqualification, participated in SNAP, a program that
26 enables qualifying stores to accept food stamp benefits in exchange for
27 eligible food items. On February 1, 2011, the Food and Nutrition Service
28 ("FNS") began a series of five investigative visits to Plaintiff's store

1 in which an agent attempted to purchase ineligible non-food items with
2 a food stamp card. (Minhas Decl. Exs. A & B.) On four of the five
3 visits, the agent was successful in purchasing ineligible non-food items
4 with his food stamp card, each time from the same clerk. Id. In total,
5 he purchased the following items: one box of Penley forks, one box of
6 Penley spoons, three Chore boy sponges, and six boxes of Penley cutlery.
7 Id. During these same visits, the agent unsuccessfully attempted to
8 purchase a box of matches and a bottle of wine with his food stamp card.
9 Id. The agent also attempted a cash transaction on his fifth visit,
10 which was refused. Id.

11 On August 31, 2011, FNS sent Plaintiff a letter that detailed
12 his store's violations of the SNAP program and stated the following:

13 Your firm is charged with accepting SNAP
14 benefits in exchange for merchandise, which, in
15 addition to eligible foods, included common non-
16 food items. The misuse of SNAP benefits noted in
[the] Exhibits . . . violated Section 278.2(a) of
the SNAP regulations (enclosed).

17 Further, the violations in [these] Exhibits .
18 . . warrant a disqualification period of six months
(Section 278.6(e)(5)). Under certain conditions,
19 FNS may impose a civil money penalty ("CMP") in
lieu of a disqualification (Section 278.6(f)(1)).

20 (Minhas Decl. Ex. A.) On September 12, 2011, Plaintiff filed a reply to
21 the August 31, 2011 letter and attended an administrative hearing. Id.
22 ¶ 10. FNS sent Plaintiff a letter dated September 29, 2011, informing
23 him that it has "determined that [Plaintiff] is not eligible for the CMP
24 because there are other authorized retail stores in the area selling as
25 large a variety of staple foods at comparable prices." Id. Ex. C. On
26 October 5, 2011, Plaintiff filed a written request for review with FNS
27 and on November 8, 2011, FNS sent Plaintiff the final agency decision of
28 the FNS affirming the six-month disqualification previously imposed.

1 (Knox Decl. ¶¶ 3-7.) On December 1, 2011, Plaintiff filed this action in
2 federal court, arguing the sanction imposed by FNS was arbitrary and
3 capricious. (ECF No. 2.) Plaintiff does not dispute that the sale of
4 ineligible items occurred. The six-month disqualification commenced on
5 December 11, 2011.

6 Section 2023(a)(17) prescribes:

7 During the pendency of such judicial review, or any
8 appeal therefrom, the administrative action under
9 review shall be and remain in full force and
10 effect, unless on application to the court on not
11 less than ten days' notice, and after hearing
12 thereon and a consideration by the court of the
applicant's likelihood of prevailing on the merits
and of irreparable injury, the court temporarily
stays such administrative action pending
disposition of such trial or appeal.

13 7 U.S.C. § 2023(a)(17). Therefore, a court "may temporarily stay [an]
14 administrative action if it determined that the aggrieved party will
15 [likely] suffer irreparable injury *and* is likely to prevail on the
16 merits of his case." Poeng v. United States, 167 F. Supp. 2d 1136, 1139
17 (S.D. Cal. 2001) (emphasis added).

18 Plaintiff argues he will prevail on the merits of his claims
19 since Defendant's imposition of a six-month SNAP disqualification is
20 arbitrary and capricious; specifically, Plaintiff argues the
21 Administrative Review Officer did not rely on or consider any evidence
22 of carelessness or poor supervision by the firm's management or
23 ownership in the Final Agency Decision. (Mot. 8:6-14.) In determining
24 whether to sanction a store, FNS regulations require it to consider "(1)
25 whether the store has been previously warned of possible violations; (2)
26 whether the charged violations indicate firm practice or result from the
27 carelessness of clerical personnel; and (3) the type of ineligible items
28 sold." Id. (citing 7 C.F.R. § 278.6(e)). The FNS shall "[d]isqualify the

1 firm for 6 months if it is to be the first sanction for the firm and the
2 evidence shows that personnel of the firm have committed violations such
3 as but not limited to the sale of common nonfood items due to
4 carelessness or poor supervision by the firm's ownership or management."
5 7 C.F.R. § 278.6(e) (5).

6 "[R]eview of the sanction imposed by the FNS is governed by
7 the arbitrary and capricious standard." Wong v. United States, 859 F.2d
8 129, 132 (9th Cir. 1988). "Under the arbitrary and capricious standard,
9 the court examines the sanction imposed by the FNS in light of the
10 administrative record to judge whether the agency properly applied the
11 regulations and to determine whether the sanction is unwarranted in law
12 or without justification in fact." Id. (internal quotation marks
13 omitted). "Although [a court] may uphold a decision of less than ideal
14 clarity if the agency's path may reasonably be discerned, [it] cannot
15 infer an agency's reasoning . . . where the agency failed to address
16 significant objections and alternative proposals." Beno v. Shalala, 30
17 F.3d 1057, 1073 (9th Cir. 1994). Further, a "reviewing court may not
18 substitute reasons for agency action that are not in the record." Ariz.
19 Cattle Growers Ass'n v. U.S. Fish & Wildlife, 273 F.3d 1229, 1236 (9th
20 Cir. 2001).

21 In its Final Agency Decision, FNS neither provides facts
22 supporting its conclusion that the violations were the result of
23 carelessness or poor supervision nor responds to Plaintiff's objection
24 that the agency had not provided evidence supporting this conclusion. At
25 the December 19, 2011 hearing on Plaintiff's motion to stay, Defendant
26 conceded that the Final Agency Decision did not include facts to support
27 a conclusion that the violations were the result of carelessness or poor
28 supervision. Although Defendant argues evidence is in the record that

1 supports this conclusion, the agency must "articulate[] a rational
2 connection between the facts found and the choice made." Ariz. Cattle
3 Growers Ass'n, 273 F.3d at 1236; see also id. ("Judicial review is
4 meaningless, however, unless we carefully review the record to ensure
5 that agency decisions are founded on a reasoned evaluation of the
6 relevant factors.").

7 Further, the agency's response to Plaintiff's objection states
8 as follows:

9 With regard to this portion of the aforementioned
10 contention, it cannot be accepted as a valid basis
11 for dismissing any of the charges, or for
12 mitigating the impact of those charges. Regardless
13 of whom the ownership of a store may utilize to
14 handle store business, the ownership is accountable
15 for the proper training; [sic] monitoring and
16 handling of SNAP benefit transactions. To allow
store ownership to disclaim accountability for the
acts of persons whom the ownership chooses to
utilize to handle store business would render
virtually meaningless the enforcement provisions of
the Food and Nutrition Act of 2008 and the
enforcement efforts of the USDA.

17 (Knox Decl. Ex. 4.) However, this statement does not address Plaintiff's
18 objection, which was an insufficiency-of-the-evidence argument. Instead,
19 the agency counters with a wholly non-responsive assertion regarding the
20 accountability of ownership under the regulations. Therefore, the FNS
21 "failed to address [a] significant objection" raised by Plaintiff. Ariz.
22 Cattle Growers Ass'n, 273 F.3d at 1236. Since the Final Agency Decision
23 neither provides facts supporting its conclusion nor responds to
24 Plaintiff's objection, Plaintiff has shown a likelihood of success on
25 the merits.

26 Further, Plaintiff argues he "is likely to suffer irreparable
27 injury if the six-month disqualification is not stayed pending trial in
28 this matter" since his claims will be moot, he will suffer substantial

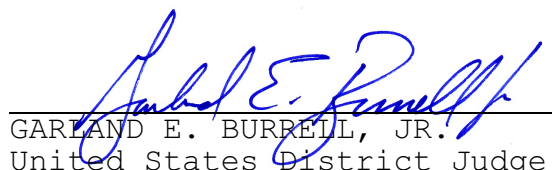
1 loss of revenue, and he will be unable to recover damages for lost
2 sales. (Mot. 5:26-27.) Plaintiff argues his action will be moot if the
3 six-month disqualification is not stayed since "[t]he court has
4 scheduled the Initial Scheduling Conference for March 26, 2012. By that
5 date, more than 50% of the six-month SNAP disqualification will have
6 taken place, unless the disqualification." Id. 6:9-14. Plaintiff also
7 argues he "will suffer substantial loss of revenue if [the] six-month
8 disqualification is not stayed." Id. 6:15-16. Plaintiff avers in a
9 declaration that his "store processes approximately \$8,500.00-9,000.00
10 in SNAP benefits every month" and that he "will lose approximately
11 \$51,000.00-\$54,000.00 if the six-month disqualification is enforced."
12 Id. 6:17-21. Plaintiff also avers "he will also lose much of the non-
13 SNAP business because his SNAP customers will be forced to find another
14 SNAP retailer to use their SNAP benefits." Id. 6:22-26.

15 Defendant counters, arguing Plaintiff has not shown
16 irreparable injury since he "does not assert, let alone provide any
17 evidence, that the disqualification will require him to close his store
18 or fire its employees, or that he will lose almost 50% of his sales and
19 that he is already operating at a loss[.]" (Opp'n 12:26-13:1.) Although
20 "[i]n general, lost revenue does not constitute irreparable harm because
21 an award of damages at the end of a case, if appropriate, will make a
22 party whole[, t]hat general proposition does not apply here[.]"
23 Jefferson Village Enter., Inc. v. United States, 2011 WL 740896, at *4
24 (E.D. Mich. Feb. 24, 2011); see also Cal. Pharm. Ass'n v. Maxwell-Jolly,
25 563 F.3d 847, 852 (9th Cir. 2009) ("Because the economic injury doctrine
26 rests only on ordinary equity principles precluding injunctive relief
27 where a remedy at law is adequate, it does not apply where, as here, the
28 Hospital Plaintiffs can obtain no remedy in damages against the state

1 because of the Eleventh Amendment."). Under FNS regulations, "[i]f the
2 disqualification action is reversed through administrative or judicial
3 review, the Secretary shall not be liable for the value of any sales
4 lost during the disqualification period." 7 C.F.R. § 279.7(d); see also
5 Jefferson Village Enterprises, 2011 WL 740896, at *4 ("That the statute
6 possibly bars the court from awarding damages to Plaintiff in the event
7 it prevails compounds the concern of mootness."). Plaintiff's showing is
8 sufficient to demonstrate he will likely suffer irreparable economic
9 loss if the stay is not granted.

10 Therefore, Plaintiff's motion to stay is GRANTED, and the six-
11 month disqualification is stayed until there is a final determination on
12 the merits.

13 Dated: December 20, 2011

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16 GARLAND E. BURRELL, JR.
United States District Judge
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