No. _____

In The
Supreme Court of the United States

KING COLE FOODS, INC.
and SALAM SAM MANNI,

Petitioners,

v.

UNITED STATES OF AMERICA;
UNITED STATES DEPARTMENT OF AGRICULTURE;
FEDERAL AGENTS JOHN AND JANE DOE 1-10;
and MARK MCCLUTCHEY,

Respondents.

On Petition For Writ Of Certiorari To The Sixth Circuit Court Of Appeals

PETITION FOR WRIT OF CERTIORARI ON BEHALF OF KING COLE FOODS, INC. AND SALAM SAM MANNI

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QUESTION PRESENTED

On April 10, 2012, Petitioners King Cole Foods, Inc. and Salam Sam Manni were permanently disqualified from further participation in the Supplemental Nutrition Assistance Program ("SNAP") by the Food and Nutrition Service ("FNS") of the United States Department of Agriculture ("USDA") as a result of employee actions unknown to petitioners and which were contrary to the terms of their employment. Petitioners sought judicial review of the sanction from the district court under 7 U.S.C. § 2023(a)(15); however, in keeping with its own precedent, which conflicts with that of other circuits, the district court concluded that it lacked jurisdiction to review the severity of the sanction. The Sixth Circuit affirmed the district court and declined *en banc* review to address the split in circuits.

The question presented is whether Sixth Circuit precedent which precludes judicial review of the administrative sanction imposed by FNS should be reversed because the express language of 7 U.S.C. § 2023(a)(15) permits *de novo* judicial review of "the questioned administrative action in issue" and because the Sixth Circuit precedent conflicts with other circuits which have reviewed the issue.

PARTIES TO THE PROCEEDINGS

Petitioners King Cole Foods, Inc. and Salam Sam Manni were Plaintiffs and Appellants below.

Respondents United States of America, United States Department of Agriculture, Federal Agents John and Jane Doe 1-10 and Mark McClutchey were Defendants and Appellees below.

RULE 29.6 DISCLOSURE

No parent or publicly owned corporation owns 10% or more of the stock in King Cole Foods, Inc.

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PETITION FOR A WRIT OF CERTIORARI

King Cole Foods, Inc. and Salam Sam Manni (referred to collectively as "King Cole" herein) respectfully petition for a writ of certiorari to review the judgment of the Sixth Circuit Court of Appeals in this matter.

OPINIONS BELOW

The March 31, 2014 decision of the Sixth Circuit Court of Appeals is reprinted in the Appendix (App.) at 1a to 5a. The district court's opinion is reprinted at App. 6a to 48a.

JURISDICTION

The Sixth Circuit Court of Appeals entered its judgment on March 31, 2014 and denied rehearing *en banc* on June 26, 2014. App. 49a-50a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

The relevant portions of 7 U.S.C. § 2023(a) provide as follows:

> (13) If the store, concern, or State agency feels aggrieved by such final determination, it may obtain judicial review thereof by filing a complaint against the United States in the

United States court for the district in which it resides or is engaged in business, or, in the case of a retail food store or wholesale food concern, in any court of record of the State having competent jurisdiction, within thirty days after the date of delivery or service of the final notice of determination upon it, requesting the court to set aside such determination.

* * *

(15) The suit in the United States district court or State court shall be a trial de novo by the court in which the court shall determine the validity of the questioned administrative action in issue, except that judicial review of determinations regarding claims made pursuant to section 16(c) shall be a review on the administrative record.

INTRODUCTION

On March 31, 2014, the Sixth Circuit Court of Appeals issued an opinion in which it affirmed the district court's dismissal of King Cole's First Amended Complaint which sought judicial review of the decision of the United States Department of Agriculture Food and Nutrition Service ("FNS") to permanently disqualify King Cole from participation in the Supplemental Nutrition Assistance Program ("SNAP"). The district court concluded that it lacked jurisdiction to review the FNS's choice of sanction based upon the rulings in *Goldstein v. United States*, 9 F.3d 521 (6th

Cir. 1993) and *Bakal Bros. v. United States*, 105 F.3d 1085 (6th Cir. 1997), despite clear statutory authority to the contrary.

King Cole requested *en banc* review because the rulings in *Goldstein* and *Bakal Bros.* – which preclude any review judicial review of the sanction imposed by FNS – conflict with the plain language of 7 U.S.C. § 2023(a)(15) which provides for district court review *de novo* of "the validity of the questioned administrative action in issue." In addition, the *Goldstein* and *Bakal Bros.* decisions are in direct conflict with rulings from virtually all other circuits which provide for judicial review of the sanction imposed under various standards of review, including *Ghattas v. United States*, 40 F.3d 281 (8th Cir. 1994); *Objio v. United States*, 113 F.Supp.2d 204 (1st Cir. 2000); *Freedman v. USDA*, 926 F.2d 252 (3d Cir. 1991); *Traficanti v. United States*, 227 F.3d 170 (4th Cir. 2000); *Vasudev v. United States*, 214 F.3d 1155 (9th Cir. 2000); and *Affum v. United States*, 566 F.3d 1150 (D.C. Cir. 2009).

The Sixth Circuit declined *en banc* review without discussion. App. 49a-50a. For the reasons set forth herein, this Court should review and reverse the lower court's ruling.

STATEMENT OF THE CASE

King Cole is a full service grocery store, which, until September 2011, provided products and services for low-income patrons. King Cole participated in the Supplemental Nutrition Assistance Program ("SNAP") until the Food and Nutrition Service ("FNS") of the United States Department of Agriculture ("USDA") permanently disqualified it for employee actions that were unknown to Petitioners at the time and contrary to their condition of employment.

On September 20, 2011, federal agents executed a search warrant on King Cole Foods based on the allegation that two employees were involved in trafficking of SNAP benefits in violation of federal law. Pursuant to the execution of the search warrant, federal agents seized all EBT Point of Sale Terminals ("POS") and all the currency from the store safe. Additionally, the government obtained a seizure warrant and seized all of King Cole's operating bank accounts held at Bank of Michigan. Due to the execution of the search and seizure warrants on September 20, 2011, King Cole was unable to conduct the majority of its business and most of the store's food inventory went out of date, spoiled and became worthless.

On September 23, 2011, the Government issued a charge letter to King Cole Foods alleging that employees of King Cole Foods "conducted more than 38 fraudulent EBT transactions, during which over $19,500 in SNAP benefits were purchased in

exchange for cash." Significantly, from 2008 through 2010, King Cole's total annual sales were over $6 million per year or between $450,000 and $500,000 per month. Historically, 65% to 75% of total sales were from Electronics Benefit Transfers ("EBT") SNAP transactions. The amount alleged to have been trafficked by King Cole was less than 0.4% of its total gross revenue for each year.

Petitioners filed timely a Request for Civil Monetary Penalty in lieu of Permanent Disqualification with the USDA, on October 5 and 31, 2011. In the Requests, Petitioners demonstrated that it had an effective compliance policy against food stamp trafficking, its compliance policy was in place prior to the alleged violations, its policy was effective, and that King Cole and Sam Manni were not aware of the alleged violations. Affidavits of the cashiers in the store, Sam Manni and Nina Gorman-Gadson were provided. Additionally, King Cole provided information that demonstrated the hardship to the SNAP beneficiaries of the store.

On November 7, 2011, the USDA determined that King Cole Foods and Manni were permanently disqualified from accepting SNAP benefits and did not qualify for a civil money penalty because it "failed to submit sufficient evidence to demonstrate that [the] firm had established and implemented an effective compliance policy and program." On November 16, 2011, Salam Manni and King Cole Foods, filed timely a Request for Review of November 7th Determination

by USDA FNS. On April 10, 2012, the Government issued its Final Agency Decision sustaining the permanent disqualification of King Cole Foods and Manni. This letter denied that King Cole Foods had an appropriate compliance and prevention policy in place to meet the minimum standard as set forth in 7 C.F.R. § 278.6(i).

As permitted under 7 U.S.C. § 2023(a)(13), Petitioners sought judicial review of the sanction imposed by FNS. Respondents filed a motion for summary judgment, arguing that the district court lacked jurisdiction to review the severity of the sanction. Petitioners argued that 7 U.S.C. § 2023(a)(15) permits *de novo* review of all aspects of the FNS ruling, including the sanction.

The district court adhered to Sixth Circuit precedent which precludes all judicial review of the sanction, a ruling which was affirmed by the Sixth Circuit on appeal. The Sixth Circuit Court of Appeals also declined *en banc* review of its own precedent, despite the fact that this authority conflicts with the statutory language as well as other circuits rulings on this issue.

REASONS FOR GRANTING THE PETITION

I. The Language of 7 U.S.C. § 2023(a)(15) Expressly Contemplates Judicial Review of "Administrative Action" Taken by FNS, Including the Sanction Imposed for SNAP Violations.

The USDA administers the SNAP through the FNS. 7 U.S.C. § 2013(a). Congress authorized the USDA to issue regulations including establishing violations. *See* 7 U.S.C. § 2012(a)(2); *see also* 7 C.F.R. § 278.6(a). After the FNS alleges that a SNAP violation occurs, a charge letter is sent to the violating firm. 7 C.F.R. § 278.6(b). FNS then determines whether or not a violation has occurred and the appropriate sanction. 7 C.F.R. § 278.6(c)-(e). The remaining administrative process is only conducted through writings.

Prior to 1988, the only penalty for trafficking in food stamps (defined as "the buying or selling of coupons, ATP cards or other benefit instruments for cash or consideration other than eligible food" according to 7 C.F.R. § 271.2) *even for owners who had nothing to do with the trafficking* was permanent disqualification from participating in SNAP. Courts were rightfully reluctant to apply such a harsh penalty to owners who had no knowledge of their employees' misconduct. *See Kim v. United States*, 121 F.3d 1269, 1272 (9th Cir. 1997); *Ghattas v. United States,* 40 F.3d 281, 286-287 (8th Cir. 1994). The USDA had no discretion to determine the penalty to impose for food stamp trafficking violations because 7 U.S.C.

§ 2012(b) mandated permanent disqualification for trafficking violations, even a first offense.

In 1988, Amendments to the Food Stamp Act were corrected to provide discretion to the USDA to assess a civil monetary penalty, instead of permanent disqualification of the food retailer, if the Act was violated. 7 U.S.C. § 2021(a). The legislative history to the 1988 Amendments indicates that Congress attempted to provide for sanctions less severe for trafficking where the storeowner had no knowledge of the trafficking. H.R. Rep. No. 100-828, at 27-28 (1988).

Judicial review of the FNS administrative action is governed by 7 U.S.C. § 2023(a)(15), which provides:

> The suit in the United States district court or State court shall be a trial *de novo* by the court in which the court shall determine the validity of the questioned administrative action in issue.

In reviewing the prior version of § 2023(a)(15), the court in *Goodman v. United States*, 518 F.2d 505 (5th Cir. 1975) examined the language used by Congress when it provided for judicial review, and concluded that it was intended to encompass both the administrative determination on the merits as well as the subsequent sanction:

> "Action" is a unitary concept which encompasses both a determination on the merits, and where guilt is established, the meting out of a consequent penalty. Indeed, by the plain meaning of the term, it would seem

> that "action" against a guilty party is not complete until a sanction is imposed. This conclusion may be inferred from the Government's assertion in its brief that the administrative action complained of here was certainly not arbitrary or unduly harsh. The appellant was disqualified from participating in the Food Stamp Program for a period of six months. The Regulations provide for disqualification for a period of up to three years. Harshness of administrative action necessarily comprehends the imposition of a penalty. **By empowering courts to review the agency's final administrative action, Congress granted jurisdiction to review both the determination of violation and the sanctioned period of disqualification.** *Goodman*, 518 F.2d, at 509. (Emphasis added.)

The *Goodman* analysis is consistent with the intent of the subsequent 1988 amendments. "With secretarial discretion, we can be assured that the punishment will more closely fit the crime." H.R. Rep. No. 100-828, at 28 (1988). In other words, by the 1988 amendments, rather than further restrict administrative action as regards sanctions, it expanded administrative powers, and likewise, intended judicial review of that administrative action.

II. The Sixth Circuit Rulings in *Goldstein* and *Bakal Bros*. Which Preclude Judicial Review of the Sanction Imposed by FNS are in Direct Conflict with Prevailing Rulings in Other Circuits, Which Provide for Some Degree of Judicial Review of the Sanction in Addition to the Finding of Misconduct.

The Sixth Circuit in *Goldstein* acknowledged that the district court can review "whether the agency properly applied the regulations" and whether the sanction is "unwarranted in law" or "without justification in fact." *Goldstein,* 9 F.3d, at 523, quoting *Woodward v. United States,* 725 F.2d 1072, 1077 (6th Cir. 1984) but refused to hold that the district court had jurisdiction to review the sanction selected by the Secretary.

Petitioners acknowledge that district courts are required to follow the precedential value of *Goldstein* in any analysis of the USDA's actions to an individual store owner. Accordingly, in this action, the district court followed *Goldstein* and held that it lacked jurisdiction to review the severity of the sanction. App. 33a. The Sixth Circuit echoed this ruling. App. 3a.

However, by *en banc* review, the Sixth Circuit had the authority to review the continuing vitality of *Goldstein* and its progeny. *See Sykes v. Anderson*, 625 F.3d 294, 319 (6th Cir. 2010) ("This panel is without authority to overrule binding precedent, because a published prior panel decision 'remains controlling

authority unless an inconsistent decision of the United States Supreme Court requires modification of the decision or this Court sitting en banc overrules the prior decision.' "), quoting *Salmi v. Sec'y of Health & Human Servs*., 774 F.2d 685, 689 (6th Cir. 1985). The Sixth Circuit wrongly declined to engage in this review. App. 49a-50a.

Looking to other circuits, it is clear that *Goldstein* represents the minority view of the scope of judicial review under 7 U.S.C. § 2023(a)(15). For example, the Eighth Circuit rejected the *Goldstein* rationale and interpreted the plain meaning of the statute as follows:

> We decline to follow *Goldstein*, which in our view is contrary to the plain meaning of the statute. The more difficult question is whether the de novo standard of review should apply to the Secretary's decision not to impose the lesser monetary sanction authorized by the 1988 and 1990 amendments . . . given the plain meaning of § 2023(a), reinforced by our view that the Secretary's compliance with the 1988 and 1990 amendments has been grudging, at best, we conclude that the decision whether to impose an alternative monetary sanction under § 2021(b)(3)(B) must be reviewed *de novo. Ghattas v. United States,* 40 F.3d 281, 287 (8th Cir. 1994).

Other Circuit Courts faced with the issue of review of the USDA's determination of sanctions imposed related to SNAP violations have also allowed

the Courts to review all aspects of the Secretary's decisions. Although the Circuit Courts do not agree on the standard of review, no other Circuit has interpreted the district court's authority to review the FNS's imposition of sanctions as narrowly as the Sixth Circuit.

As noted, the Eighth Circuit applies a *de novo* standard of review of the Secretary's choice of sanctions. *Ghattas,* 40 F.3d, at 287 (8th Cir. 1994) ("Given the plain meaning of § 2023(a), reinforced by our view that the Secretary's compliance with the 1988 and 1990 amendments has been grudging, at best, we conclude that the decision whether to impose an alternative monetary sanction under § 2021(b)(3)(B) must be reviewed *de novo*."); *see also Corder v. United States,* 107 F.3d 595 (8th Cir. 1997).

Other Circuits apply the arbitrary and capricious standard. *See Objio v. United States*, 113 F.Supp.2d 204, 208 (1st Cir. 2000); *Freedman v. USDA,* 926 F.2d 252, 261 (3d Cir. 1991); *Traficanti v. United States*, 227 F.3d 170 (4th Cir. 2000); *Goodman v. United States,* 518 F.2d 505 (5th Cir. 1975); and *Vasudev v. United States,* 214 F.3d 1155 (9th Cir. 2000).

Finally, one Circuit applies an abuse of discretion standard following a *de novo* determination of the factual basis underlying the penalty. *Affum v. United States,* 566 F.3d 1150, 1161 (D.C. Cir. 2009) ("But the situation is different when an aggrieved party challenges the Secretary's failure to impose a civil money penalty in lieu of disqualification. In this latter

situation, the trial court must still conduct a trial *de novo* as required by § 2023(a)(15) to determine the facts on which the sanction was predicated. However, the terms of the Act indicate that a trial court may only overturn the agency's choice of penalty if, on the *de novo* factual record, it is determined that the Secretary abused his discretion in declining to impose a civil money penalty in lieu of disqualification."). While the standard may vary, importantly all of the aforementioned circuits offer at least basis for review of agency action in choosing a penalty.

Interestingly, while the Sixth Circuit has interpreted *Goldstein* to preclude any substantive review of the sanction, other district courts outside the Sixth Circuit have read *Goldstein* to permit review of the sanction under an arbitrary and capricious standard. Compare *Main & Champ Food & Deli, Inc. v. United States Secy. of Agric.*, No. 2:10-cv-00145, 2011 U.S. Dist. LEXIS 94760 (S.D. Ohio Aug. 24, 2011) ("Because of the discretionary nature of this sanctioning option, however, the Sixth Circuit has held that when permanent disqualification is warranted under law, this Court may not review FNS's decision as to whether to impose a civil penalty," citing *Goldstein* and *Bakal Bros.*) with *Odeh v. Conrad*, No. 96-1156-CIV-T-17C, 1996 U.S. Dist. LEXIS 9382 (M.D. Fla. June 28, 1996) ("But if the Court finds that 'trafficking' did occur, then it reviews the agency's sanction under an arbitrary and capricious standard," citing *Goldstein*.) *See also Colorado v. United States*, No. 07-cv-00936, 2008 U.S. Dist. LEXIS 123075 (D. Colo. Mar. 19, 2008).

Here, King Cole, as an aggrieved party, obviously advocates for imposition of the *de novo* standard adopted by the Eighth Circuit. Not only does that standard comply with the plain language of § 2023(a)(15) but it also recognizes that disqualification is a severe sanction deserving of appropriate review. However, any standard of review is better than none, as presently exists exclusively in the Sixth Circuit.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 23, 2014

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

File Name: 14a0238n.06

No. 13-1759

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

KING COLE FOODS, INC., et al.,	)	
Plaintiffs-Appellants,	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN
v.	)	
UNITED STATES OF AMERICA, et al.,	)	
Defendants-Appellees.	)	(Filed Mar. 31, 2014)

BEFORE: BOGGS and KETHLEDGE, Circuit Judges; RESTANI, Judge.*

PER CURIAM. King Cole Foods, Inc. and Salam Sam Manni, its owner and president (collectively, "Plaintiffs"), appeal the district court's judgment dismissing their civil complaint.

In September 2011, federal agents executed search warrants at King Cole Foods and its bank based on suspicion that store employees had violated regulations relating to the Supplemental Nutrition

* The Honorable Jane A. Restani, Judge for the United States Court of International Trade, sitting by designation.

Assistance Program (SNAP). The agents seized SNAP payment processing equipment, currency, and bank account proceeds. Following the seizure, the United States Department of Agriculture Food and Nutrition Service (FNS) issued a charge letter to King Cole Foods, informing it that it may be permanently disqualified from accepting SNAP benefits. Plaintiffs requested a civil monetary penalty in lieu of permanent disqualification, but the FNS denied that request and permanently disqualified King Cole Foods from accepting SNAP benefits. Plaintiffs unsuccessfully sought further administrative relief.

Plaintiffs filed a complaint in the district court, alleging, among other things, that imposition of the permanent disqualification was improper, that certain SNAP regulations are unconstitutionally vague, and that the FNS's actions violated their Fifth and Eighth Amendment rights. The district court granted the defendants' motion to dismiss, concluding that it lacked jurisdiction to review the FNS's choice of sanction, that the challenged SNAP regulations are not unconstitutionally vague, and that Plaintiffs failed to allege viable Fifth and Eighth Amendment claims.

On appeal, Plaintiffs argue that the district court erred by concluding that it lacked jurisdiction to review the FNS's choice of sanction and by dismissing their Fifth Amendment, Eighth Amendment, and vagueness claims. We review de novo a district court's decision regarding subject-matter jurisdiction. *Cleveland Hous. Renewal Project v. Deutsche Bank Trust*

Co., 621 F.3d 554, 559 (6th Cir. 2010). We likewise review de novo a district court's decision to grant a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). *Jasinski v. Tyler,* 729 F.3d 531, 538 (6th Cir. 2013). To avoid dismissal, a plaintiff must allege facts that are sufficient to state a claim to relief that is plausible on its face. *Id.* In reviewing a motion to dismiss, we accept as true the factual allegations in the complaint and construe the complaint in the light most favorable to the plaintiff. *Id.*

Plaintiffs first argue that the district court erred by concluding that it lacked jurisdiction to review the FNS's choice of sanction. As Plaintiffs concede, however, we have previously held that the district court lacks jurisdiction to review the severity of the sanction, *see Bakal Bros. v. United States,* 105 F.3d 1085, 1088-89 (6th Cir. 1997); *Goldstein v. United States,* 9 F.3d 521, 524 (6th Cir. 1993), and this panel is bound by that determination, *see United States v. Mateen,* 739 F.3d 300, 305 (6th Cir. 2014).

Plaintiffs next argue that the district court erred by dismissing their Fifth Amendment claim because they adequately alleged that the FNS denied them due process in connection with the decision to permanently disqualify them from accepting SNAP benefits. The district court properly dismissed this claim because the allegations in the complaint did not demonstrate that Plaintiffs were denied notice and an opportunity to be heard. *See Flaim v. Med. Coll. of Ohio,* 418 F.3d 629, 634 (6th Cir. 2005).

To the extent that Plaintiffs argue that the seizure of their property constituted a "taking" under the Fifth Amendment, dismissal of this claim was proper because the property was seized pursuant to a lawful warrant during an investigation into possible violations of the law. *See Johnson v. Manitowoc Cnty.,* 635 F.3d 331, 336 (7th Cir. 2011); *Bennis v. Michigan,* 516 U.S. 442, 452 (1996).

Plaintiffs next argue that the district court erred by dismissing their Eighth Amendment claim because their permanent disqualification from processing SNAP benefits constituted an excessive fine. The Eighth Amendment states that, "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII. The Excessive Fines Clause "limits the government's power to extract payments, whether in cash or in kind, as punishment for some offense." *United States v. Bajakajian,* 524 U.S. 321, 328 (1998) (citation and internal quotation marks omitted). The Plaintiffs' claim fails under the Eighth Amendment because a "fine" as understood in this context is "a payment to a sovereign as punishment for some offense," not the loss of an administratively granted privilege to process third-party federal benefits. *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.,* 492 U.S. 257, 265 (1989).

Finally, Plaintiffs argue that the district court erred by dismissing their vagueness claim because the regulations set forth in 7 C.F.R. § 278.6(a) and (f)(1) are ambiguous concerning when the FNS may

impose a monetary penalty in lieu of a disqualification on the basis of hardship to SNAP households. The district court properly dismissed this claim because there is no ambiguity in the challenged regulations. Rather, they make clear that a finding of hardship to SNAP households permits imposition of a monetary penalty in lieu of a temporary disqualification, but not in lieu of a permanent disqualification.

Accordingly, we affirm the district court's judgment.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

King Cole Foods, Inc.,
and Salam Sam Manni,

Plaintiffs,

v.

United States of America, United States Department of Agriculture, Special Agent Mark W. McClutchey, and Federal Agents Jane and John Doe 1-10,

Defendants. /

Case No. 12-cv-12122

Hon. Sean F. Cox
District Court Judge

OPINION AND ORDER GRANTING UNITED STATES AND UNITED STATES DEPARTMENT OF AGRICULTURE'S (1) MOTION TO DISMISS [DOCKET NO. 8] AND (2) MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT [DOCKET NO. 24]

Plaintiff King Cole Foods, Inc. ("King Cole Foods") operates as a grocery store in downtown Detroit. It formerly participated in the Supplemental Nutrition Assistance Program ("SNAP"), but was permanently disqualified as a sanction because its employees engaged in food stamp trafficking. Trafficking is "the buying or selling of coupons, ATP cards or other benefit instruments for cash or consideration other than eligible food. . . ." *See* 7 C.F.R. § 271.2.

In their Complaint, which was filed on May 10, 2012, the Plaintiffs seek judicial review, pursuant to 7 U.S.C. § 2023, of the sanction imposed by the Food and Nutrition Service of the United States Department of Agriculture ("FNS") for the trafficking offenses. The Plaintiffs also bring claims against the United States, the United States Department of Agriculture and the unknown federal agents who executed the search warrant for the trafficking offenses, under the Fourth, Fifth and Eighth Amendments, contending that the seizure of their property, which included monies from the store safe and bank account, during the execution of the search warrant associated with the trafficking offenses, resulted in a *de facto* seizure/taking of their business without due process of law and constituted a grossly disproportionate fine. The Plaintiffs also contend that 7 C.F.R. § 278.6(a) is unconstitutionally vague. The Plaintiffs pray for an award of compensatory and punitive damages against each of the Defendants.

On July 23, 2012, the Defendants United States and United States Department of Agriculture (hereinafter referred to collectively as "the Government"), filed their Motion to Dismiss, pursuant to Federal Rules of Civil Procedures 12(b)(1) and 12(b)(6), contending, respectively, that (1) this Court lacks subject matter jurisdiction to overturn the FNS' discretionary decision to sanction King Cole Foods with a permanent disqualification and that (2) the Plaintiffs' constitutional claims fail to state claims upon which relief can be granted.

A hearing was held on October 18, 2012, to address the issues presented in that motion. The motion was taken under advisement, and the parties were directed to attend a status conference to follow-up on those issues on November 2, 2012. The Plaintiffs were also granted leave to file their First Amended Complaint, which added several statutes that the Plaintiffs base their claims on and named an additional defendant, Special Agent Mark McClutchey, one of the unknown federal agents who executed the search warrant.

On November 6, 2012, the Government filed their Motion to Dismiss Plaintiffs' First Amended Complaint, which contains the same arguments as their original Motion to Dismiss. With regard to the Motion to Dismiss Plaintiffs' First Amended Complaint, the Court finds that the issues have been adequately presented in the parties' briefs and that oral argument would not significantly aid the decision making process. *See* Local Rule 7.1(f)(2), U.S. District Court, Eastern District of Michigan. The Court therefore orders that the motion will be decided on the briefs.

Because this Court lacks jurisdiction to overturn the FNS' discretionary decision to sanction King Cole Foods with a permanent disqualification and because the Plaintiffs' constitutional claims fail to state claims upon which relief can be granted, this Court **GRANTS** the Government's Motion to Dismiss [Docket No. 8] and Motion to Dismiss Plaintiffs' First Amended Complaint [Docket No. 24].

BACKGROUND

Plaintiff King Cole Foods is a Michigan corporation. (Docket No. 19, at 1, ¶ 1.) It operates as a grocery store, which is located at 40 Clairmount Street in Detroit, Michigan. (*Id.* at 1-2, ¶¶ 1, 9-10.) Plaintiff Salam Manni is the part owner and President of King Cole Foods. (*Id.* at 2, ¶ 9.) Historically, between 65% to 75% of King Cole Foods' total sales, which typically range between $450,000 to $500,000 a month, are generated from SNAP Electronic Benefit Transfers ("EBT") transactions. (*Id.* at 3, ¶¶ 11-12.)

On September 20, 2011, federal agents executed a search warrant on King Cole Foods and its bank accounts at Bank of Michigan. (*Id.* at 3, ¶ 13; Docket No. 8-3.) The warrant was supported by the affidavit of Special Agent Mark W. McClutchey, who was the agent in charge of the King Cole Foods trafficking investigation. (*Id.*) Pursuant to the warrant, federal agents seized all EBT Point of Sale Terminals located in King Cole Foods, the currency from the store's safe, and all of the funds in King Cole Foods' operating bank accounts held at Bank of Michigan. (*Id.* at 3, ¶ 14.)

The Plaintiffs contend that the seizures of these properties resulted in a *de facto* seizure of the entire business because, after the execution of the search warrant, King Cole Foods was unable to conduct business and most of its inventory spoiled. (*Id.* at 3, ¶ 15.)

The USDA administers the SNAP through the FNS. 7 U.S.C. § 2013(a). Congress authorized the USDA to issue regulations in furtherance of the SNAP, including establishing violations. *See* 7 U.S.C. § 202(a)(2); *see also* 7 C.F.R. § 278.6(a). When the FNS determines that a violation may have occurred that results in a civil penalty or permanent disqualification, the FNS must send a charge letter describing the alleged violations to the store. 7 C.F.R. § 278.6(b). Thereafter, the store has ten days to respond to those charges, either orally or in writing. *Id.*

Next, once the FNS considers the store's response, the FNS determines if, in fact, a violation occurred and, if so, imposes an appropriate sanction. 7 C.F.R. § 278.6(c)-(e).

With regard to a trafficking violation, the Secretary of the USDA has the discretion to impose a civil money penalty in lieu of a permanent disqualification for a trafficking violation if the Secretary determines that there is substantial evidence that the store had an effective policy and program in effect to prevent violations, including evidence that:

> (i) the ownership of the store or food concern was not aware of, did not approve of, did not benefit from, and was not involved in the conduct of the violation; and
>
> (ii)(I) the management of the store or food concern was not aware of, did not approve of,

> did not benefit from, and was not involved in the conduct of the violation; or
>
> (II) the management was aware of, approved of, benefited [sic] from, or was involved in the conduct of no more than 1 previous violation by the store or food concern. . . .

7 U.S.C. § 2021(b)(3)(B)(i)-(ii)(I)-(II); *see also* 7 C.F.R. § 278.6(i). Furthermore, at a minimum, the firm/store, in order to establish its eligibility for a civil money penalty in lieu of a permanent disqualification for trafficking, "shall" establish the following criteria by substantial evidence:

> Criterion 1. The firm shall have developed an effective compliance policy as specified in § 278.6(i)(1); and
>
> Criterion 2. The firm shall establish that both its compliance policy and program were in operation at the location where the violation(s) occurred prior to the occurrence of violations cited in the charge letter sent to the firm; and
>
> Criterion 3. The firm had developed and instituted an effective personnel training program as specified in § 278.6(i)(2); and
>
> Criterion 4. Firm ownership was not aware of, did not approve, did not benefit from, or was not in any way involved in the conduct or approval of trafficking violations; or it is only the first occasion in which a member of firm management was aware of, approved,

> benefited [sic] from, or was involved in the conduct of any trafficking violations by the firm. Upon the second occasion of trafficking involvement by any member of firm management uncovered during a subsequent investigation, a firm shall not be eligible for a civil money penalty in lieu of permanent disqualification. Notwithstanding the above provision, if trafficking violations consisted of the sale of firearms, ammunition, explosives or controlled substances, as defined in 21 U. S.C. § 802, and such trafficking was conducted by the ownership or management of the firm, the firm shall not be eligible for a civil money penalty in lieu of permanent disqualification. For purposes of this section, a person is considered to be part of firm management if that individual has substantial supervisory responsibilities with regard to directing the activities and work assignments of store employees. Such supervisory responsibilities shall include the authority to hire employees for the store or to terminate the employment of individuals working for the store. . . .

7 C.F.R. § 278.6(i). After the agency determines a violation and sanction, a store has the option to request administrative review. 7 C.F.R. § 279.1. Once administrative review is completed, a store may then pursue a trial *de novo* in the district court. 7 U.S.C. § 2023(a)(15).

On September 23, 2011, the USDA Food Nutrition Services issued a Charge Letter. (Docket No. 1-1.) The Charge Letter states in relevant part:

> United States Department of Agriculture investigators have investigated your firm. From this Investigation, there is evidence that violations of the Supplemental Nutrition Assistance Program (SNAP) regulations have occurred in your firm.
>
> Based on the transaction(s) which occurred during this investigation your firm is charged with trafficking, as defined in Section 271.2 of the enclosed SNAP regulations. As provided by Section 278.6(e)(1) of the SNAP regulations, the sanction for the trafficking violation(s) noted below is permanent disqualification.
>
> Between the dates 8/31/2010-06/30/2011, King Cole Foods, through employees Ghazi Manni and Adil "Eddie" Manni, conducted several trafficking transactions both in the store and manually from another store, Caesar Food Center, 880 West McNichols Road, Detroit, Michigan. During this investigation, Ghazi Manni conducted more than twenty (20) fraudulent SNAP transactions, during which he purchased approximately $8,638 in SNAP benefits from USDA investigators in exchange for cash. During the investigation at Caesar Food Center, Adnan Kejbou, Manager, conspired with employees, including Adil 'Eddie' Manni, of King Cole Foods to conduct more than thirty-eight (38) fraudulent

> EBT transactions, during which over $19,500 in SNAP benefits were purchased in exchange for cash.
>
> The SNAP regulations also provide that, under certain conditions, FNS may impose a civil money penalty (CMP) of up to $59,000.00 in lieu of permanent disqualification of a firm for trafficking. The SNAP regulations, Section 278.6(i), list the criteria that you must meet in order to be considered for a CMP. If you request a CMP, you must meet each of the four criteria listed and provide the documentation as specified within 10 days of your receipt of this letter. . . .

(*Id.* at 1.)

On October 5, 2011, Salam Manni and King Cole Foods filed a request for a civil monetary penalty in lieu of a permanent disqualification. (Docket No. 1-2.) In that document, the Plaintiffs describe the policies and programs that have been implemented to prevent future violations of the SNAP as (1) the training of King Cole Foods' employees in EBT transactions by Salam Manni and Nina-Gorman Gadson, who was the Manager of King Cole Foods; (2) safeguards in King Cole Foods' point of service computer system, which is regularly updated, provide that no taxable foods can be paid with a customer's EBT card; (3) postings placed by the time card machines, which state that employees are to comply with all regulations related to EBT transactions; and (4) the immediate termination of any employee who does not

comply with the SNAP's anti-fraud regulations. (*Id.*) The letter states that these policies were in place prior to the violations and that the owners of King Cole Foods had no involvement in the trafficking offenses. (*Id.* at 3-4.) The letter also states that permanently disqualifying King Cole Foods from the SNAP would cause an undue hardship on the community. (*Id.* at 4.) Included with the letter were over 360 signatures from individuals in the community stating that they are "EBT households and will experience hardship if they could not redeem food coupons through EBT at King Cole." (*Id.*)

On October 31, 2011, the Plaintiffs filed a supplemental request for civil monetary penalty, which basically reiterated the store's attempts to ensure future compliance with the SNAP. (Docket No. 1-3.) The document also noted that King Cole Foods has complied with Western Union services training since 2008, and that, "[w]hen employees attend these compliance programs, they also discuss EBT and WIC compliance issues." (*Id.* at 1.) The letter also states that permanently disqualifying King Cole Foods from the SNAP would effectively result in its closure and cause its loans with Bank of Michigan, which are guaranteed by the Small Business Administration, to go into default. (*Id.* at 2.) The letter concludes by stating, in effect, King Cole Foods' closure would constitute an undue hardship on the community due to its prominent standing in the community, which is evidenced by affidavits and signatures attached to

the letter, as well as the apparent lack of comparable grocery stores in downtown Detroit. (*Id.*)

On November 7, 2011, the FNS issued a determination letter stating that King Cole Foods was permanently disqualified from accepting SNAP benefits. (Docket No. 1-4, at 1.) In that letter, the FNS stated that:

> [it] finds that the violations cited in our charge letter occurred at your firm.
>
> We considered your eligibility for a trafficking civil money penalty (CMP) according to the terms of Section 278.6(i) of the Supplemental Nutrition Assistance Program (SNAP) regulations (enclosed). We have determined that you are not eligible for the CMP because you failed to submit sufficient evidence to demonstrate that your firm had established and implemented an effective policy and program to prevent violations of the Supplemental Nutrition Assistance Program.

(*Id.*) Thus, King Cole Foods was permanently disqualified from the SNAP, though it could seek further administrative review. 7 C.F.R. § 279.1.

On November 16, 2011, Manni and King Cole Foods filed a request for administrative review of the FNS' November 7th Determination. (Docket No. 1-5.) On April 10, 2012, FNS issued its Final Agency Decision, which sustained King Cole Foods' permanent disqualification from the SNAP. (Docket No. 1-6,

at 2.) The Final Agency Decision contends that the documentation and evidence provided by Plaintiffs fails to satisfy the four criteria of 7 C.F.R. § 278.6(i) for the following reasons:

Criterion 1:

- Appellant provided insufficient written documentation reflecting a commitment to ensure that the firm is operated in a manner consistent with SNAP regulations and policy:
    - Documentation of the development and/or operation of a policy to terminate violating employees.
    - Documentation of development and/or operation of procedures/policy to implement corrective action in response to complaints of violations.
    - Documentation of development and/or operation of procedures providing for internal review of employees' compliance.
    - Appellant provided only affidavits signed and dated after the violation occurred; the firm provided Western Union training and compliance documentation; such training and compliance efforts do not pertain to the SNAP; there is in fact no single reference to the SNAP in any of the Western Union training/compliance materials, which deal solely with

money orders and/or related financial instruments. The firm also provided documentation of WIC training; likewise, this documentation does not cover SNAP rules and regulations and cannot substitute for same.

Criterion 2:

- Appellant does not provide evidence which establishes that the firm's compliance policy and program were in operation prior to the occurrence of the violations at issue.

Criterion 3:

- Appellant did not provide the following:
    - Documentation of dated training curricula and dates of training sessions prior to the violations.
    - Records of dates of employment of all firm personnel.
    - Contemporaneous documentation of participation of violating personnel in initial and follow-up training prior to violations.
- Appellant provided insufficient documentation to demonstrate that its training program meets or is otherwise equivalent to the following standards:

- Training for all who work in the store within one month of implementing the compliance policy documented in Criterion 1. Noted in Affidavits only, signed and dated following the violations at issue. Does not address the 'within one month' time period referenced.
- Any subsequent hired employees are trained within one month of hiring and trained periodically thereafter. Noted in Affidavits only, signed and dated following the violations at issue. Does not address the 'within on month' time period referenced.
- Training is designed to establish a level of competence that assures compliance. Appellants provides no evidence that it developed a SNAP compliance policy or program.
- Written materials, which may include FNS publications and regulations, are used in the training programs. Appellant provides a copy of the front page of the Training Guide for Retailers but does not provide evidence that employees were required to be familiar with it and does not provide evidence that any employees were made familiar with it prior to the violations.

Criterion 4:

- Appellant provided insufficient evidence in support of the following:
    - Ownership/Management did not benefit from SNAP trafficking. Appellant notes only that the amount of the benefit was small compared to the firm's yearly gross sales.

(Docket 1-6, at 7-8.)

Thereafter, the Plaintiffs filed their Complaint seeking *de novo* review of the FSN's Final Agency Decision, pursuant to 7 U.S.C. § 2023 and 7 C.F.R. § 279.7. (Docket No. 1, at 6; Docket No. 19.) The Plaintiffs also assert in their Complaint that the Defendants unlawfully seized their property and business without notice and a fair hearing in violation of the Fourth and Fifth Amendments and unlawfully subjected them to a disproportionate penalty in violation of the Eighth Amendment. (Docket No. 1, at 5-8; Docket No. 19, at 5-8.) The Plaintiffs also contend that 7 C.F.R. § 278.6(a), C.F.R. § 278.6(f)(1) and C.F.R. § 278.6(i) are unconstitutionally vague and ambiguous. (Docket No. 1, at 6, ¶ 24; Docket No. 19, at 6, ¶ 25.) The Plaintiffs seek money damages from the Defendants for the alleged constitutional violations for loss of business, mental pain and suffering, impairment of reputation, personal humiliation, and intentional infliction of emotional pain and suffering. (*Id.*)

The Plaintiffs filed their First Amended Complaint on October 23, 2012. (Docket No. 19.) The First Amended Complaint contains the same claims as the original Complaint. It also adds as a party, Special Agent Mark McClutchey. (*Id.*)

STANDARD OF REVIEW

A motion under Federal Rule of Civil Procedure 12(b)(1) seeks to dismiss a complaint for lack of subject matter jurisdiction. A court must consider a 12(b)(1) motion prior to other challenges since proper jurisdiction is a prerequisite to determining the validity of a claim. *See Gould, Inc. v. Pechiney Ugine Kuhlmann & Trefimetaux,* 853 F.2d 445, 450 (6th Cir. 1988). The plaintiff has the burden of proving jurisdiction in order to survive a 12(b)(1) motion. *Moir v. Greater Cleveland Reg'l Transit Auth.,* 895 F.2d 266, 269 (6th Cir. 1990).

Jurisdictional challenges under Rule 12(b)(1) can be either facial or factual. *RMI Titanium Co. v. Westinghouse Elec. Corp.* 78 F.3d 1125, 1134-35 (6th Cir. 1996). A facial challenge is directed at the allegations in the complaint, which the court must accept as true. *Id.* at 1134. Factual challenges rely on matters outside of the pleadings and, unlike motions under Rule 12(b)(6), "the court is empowered to resolve factual disputes." *Id.* at 1135 ("Because at issue in a factual 12(b)(1) motion is the trial court's jurisdiction – its very power to hear the case – there is substantial authority that the trial court is free to weigh the

evidence and satisfy itself as to the existence of its power to hear the case."); *see also 2 James* Wm. Moore, Moore's Federal Practice § 12.30[4] (3d ed. 2000) ("When a court reviews a complaint under a factual attack, the allegations have no presumptive truthfulness, and the court that must weigh the evidence has discretion to allow affidavits, documents, and even a limited evidentiary hearing to resolve disputed jurisdictional facts.").

In addressing a complaint, pursuant to a Rule 12(b)(6) motion to dismiss for failure of a party to state a claim upon which relief can be granted, this Court "accept[s] all well-pleaded factual allegations of the complaint as true and construe[s] the complaint in the light most favorable to the plaintiff" *Inge v. Rock Fin. Corp.,* 281 F.3d 613, 619 (6th Cir. 2002). "Although a complaint need not contain 'detailed factual allegations,' it does require more than 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action.'" *Reilly v. Vadlamudi,* 680 F.3d 617, 622 (6th Cir. 2012) (quoting *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 555, 127 S. Ct. 1955, 1964-65 (2007)). "Thus, a complaint survives a motion to dismiss if it 'contain[s] sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Id.* at 622-23 (quoting *Ashcroft v. Iqbal,* 556 U.S. 662, 678, 129 S. Ct. 1937, 1949 (2009)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant

is liable for the misconduct alleged." *Ashcroft,* 556 U.S. at 678, 129 S. Ct. at 1949.

ANALYSIS

A. This Court GRANTS the Government's Motion to Dismiss [Docket No. 8] and Motion to Dismiss Plaintiffs' First Amended Complaint [Docket No. 24]

The Government contends that this Court should grant its Motion to Dismiss [Docket No. 8] and its Motion to Dismiss Plaintiffs' First Amended Complaint [Docket No. 24] because (1) this Court lacks subject matter jurisdiction over the Plaintiffs' Petition for Review and (2) the Plaintiffs' constitutional claims fail to state claims upon which relief can be granted.

For the reasons that follow, this Court **GRANTS** the Motion to Dismiss [Docket No. 8] and the Motion to Dismiss Plaintiffs' First Amended Complaint [Docket No. 24].

1. This Court Lacks Subject Matter Jurisdiction to Review the Severity of the Sanction

In Count 1 of the Amended Complaint, the Plaintiffs petition this Court to review, pursuant to 7 U.S.C. § 2023 and 7 C.F.R. § 279.7, the FNS' decision to permanently disqualify King Cole Foods from the SNAP, contending that it is invalid "because the agency did not properly apply . . . 7 U.S.C. §§ 2021

and 2023 and C.F.R. §§ 278.6 and 279.7. . . .” (Docket No. 1, at 5-6; Docket No. 19, 5-6, ¶¶ 23-24.)

In describing what actions and decisions, on the part of FNS, they are challenging, the Plaintiffs state:

> For the purposes of this motion only, King Cole Foods does not challenge the underlying allegation of EBT trafficking by its employees. It does contest the USDA's determination that its compliance program was inadequate, and, that it did not qualify for a civil monetary penalty. Plaintiffs submit that this Court has jurisdiction to review the Secretary's determination that King Cole Food's evidence was inadequate related to the criteria set forth in 7 C.F.R. § 278.6(i).

(Docket No. 13, at 10.) Thus, the Plaintiffs contend that this Court has jurisdiction to determine whether the FNS properly weighed the criterion in 7 C.F.R. § 278.6(i), when the FNS sanctioned King Cole Foods with a permanent disqualification, as opposed to a civil monetary penalty. (*Id.*) The Government contends that because the Plaintiffs are challenging the FNS' discretionary choice of sanction, this Court lacks subject matter jurisdiction to address the Plaintiffs' Petition for Review. (Docket No. 8, at 14-16; Docket No. 24, at 7, 11.)

Under 7 U.S.C. § 2012(b), a retail food store shall be subject to sanctions if the store has engaged in the trafficking of food stamps. 7 U.S.C. § 2021(a)(1), (b)(3)(B). A store is responsible for the trafficking of food stamps by “[p]ersonnel of the firm.” 7 C.F.R.

§ 278.6(e)(1)(i). With regard to a trafficking violation, the Secretary of the USDA has the discretion to impose a civil money penalty in lieu of a permanent disqualification for a trafficking violation "if the Secretary determines that there is substantial evidence that such store or food concern had an effective policy and program in effect to prevent violations of the chapter and the regulations. . . ." 7 U.S.C. § 2021(b)(3)(B). Furthermore, 7 C.F.R. § 278.6(i) provides the four criteria, mentioned in the previous section, that a firm "shall" establish in order for the Secretary to impose a civil monetary penalty in lieu of permanent disqualification as a sanction for trafficking.

This Court reviews the validity of the administrative action in a trial *de novo.* 7 U.S.C. §2023(a)(15). In describing the scope of judicial review with regard to the FNS' choice of sanction for trafficking violations, pursuant to 7 U.S.C. § 2021(b)(3)(B) and 7 C.F.R. § 278.6(i), the Court of Appeals for the Sixth Circuit in *Goldstein v. United States* stated:

> Determination of a sanction to be applied by an administrative agency, if within bounds of its lawful authority, is subject to very limited judicial review. Once the trial court has confirmed that the store has violated the statutes and regulations, the court's only task is to examine the sanction imposed in light of the administrative record in order to judge whether the agency properly applied the regulations, i.e., whether the sanction is 'unwarranted in law' or 'without justification

> in fact.' If the agency properly applied the regulations, then the court's job is done and the sanction must be enforced. The trial *de novo* is limited to determining the validity of the administrative action; the severity of the sanction is not open to review.

9 F.3d 521, 523 (6th Cir. 1993) (citations and internal quotations omitted); *see also Bakal Brothers, Inc. v. United States,* 105 F.3d 1085, 1088-90 (6th Cir. 1997) ("The determination of the appropriate sanction is left to the discretion of the Secretary. We have held that this determination is not open to judicial review.").

Thus, *Goldstein* provides that this Court must confirm that the store has violated the statutes and regulations. Then, the Court's only task is to determine whether the regulations were properly applied, i.e., whether the decision is "unwarranted in law" or "without justification in fact." This Court lacks jurisdiction to review the severity of the sanction.

Here, the Plaintiffs do not contest that its employees engaged in food stamp trafficking. (Docket No. 13, at 10.) Therefore, the only question for this Court to address is whether the regulations were properly applied.

All of the Plaintiffs' arguments in their responses to the Motion to Dismiss and the Motion to Dismiss the First Amended Complaint challenge the FNS' discretionary decision to issue the permanent disqualification, instead of the civil money penalty, and

the Sixth Circuit held that this Court lacks jurisdiction to address the agency's discretionary decision regarding the severity of the sanction imposed. *See Goldstein,* 9 F.3d at 523; *Bakal Brothers, Inc.,* 105 F.3d at 1088-90.

The Plaintiffs contend, in their response to the Motion to Dismiss, that

> [a]ll other Circuit Courts faced with the issue of review of the USDA's determination of sanctions imposed related to SNAP violations, have allowed the Courts to review all aspects of the Secretary's decisions. Although the Circuit Courts do not agree on the standard of review . . . for sanction selection, no other Circuit has interpreted the District Court's authority to review USDA regulations as narrowly as the Sixth Circuit. . . . The Sixth Circuit stands alone in its strict interpretation 7 U.S.C. 2023 (a)(15) providing that the USDA's choice of sanction cannot be reviewed by the District Court. The Sixth Circuit refusal to review the sanction imposed should be reversed as it is contrary to the plain reading of the statute and the interpretation of USDA laws by all other Circuits.

(Docket No. 13, at 10.)

Likewise in their response to the Motion to Dismiss the First Amended Complaint, the Plaintiffs assert:

> As set forth below, the Sixth Circuit's failure to allow for a judicial review of the validity of all of the Secretary's decision related to the USDA administrative action, regardless of the sanction imposed, is improper and should be expanded by this Court. . . . The Sixth Circuit stands alone in its strict interpretation 7 U.S.C. § 2023(a)(15) providing that the USDA's choice of sanction cannot be reviewed by the District Court. The Sixth Circuit refusal to review the sanction imposed should be reversed as it is contrary to the plain reading of the statute and the interpretation of USDA laws by all other Circuits. For purposes of this motion only, King Cole Foods does not challenge the underlying allegation of EBT trafficking by its employees. It does contest the USDA's determination that its compliance program was inadequate, and, that it did not qualify for a civil monetary penalty. . . . The compliance program in place was adequate to prevent fraud and King Cole should have received a lesser penalty than permanent disqualification. . . . [T]he compliance program in place was adequate to prevent fraud and King Cole should have received a lesser penalty than permanent disqualification. . . .

(Docket No. 25, at 10-13.)

As an initial matter, the authority to impose a civil money penalty is permissive, not mandatory. *See Goldstein,* 9 F. 3d at 524; *Bakal Brothers, Inc.,* 105 F.3d at 1088. The fact that the Sixth Circuit "stands

alone" on an issue is irrelevant. This Court is bound to follow Sixth Circuit authority. The Plaintiffs are asking this Court to reconsider the four criteria, codified in 7 C.F.R. § 278.6(i), and re-weigh the mitigating evidence to determine the appropriate sanction. As mentioned before, this Court lacks jurisdiction under binding Sixth Circuit authority to do that.

The Final Agency Decision cites to a general lack of documentation and support to establish the four criteria. The Plaintiffs offer evidence that they may have satisfied some of the criteria, but they do not address all the concerns that the FNS had with regard to the Plaintiffs' failure to provide proper support or documentation to establish the criteria in 7 C.F.R. § 278.6(i), which is discussed in the Final Agency Decision. The statute says that the firm shall, at a minimum, establish the four criteria. 7 C.F.R. § 278.6(i). Thus, even if this Court were to conclude that the FNS erred when it failed to consider this evidence, the Plaintiffs still fail to satisfy the four criteria. The FNS determined that King Cole Foods' training program was and still currently is inadequate. The affidavits that the Plaintiffs submit, attesting to the training program for new employees, do not change this conclusion. (Docket No. 25, at 13.)

Likewise, the fact that King Cole Foods' point of service computer system was programmed so that no taxable foods could be purchased with an EBT card and that there were informative posters displayed in the store describing EBT fraud are inapposite. The

trafficking occurred even though these preventive measures were taken, and nothing in the regulations or authorizing statutes require the FNS to consider these measures or the affidavits of the employees, for that matter. (*Id.*) The Plaintiffs assert that the FNS erred when it did not consider Sam Manni's alleged non-involvement in the trafficking. (*Id*.) The Plaintiffs' contention that Congress initially intended to provide innocent shop owners with less severe sanctions is relevant only to determine *which* sanction may be imposed when the FNS exercises its discretion in determining the severity of the sanction. (Docket No. 13, at 8-10.) The Sixth Circuit addressed these very same issues in *Bakal Brothers, Inc.,* 105 F.3d at 1088, holding that "[u]nder the amendment to § 2021(b), a store is responsible for illegal trafficking by employees even if there is evidence that neither the owner nor manager of the store 'was aware of, approved, benefitted from, or was involved in the conduct or approval of the violation.'" *Id.* (citing 7 U.S.C. § 2021(b)(3)(B)). The Court recognized that "[t]he innocence of the store owner is relevant only to determine *which* sanction shall be imposed – a civil penalty or disqualification – not *whether* a sanction shall be imposed." *Id.* Thus, the innocence of shopkeeper is merely a mitigating factor in determining whether to issue a civil monetary penalty in lieu of permanent disqualification, which the FNS could not take into consideration because the Plaintiffs did not provide sufficient evidence to support their claim that "[o]wnership/[m]anagement did not benefit from SNAP trafficking." (Docket No. 1-6, at 8.) Instead,

when the Plaintiffs responded to the charge letter, they only "note[d] . . . that the amount of the benefit was small compared to the firm's yearly gross sales." (*Id.*)

The Plaintiffs cite to *Anton v. United States,* 225 F. Supp. 2d 770 (E.D. Mich. 2002), to support their contention that this Court has jurisdiction to re-weigh the criterion in order to overturn the FNS' choice of sanction. (Docket No. 13, at 9, 11.) *Anton* dealt with a retail food market owner who trafficked in food stamp coupons. *Id.* at 771. As sanctions for his conduct, Anton's store was permanently disqualified from the food stamp program and would be assessed a civil monetary penalty, pursuant to 7 C.F.R. § 278.6(f)(2), in the amount of $31,360, if he ever sold or transferred his store. *Id.* at 771-72. Anton eventually sold his store and was assessed the penalty. *Id.* at 772. He thereafter brought suit in District Court, seeking *de novo* review of the FNS' decision to impose the civil money "transfer penalty" upon him. *Id.* In particular, in Anton's petition for review, he challenged the FNS' calculation of the transfer penalty under the applicable regulations. *Id.* at 772-77. Upon addressing the Government's claim that it lacked jurisdiction to re-calculate the transfer penalty, the District Court held that, although the Court may not review the severity of the sanction, it may still inquire "'whether the agency properly applied the regulations, i.e., whether the sanction is 'unwananted in law' or 'without justification in fact.'" *Id.* at 773-74 (quoting *Goldstein,* 9 F.3d at 523). The District Court

further reiterated, "'a court should not second-guess the judgment of the [agency] in connection with the imposition of sanction, unless the [agency] has acted contrary to law, without basis in fact or in abuse of discretion.'" *Id.* at 774 (quoting *Wonsover v. SEC,* 205 F.3d 408, 412 (2000)). Applying this standard, the District Court recalculated Anton's civil penalty, codified in 7 C.F.R. § 278.6(f)(2),(g), and held that the agency's interpretation of that statute's formula in arriving at its calculation of the civil penalty was not arbitrary or capricious, procedurally defective, or manifestly contrary to the statute. *Id.* at 777.

Thus, *Anton* dealt with whether the agency properly applied the regulation, which the District Court had jurisdiction to resolve. Here, there is no "transfer penalty calculation" provision to interpret as was the case in *Anton* nor is there any convincing argument that the FNS did not properly apply the statutes or regulations. *Id.* at 776. Instead, 7 U.S.C. § 2021(b)(3)(B) clearly describes that the FNS has discretion in determining the severity of the sanction, while 7 C.F.R. § 278.6(i) provides the four criteria that a firm must, at a minimum, establish in order for the Secretary to impose a civil monetary penalty in lieu of permanent disqualification as a sanction for trafficking. The Plaintiffs failed to satisfy that criteria by submitting insufficient evidence to the FNS.

The Government made factual and facial challenges to the Plaintiffs' Petition for Review under Federal Rule of Civil Procedure 12(b)(1) in the Motion to Dismiss [Docket No. 8] and the Motion to Dismiss

Plaintiffs' First Amended Complaint [Docket No. 24]. The Plaintiffs have failed to satisfy their burden to prove jurisdiction. *See e.g., Ryan's Party Store, Inc. v. USDA,* No. 1014502, 2011 WL 1812663, at *1-2 (E.D. Mich. May 12, 2011). Accordingly, this Court lacks jurisdiction to address the Plaintiffs' Petition for Review because the only issue that remains is the severity of the sanction imposed. *See id.* ("[T]his Court has jurisdiction to review whether FNS acted within its authority in determining the sanction imposed. *See Goldstein v. United States,* 9 F.3d 521, 523 (6th Cir. 1993). This court does not, however, have jurisdiction to review the determination itself. *Id."*)

2. The Plaintiffs' Constitutional Claims Fail to State Claims Upon Which Relief Can Be Granted

The Plaintiffs contend that the Defendants violated the Fourth and Fifth Amendments because they constructively seized King Cole Foods and its operating assets without due process of law. (Docket No. 1, at 7, ¶¶ 29-31; Docket No. 19, at ¶¶ 30-32; Docket No. 25, at 15-16.) They also assert that 7 C.F.R. § 278.6(a), 7 C.F.R. § 278.6(f)(1), 7 C.F.R. § 278.6(i) are unconstitutionally vague and ambiguous. (Docket No. 1, at 6, ¶ 24; Docket No. 19, at 6, ¶ 25.) The Plaintiffs finally assert that they were unlawfully penalized by the constructive seizure of King Cole Foods and its operating assets in violation

of the Eighth Amendment. (Docket No. 1, at 7, ¶ 32; Docket No. 19, at 7, ¶ 33; Docket No. 25, at 16-18.)

The Government asserts that the Plaintiffs' constitutional claims fail to state claims upon which relief can be granted because (1) the proceedings before the FNS did not violate the Fourth and Fifth Amendments; (2) the Plaintiffs cannot establish that the regulations are vague and ambiguous; and (3) the seizure of King Cole Foods' property, upon executing the search warrant, and the FNS' discretionary decision to permanently disqualify King Cole Foods from the SNAP are not excessive fines in contravention of the Eighth Amendment. (Docket No. 8, at 16-22; Docket No. 24, at 12-13.)

a. The Proceedings Before the FNS Did Not Violate the Fourth and Fifth Amendments

With regard to their Fourth and Fifth Amendment claims, the Plaintiffs assert that because the FNS did not adequately review the evidence demonstrating compliance, it was deprived of notice and a fair hearing, which effectively resulted in an unlawful *de facto* seizure of King Cole Foods and its operating assets. (Docket No. 1, at 7, ¶¶ 30-31; Docket No. 13, at 13; Docket No. 19, at 7, ¶¶ 31-32; Docket No. 25, at 15-16.) The Plaintiffs liken the *de facto* seizure of King Cole Foods and its operating assets to a forfeiture action. (Docket No. 13, at 13; Docket No. 25, at 15-16.)

The Government contends that because this Court is reviewing the FNS' decision *de novo* or because *de novo* review is available, all of the Plaintiffs' due process concerns are cured. (Docket No. 8, at 17-20; Docket No. 24, 12-13.) The Government also asserts that because the FNS followed the statutory requirements regarding the decision to permanently disqualify King Cole Foods from the SNAP and because the Plaintiffs are only challenging the choice of sanction, which this Court lacks jurisdiction to review, the Plaintiffs' due process claims fail to state claim upon which relief can be granted. (*Id*.)

Due process requires, at a minimum, that there can be no "deprivation of life, liberty or property by adjudication . . . [without] notice and opportunity for hearing appropriate to the nature of the case." *Mullane v. Cent. Hanover Bank & Trust Co.,* 339 U.S. 306, 313, 70 S. Ct. 652, 656-57 (1950).

A taking under the Fifth Amendment is either a physical taking or regulatory taking. *Waste Mgmt., Inc. of Tenn. v. Metro. Gov't of Nashville and Davidson Cnty.,* 130 F.3d 731, 737 (6th Cir. 1997). A physical taking occurs when "the government physically intrudes upon a plaintiff's property." *Id.* A regulatory taking occurs when a governmental enactment leaves a property owner with "no productive or economically beneficial use" of his property, *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 1017, 112 S. Ct. 2886 (1992) (emphasis in original), or prevents the property owner from enjoying "some – but not all – economic uses." *Harris v. City of St.*

Clairsville, 330 F. App'x 68, 76 (6th Cir.2008). The Plaintiffs do not distinguish whether they are asserting a physical taking or a regulatory taking.

As support for their proposition that a *de novo* trial cures all due process concerns, the Government cites to *Spencer v. USDA,* No. 96-3733, 1998 WL 96569 (6th Cir. February 27, 1998), and *TRM, Inc. v. United States,* 52 F.3d 941 (11th Cir. 1995). (Docket No. 8, at 18.)

In *Spencer,* the plaintiff appealed from the Magistrate Judge's decision upholding the FNS' decision disqualifying plaintiff from the food stamp program. 1998 WL 96569, at *2-3. Likewise, in *TRM, Inc.,* an appeal was made from a District Court Judge's grant of summary judgment in a similar action. 52 F.3d at 942-44.

Here, the Plaintiffs filed a petition for review from the FNS' Final Agency Decision, not from a decision of a District Court Judge or Magistrate Judge, who engaged in *de novo* review of an agency's decision. Essentially, the Government's argument is that the Plaintiffs have no due process concerns because *de novo* review is available. The mere fact that *de novo* review is available does not cure all due process concerns. *See Spencer,* 1998 WL 96569, *3 ("In *Haskell,* the store received no evidentiary hearing at the administrative level, but received a trial in federal district court. The court held that the trial cured any due process problem.") (emphasis added) (citing *Haskell v. USDA,* 930 F.2d 816, 819-20 (10th Cir.

1991). Thus, it is the review in the district court that cures due process concerns.

Regardless, as the Government points out, the Plaintiffs provide no argument how the proceedings before the FNS differed from any other similar proceedings. (Docket No. 8, at 18-19; Docket No. 24, at 12-13.) The Plaintiffs are not challenging the validity or execution of the warrant. They do not contest that the trafficking violations occurred. Instead, the Plaintiffs' arguments under the Fourth and Fifth Amendment are based primarily on the FNS' choice of sanction, which they liken to a *de facto* taking of their business under the Fifth Amendment. The Plaintiffs also assert that they were denied their due process rights because the FNS did not properly weigh the criteria. Again, the Plaintiffs are essentially asking this Court to re-weigh the criteria in order to overturn the FNS' choice of sanction. As mentioned before, this Court lacks jurisdiction to do that. As previously discussed, the FNS determined that the Plaintiffs did not establish with substantial evidence any of the four criteria 7 C.F.R. § 278.6(i). Because that statute says that the firm shall, at a minimum, establish the four criteria and because the Plaintiffs only offer evidence to allegedly satisfy some the criteria, not all of the criteria, this Court holds that the Plaintiffs' Fourth and Fifth Amendment claims fail to state claims upon which relief can be granted. This Court lacks jurisdiction to review the severity of the sanction imposed by the FNS.

b. The Plaintiffs Cannot Establish that 7 C.F.R. § 278.6(a), 7 C.F.R. § 278.6(f)(1), and 7 C.F.R. § 278.6(i) Are Facially Vague or Ambiguous

The Plaintiffs assert that 7 C.F.R. § 278.6(a), 7 C.F.R. § 278.6(f)(1), and 7 C.F.R. § 278.6(i) are facially vague because:

> C.F.R. § 278.6(a) provides that in lieu of a disqualification, a firm **may** be subject to a civil money penalty if 'FNS determines that a disqualification would cause hardship to participating households.' Although 7 C.F.R. § 278.6(f)(1) indicates that a civil money penalty for hardship may not be imposed in lieu of a permanent disqualification if trafficking is involved, the two regulations create an ambiguity in enforcement. 7 C.F.R. § 278.6 allows for consideration of hardship on the participating households only if there is no allegation of trafficking. This creates an ambiguity that renders the USDA's failure to consider the effect on the community, unconstitutional, and a basis for this Court to have jurisdiction to review the sanction. In this case, King Cole has provided ample evidence in the administration proceedings to demonstrate that the community will suffer a tremendous hardship if King Cole is disqualified and does not receive a civil monetary fine.

(Docket No. 25, at 14-15; *see also* Docket 13, at 12.) The Plaintiffs also offer as evidence 360 signatures from community members and affidavits of support

from community leaders, who assert that King Cole Foods' permanent disqualification from the SNAP results in an undue hardship on the community. (*Id.*)

The Government contends that the plain meaning of those regulations clearly asserts that community impact/hardship to the community is only a factor that will be taken into consideration in the FNS' choice of sanction. (Docket No. 8, at 19-20; Docket No. 24, at 12.)

Title 7, Section 278.6(a) of the Code of Federal Regulations states in relevant part:

> FNS **may**, in lieu of a disqualification, subject a firm to a civil money penalty of up to an amount specified in § 3.91(b)(3)(i) of this title for each violation if FNS determines that a disqualification would cause hardship to participating households. FNS may impose a civil money penalty of up to an amount specified in § 3.91(b)(3)(ii) of this title for each violation in lieu of a permanent disqualification for trafficking, as defined in § 271.2 of this chapter, in accordance with the provisions of paragraphs (i) and (j) of this section.

7 C.F.R. § 278.6(a) (emphasis added).

Title 7, Section 278.6(f)(1) states that the:

> FNS **may** impose a civil money penalty as a sanction in lieu of disqualification when the firm subject to a disqualification is selling a substantial variety of staple food items, and

> the firm's disqualification would cause hardship to food stamp households because there is no other authorized retail food store in the area selling as large a variety of staple food items at comparable prices. FNS may disqualify a store which meets the criteria for a civil money penalty if the store had previously been assigned a sanction. A civil money penalty for hardship to food stamp households may not be imposed in lieu of a permanent disqualification.

7 C.F.R. § 278.6(f)(1) (emphasis added).

Finally, 7 C.F.R. § 278.6(i) provides states that the:

> FNS **may** impose a civil money penalty in lieu of a permanent disqualification for trafficking . . . if the firm timely submits to FNS substantial evidence which demonstrates that the firm had established and implemented an effective compliance policy and program to prevent violations of the Program. . . . In determining the minimum standards of eligibility of a firm for a civil money penalty in lieu of a permanent disqualification for trafficking, the firm **shall, at a minimum, establish** by substantial evidence its fulfillment of each of the following [four] criteria.

7 C.F.R. § 278.6(i) (emphasis added). The four criteria has already been discussed. The FNS determined that King Cole Foods did not show, with substantial evidence, any of the four criteria.

When this Court reviews an agency's interpretation of its own regulation, and not its application of a statute passed by Congress:

> [this Court] must defer to the agency's interpretation unless it is plainly erroneous or inconsistent with the regulation. We afford an agency's interpretation no deference, however, if the language of the regulation is unambiguous, for doing so would permit the agency, under the guise of interpreting a regulation, to create de facto a new regulation. If the regulation is ambiguous and deference is due, we have still noted that deferential review is not inconsequential . . . and we must be satisfied that the agency's action minimally involved a rational connection between the facts found and the choice made.

Summit Petroleum Corp. v. EPA, 690 F.3d 733, 740-41 (6th Cir. 2012) (internal cites and quotations omitted).

The plain meaning of 7 C.F.R. § 278.6(a) is clear, "if the FNS determines that a disqualification would cause hardship to participating households," the FNS "***may,*** in lieu of disqualification, subject a firm to a civil money penalty. . . ." *Id.* (emphasis added). The provision clearly asserts that this consideration is discretionary or a mitigating factor, and is not wholly dispositive. There is no ambiguity in this regulation.

Likewise, the 7 C.F.R. § 278.6(f)(1) and 7 C.F.R. § 278.6(i) are also permissive, not mandatory, asserting

that the FNS could, in its discretion, impose a monetary penalty in lieu of a permanent disqualification. Title 7, Code of Federal Regulations, section 278.6(i) provides the criteria that the firm was required to establish, at a minimum, for the FNS to exercise that discretion. The FNS determined that King Cole Foods failed to establish any of those criteria with substantial evidence. The Plaintiffs do not address all the concerns listed by the FNS outlined in the Final Agency Decision.

Furthermore, the fact that the Plaintiffs secured 360 signatures and have produced affidavits in support of a money penalty from various community leaders is irrelevant because this Court lacks jurisdiction to re-weigh the evidence to determine whether the FNS' choice of sanction was unlawful. As mentioned before, the FNS choice of sanction is discretionary, and this Court cannot review the severity of the sanction imposed. The FNS already considered those signatures.

c. The Seizure of the Plaintiffs' Property During the Execution of the Search Warrant and the FNS' Discretionary Decision to Permanently Disqualify King Cole Foods from the SNAP, Which the Plaintiffs Contend Resulted in a De Facto Seizure of King Cole Foods, Are Not Excessive Fines Contrary to the Eighth Amendment

The Government asserts that the Plaintiffs' Eighth Amendment claims fail to state claims upon which relief can be granted because neither the seizure of the Plaintiffs' property, upon executing the search warrant, nor the FNS' decision to permanently disqualify King Cole Foods from the SNAP are an excessive fine contrary to the Eighth Amendment because they are not "payments" to the government. Rather, permanent disqualification works to prohibit King Cole Foods' "access to a revenue stream provided by the FNS. . . ." (Docket No. 8, at 20-22; *see also* Docket No. 24, at 13.)

The Plaintiffs counter that the seizure of their property during the execution of the search warrant and the FNS' decision to permanently disqualify King Cole Foods from the SNAP, which the Plaintiffs contend resulted in a *de facto* seizure of King Cole Foods, are excessive fines under the Eighth Amendment because the (1) employees committed the trafficking offenses, (2) the employees who committed those offenses acted outside of the scope of their

employment, (3) the FNS could have assessed King Cole Foods a monetary penalty, (4) the alleged harm resulting from the trafficking violation was addressed in the criminal actions against employees, and (5) fraudulent sales only accounted for 0.4% of King Cole Foods' total annual sales. (Docket No. 13, at 14-15; Docket No. 25, at 16-18.)

The Eighth Amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII. The Excessive Fines Clause of the Eighth Amendment "limits the government's power to extract payments, whether in cash or kind, as punishment for some offense." *Austin v. United States,* 509 U.S. 602, 609-10, 113 S. Ct. 2801, 2805 (1993); *see also United States v. Bajakajian,* 524 U.S. 321, 328, 118 S. Ct. 2028, 2033 (1998). A fine violates the Excessive Fine Clause if it is "grossly disproportionate to the gravity of a defendant's offense." *Bajakajian,* 524 U.S. at 334, 118 S. Ct. 2036. "[A]t the time the Constitution was adopted, 'the word "fine" was understood to mean a payment to a sovereign as punishment for some offense.'" *Bajakajian,* 524 U.S. at 327-28, 118 S. Ct. at 2033 (quoting *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.,* 492 U.S. 257, 265, 109 S. Ct. 2909, 2915 (1989)).

The Ninth Circuit in *Kim v. United States* held that a "[p]ermanent disqualification pursuant to 7 U.S.C. § 2021(b)(3)(B) is not an excessive fine prohibited by the Eighth Amendment because it is not cash

or in kind payment directly imposed by, and payable to, the government." 121 F.3d 1269, 1276 (9th Cir. 1997) (citing *Austin,* 509 U.S. at 609-10, 113 S. Ct. at 2805-06; *Browning-Ferris Indus. of Vt., Inc.,* 492 U.S. at 268, 109 S. Ct. at 2916); *see also Anton v. United States,* 225 F. Supp. 2d 770, 777-81 (E.D. Mich. Sept. 30, 2002) ("For the reasons discussed in connection with Plaintiff's Double Jeopardy argument, the Court concludes that the transfer penalty at issue is not 'punishment' for purposes of the Eighth Amendment."). This Court incorporates that reasoning.

Here, there was no "fine" exacted in this case or payment, whether in cash or kind. Instead, King Cole Foods was disqualified from the SNAP as a sanction for its employees' trafficking in food stamp coupons. The Plaintiffs do not challenge the validity of the warrants or the underlying trafficking violations. The Plaintiffs do not provide any authority asserting that property seized during the execution of a valid search warrant is an excessive fine. This Court can only assume that the Plaintiffs are arguing that, when compared to the gravity of the trafficking offenses, the seizures and the permanent disqualification, which the Plaintiffs liken to a *de facto* taking of King Cole Foods, had a substantial impact on King Cole Foods' business, resulting in an "excessive fine." This argument is unconvincing. Regardless, as mentioned before, this Court lacks jurisdiction to address the FNS' discretionary decision to permanently disqualify King Cole Foods from the SNAP.

Furthermore, the fact that ownership/management may or may not have known about the trafficking violations, when they occurred, is only relevant as a mitigating factor in determining the severity of the sanction imposed. As mentioned before, the Plaintiffs provided no evidence to the FNS so that it could consider that criterion. Accordingly, the Plaintiffs' claims under the Eighth Amendment fail to state claims upon which relief can be granted.

B. Plaintiffs' Claims Against Special Agent Mark W. McClutchey and the Other Government Agents Who Executed the Search Warrant Remain In This Action

In their Motion to Dismiss [Docket No. 8], the Government states:

> Plaintiffs also advance claims for personal liability against several unidentified agents or officers for supposed violations of the Fourth, Fifth, and Eighth Amendments, under *Bivens*. Because those defendants remain unidentified, this motion does not address any arguments for dismissal the defendants may have. Nor could this motion do so, since representation by the undersigned counsel of individual agents and officers sued in their individual capacities requires both the request of that party and authorization from the Department of Justice.

(Docket No. 8, at 9.)

On August 27, 2012, the Plaintiffs filed a Motion to Amend the Complaint. (Docket No. 12.) This Court granted the Plaintiffs' Motion to Amend the Complaint on October 18, 2012. (Docket No. 18.)

In their Response to the Motion to Amend the Complaint, the Government makes an argument that the Plaintiffs cannot maintain a *Bivens* action against the federal agents who executed the search warrant. (Docket No. 16, at 8.) With regard to these claims, the Plaintiffs argue in their Reply Brief in Support of their Motion to Amend the Complaint that,:

> but for the unconstitutional conduct by the federal agents prior to King Cole's permanent disqualification, King Cole should have been able to conduct business and accept EBT benefits and continue its normal business. Therefore, the government action spear-headed by USDA Agent McClutch[e]y shut down the King Cole business without providing it with the due process it was entitled. That conduct was outside the law causing the Plaintiff's damages and the relief requested under Bivens.

(Docket No. 17, at 4-5.) Thus, the parties confined their arguments with regard to the alleged futility of the Plaintiffs' *Bivens* claims in their responses to the Plaintiffs' Motion to Amend the Complaint. As a result, this Court cannot address those claims in this Opinion.

Likewise, the Motion to Dismiss Plaintiffs' First Amended Complaint [Docket No. 24] does not address Plaintiffs' *Bivens* claims.

Accordingly, Plaintiffs' *Bivens* claims remain in this action.

CONCLUSION AND ORDER

IT IS ORDERED that the Government's Motion to Dismiss [Docket No. 8] and Motion to Dismiss Plaintiffs' First Amended Complaint [Docket No. 24] are **GRANTED**.

IT IS SO ORDERED.

S/Sean F. Cox
Sean F. Cox
United States District Judge

Dated: January 7, 2013

I hereby certify that a copy of the foregoing document was served upon counsel of record on January 7, 2013, by electronic and/or ordinary mail.

S/Jennifer McCoy
Case Manager

No. 13-1759

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

KING COLE FOODS, INC., ET AL., Plaintiffs-Appellants, v. UNITED STATES OF AMERICA, ET AL., Defendants-Appellees.	)	ORDER (Filed Jun. 26, 2014)

BEFORE: BOGGS and KETHLEDGE, Circuit Judges; and RESTANI, Judge.*

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

* The Honorable Jane A. Restani, Judge for the United States Court of International Trade, sitting by designation.

Therefore, the petition is denied.

ENTERED BY ORDER
OF THE COURT

/s/ Deb S. Hunt
Deborah S. Hunt, Clerk