

**U.S. Department of Agriculture
Food and Nutrition Service
Administrative Review Branch**

Ci Gourmet Deli Grocery Corp,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0249228

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS), that there is sufficient evidence to support a finding that a permanent disqualification from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP) was properly imposed against Ci Gourmet Deli Grocery Corp (hereinafter “Ci Gourmet Deli Grocery Corp” or “Appellant”) by the Retailer Operations Division of FNS.

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR § 278.6(e)(1)(i) in its administration of the SNAP, when it imposed a permanent disqualification against Ci Gourmet Deli Grocery Corp.

AUTHORITY

7 U.S.C. 2023 and its implementing regulations at 7 CFR § 279.1 provide that “[A] food retailer or wholesale food concern aggrieved by administrative action under § 278.1, § 278.6 or § 278.7 . . . may file a written request for review of the administrative action with FNS.

CASE CHRONOLOGY

In a letter dated April 7, 2022, the Retailer Operations Division informed the Appellant that Ci Gourmet Deli Grocery Corp was in violation of the terms and conditions of the SNAP regulations, 7 CFR § 270 –282, based on EBT SNAP benefit transactions that "establish clear and repetitive patterns of unusual, irregular, and inexplicable SNAP activity for your type of firm." The letter also noted that the Appellant could request a trafficking civil money penalty (CMP) in lieu of a permanent disqualification within 10 days of receipt under the conditions specified in 7 CFR § 278.6(i). Per UPS confirmation of delivery, the charge letter was delivered to the Appellant at the store address of record on April 11, 2022.

In a response to the Retailer Operations Division of April 15, 2022, the Appellant, through counsel, replied to the letter of charges. The record reflects that the Retailer Operations Division received and considered the information provided prior to making a determination. The record reflects that in the response, the Appellant's counsel requested information and documents from FNS with regard to the agency's case against Ci Gourmet Deli Grocery Corp pursuant to the Freedom of Information Act (FOIA). Counsel noted that he filed a FOIA demand with the FNS FOIA office; however, as of the date of this Final Agency Decision, July 12, 2022, no FOIA request was submitted by counsel to the FNS FOIA office.

After considering the Appellant's response and the evidence in the case, the Retailer Operations Division issued a determination letter dated April 29, 2022, informing the Appellant that Ci Gourmet Deli Grocery Corp was being permanently disqualified from participation in the SNAP in accordance with 7 CFR § 278.6(e)(1) for trafficking violations. The letter also stated that the Appellant was not eligible for a trafficking civil money penalty (CMP) in accordance with 7 CFR § 278.6(i) as the Appellant did not submit sufficient evidence to demonstrate that the firm had established and implemented an effective compliance policy and program to prevent violations of the SNAP.

In a letter postmarked May 6, 2022, the Appellant, through counsel, requested an administrative review of the Retailer Operations Division's decision to permanently disqualify the firm from participation in the SNAP. FNS granted the Appellant's request for administrative review by letter dated May 11, 2022.

STANDARD OF REVIEW

In appeals of adverse actions, the Appellant bears the burden of proving by a preponderance of the evidence, that the administrative actions should be reversed. That means the Appellant has the burden of providing relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true.

CONTROLLING LAW

The controlling statute in this matter is contained in the Food and Nutrition Act of 2008, amended, 7 U.S.C. § 2021 and 278 of Title 7 of the Code of Federal Regulations (CFR). 7 U.S.C. § 2021, Part 278.6(a) and Part 278.6(e)(1)(i) of the Regulations establish the authority upon which a permanent disqualification may be imposed upon a retail food store or wholesale food concern. There also exist FNS policy memoranda and clarification letters which further explain the conditions necessary in order to permanently disqualify retail stores.

7 U.S.C. § 2021(b)(3)(B) states, inter alia:

... a disqualification under subsection (a) shall be ... permanent upon ... the first occasion or any subsequent occasion of a disqualification based on the purchase of coupons or trafficking in coupons or authorization cards by a retail food store or wholesale food concern or a finding of the unauthorized redemption, use, transfer, acquisition, alteration, or possession of EBT cards ...

7 CFR § 278.6(a) states, inter alia:

FNS may disqualify any authorized retail food store ... if the firm fails to comply with the Food and Nutrition Act of 2008, as amended, or this part. Such disqualification shall result from a finding of a violation on the basis of evidence that may include facts established through on-site investigations, inconsistent redemption data, evidence obtained through a transaction report under an electronic benefit transfer system ... [Emphasis added].

7 CFR § 278.6(e)(1)(i) states:

Disqualify a firm permanently if: Personnel of the firm have trafficked as defined in § 271.2.

7 CFR § 271.2 states, inter alia:

Trafficking means...The buying, selling, stealing, or otherwise effecting an exchange of SNAP benefits issued and accessed via Electronic Benefit Transfer (EBT) cards, card numbers and personal identification numbers (PINs), or by manual voucher and signature, for cash or consideration other than eligible food, either directly, indirectly, in complicity or collusion with others, or acting alone...

7 CFR § 278.6(f)(1) states, inter alia:

A civil money penalty for hardship to SNAP households may not be imposed in lieu of a permanent disqualification.

7 CFR § 278.6(i) states, inter alia:

FNS may impose a civil money penalty in lieu of a permanent disqualification for trafficking as defined in § 271.2 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 ...

7 CFR § 278.6(b)(2) states, inter alia:

(ii) Firms that request consideration of a civil money penalty in lieu of a permanent disqualification for trafficking shall have the opportunity to submit to FNS information and evidence as specified in § 278.6(i), that establishes the firm's eligibility for a civil money penalty in lieu of a permanent disqualification in accordance with the criteria included in § 278.6(i). This information and evidence shall be submitted within 10 days, as specified in § 278.6(b)(1). [Emphasis added].

(iii) If a firm fails to request consideration for a civil money penalty in lieu of a permanent disqualification for trafficking and submit documentation and evidence of its eligibility within the 10 days specified in § 278.6(b)(1), the firm shall not be eligible for such penalty. [Emphasis added].

SUMMARY OF CHARGES

The Appellant was charged and determined to be trafficking based on an analysis of EBT transaction data from June 2021 through December 2021. This involved the following SNAP transactions patterns which are indicative of trafficking:

- There were multiple transactions made from the accounts of individual SNAP households within a set time period; and
- There were EBT transactions conducted that are large based on the observed store characteristics and recorded food stock.

The issue in this review is whether, through a preponderance of evidence, it is more likely true than not true that questionable transactions were the result of trafficking.

APPELLANT'S CONTENTIONS

The following represents a brief summary of the Appellant's contentions in this matter. Please be assured, however, that in reaching a decision, full attention and consideration was given to all contentions presented, including any not specifically recapitulated or specifically referenced herein.

In the reply to the charge letter and in the administrative review request, the Appellant, through counsel, stated the following summarized contentions, in relevant part:

- The Appellant vehemently denies that he or anyone involved with or employed by the firm has engaged in repetitive patterns of unusual, irregular and inexplicable activity or in any activities which constitute violations of the SNAP regulations.
- There has been no prior action taken by FNS to warn the firm about the possibility that violations were occurring.
- The subject store has no prior history of noncompliance. Such an unblemished record is evidence of the store's continued compliance with the law and training and supervision of employees. While the owner is not on the premises during the entire period the store is open, he is regularly in the store supervising employees and that they are in compliance with the SNAP regulations and are adhering to the standards set by store policy.
- It is unclear which employees were on duty at the times of the alleged violations; however, the owner has never witnessed any trafficking during or after the review period.
- Noteworthy is that an FNS reviewer conducted a store visit at the Appellant on or about the times of these alleged violations. During the store visit, no violations occurred and the store was fully stocked.
- The store is well stocked at all times with staple food inventory specifically designed to accommodate those low-income customers who regularly purchase large quantities of items with SNAP benefits. The store receives deliveries on a daily and weekly basis. As proof of same, the Appellant will forward copies of invoices from wholesaler/distributors. That such an account of all purchases from distributors and wholesales who provide inventory to the Appellant will demonstrate that the store characteristics and recorded food stock are sufficient to support the purchases noted in charge letter Attachments 1 and 2.
- The store sells fruits, vegetables, rice, beans, pasta, meat, fruits, vegetables, milk and other dairy products, eggs, bread, cereal, prepared foods, coffee, cooking oil, and other cooking

ingredients. It also sells a large variety of sweetened drinks, juices, desserts, salty snacks, candy and chips.

- The subject store is open 7 days per week, from 6:00 am until 12:00 am each day. The store is staffed by four full-time employees, with one cash register, as it is a large sized mini market of approximately 800 square feet of sales space and 200 square feet of storage in the back of the store.
- The store has a 12 foot register counter where customers can pay for the items they intend to purchase.
- There is one aisle with numerous levels of shelving for all types of eligible food stuffs down the middle and along the side walls and back wall and behind the counter area. There is one long refrigerator with several doors displaying numerous food products. There is one 6 foot freezer for ice cream and other desserts and other frozen foods.
- The owner has invested large sums of money to renovate and improve this store for his customers and for air conditioning, counters, shelving, floors, ceilings, glass, and signage.
- The vast majority of the people who patronize this store are regular customers and use this store as their primary food shopping location.
- As a convenience to its customers, this store takes telephone orders and makes deliveries.
- The Appellant provides necessary items to the community of large multi-family apartment complexes. The neighborhood has a very high population density, all with large families in said apartment buildings, which are within walking distance of the Appellant. There are also family homeless shelters, rehabilitation centers, and other commercial enterprises. There are numerous schools, churches, and family shelters which bring the parents of school age children to the store to buy foodstuffs and other eligible items on a daily basis before and after pick-up. The store is located across the street from a bus stop and near a subway stop.
- There are no other similar providers or eligible SNAP providers in the immediate area. The closest supermarket is approximately ¼ mile away and closes early in the evening. In fact, this store does a substantial amount of business in the evening after the supermarkets close.
- There have been numerous closings of convenience stores in the immediate area which were SNAP retailers creating a serious need for the community to have a store where they can redeem their SNAP benefits.
- There is a great need for families who live and work in the neighborhood, many of which are large families, to have access to basic items in bulk like baby formula such as Enfamil and Similac, milk, eggs, baby food, cereal, bread, juice and other infant and child care products after work and at all hours of the day. The store also sells cases of Ensure and Red Bull.
- With regard to the transactions noted in charge letter Attachment 1, these transactions reflect legitimate business and not trafficking. The owner cannot control how patrons shop. FNS has never passed any regulations limiting how often beneficiaries could visit a SNAP retailer or warned the retailer against allowing beneficiaries to shop at the subject store multiple times during an abbreviated time period.
- Regular customers will often call the store by telephone and pre-order by placing their large grocery orders and then personally pick-up these orders at which time they pay for the telephone orders and purchase additional items, which they cannot do at a supermarket.
- Some customers allow others to use their cards or they themselves use the card for other families.
- FNS should be investigating the benefit cardholders to determine whether they are misusing and abusing the SNAP assistance they have been provided.

- Many of these transactions resulted from individuals who live in close proximity and are going to pick up items they need for convenience or who are picking up their children or low-income seniors who live nearby and frequent the store regularly.
- The Appellant allows individuals to purchase items throughout the day and night, allowing customers to purchase breakfast, lunch and dinner at the subject store for themselves and their families. These are all legally allowable customer behaviors and not indicative of any violation of SNAP rules.
- Most of these customers do not own cars and by virtue of that fact travel on foot and need multiple trips to transport their purchases, which are packaged in plastic bags. Many of the store's customers live in the immediate area and do not have the capacity to carry heavy shopping bags from large supermarkets and carry them up into their apartment buildings. As such, they must travel on foot and have to make several trips to the store to make their daily, weekly, and monthly purchases.
- The Appellant may not fit the pattern of the nationwide computer model programmed by FNS, but to pre-judge the number of times in one set period that the card is used by declaring it to be an unacceptable American business practice is discriminatory and should not render the Appellant criminal in the eyes of the agency. It is unconscionable that FNS can cause the owner to be permanently disqualified based on his business judgement, without any proof of wrong doing, despite the number of multiple transactions made from the accounts of individual SNAP households within a set time period, being outside the agency's acceptable computer analysis and logarithms.
- It is patently ridiculous that after years of participation in the SNAP that the Appellant would risk permanent disqualification or a costly civil money penalty in exchange for a mere sum of \$119,171.50, where it is unknown by FNS as to what portion of that amount might have been exchanged for cash or if any swipe was in fact exchanged for cash.
- The transactions noted in charge letter Attachment 2 are the result of SNAP customers who are unable to get to the larger supermarkets and rely upon local grocery stores for their primary food shopping.
- They also buy items on their way home from picking up their children from school or to and from church using this store as a primary source of daily food for their families. The store is designed to accommodate the needs of regular and repetitive customers of this business.
- Based on the volume of goods purchased, the recorded food stock is more than adequate to account for the volume of purchases of this store. The submitted inventory purchase invoices substantiate this.
- These large transactions occurred during the COVID-19 crisis where 5 U.S.C. § 552 (b)(6) & (b)(7)(C) was in a virtual lockdown. During this period the owner was allowing customers to purchase items numerous times during the day. This practice was not and has never been done in the regular course of business. However, the Appellant acted to protect customers and families so they would not go hungry during such a dire time.
- Many of these transactions were conducted shortly after patrons received their monthly SNAP deposits, prompting them to spend much of their balances at the subject store. As a result, the recipients use much of the balance of their SNAP account at the Appellant.
- Many of these transactions resulted from well-established customers who had budgeted their benefits, and some had placed telephone orders, and from deliveries at a particular time in the month when they know they can use the balance of their benefits for eligible food items.
- This store is very busy processing 1,500 transactions per month. If FNS averages the amount of purchases, it would find that the average purchase is in the \$40.00 to \$70.00 range, which is not unusual under these circumstances.

- Additionally, during this past spring through fall when there was very warm weather, numerous customers only wanted to go out when they needed to buy in bulk to avoid going out numerous times in hot weather.
- It is ludicrous for FNS to refuse to allow an owner to sell large containers of Ensure, Enfamil and other expensive items without risking allegations of trafficking, especially where the agency has failed to provide guidelines as to the amounts their benefit cardholders are permitted to purchase at one time.
- While there are larger stores in the area those supermarkets are not preferred by residents as they are crowded with long lines, selling the same items for similar prices.
- These large transactions are nothing more than the expensive cost of goods in 5 U.S.C. § 552 (b)(6) & (b)(7)(C), where all food items are costly.
- The owner would not risk a permanent SNAP disqualification and the liability for a substantial civil money penalty as alleged in Attachment 2 over a seven month period for a total amount of \$412,195.45, especially in light of the fact that it is unknown by FNS as to what portion of that amount was even exchanged for cash, if any swipe amount was in fact exchanged for cash.
- FNS has failed to establish intent, which is an essential element of the basis for its decision to permanently disqualify the Appellant from the SNAP.
- The disqualification decision is based upon a predetermined standard of SNAP activity for the type of firm of the Appellant. FNS' use of EBT records in the ALERT system in sole support of its claim of unlawful activity is completely inadequate and violative of its obligations and duties in the administration of the SNAP. The disqualification decision is based upon a statistical survey data unfounded and without merit. The disqualification is based upon a predetermined standard of SNAP activity for the type of firm owned and operated by the Appellant. A statistical sampling or survey has been erroneously used to determine the normal transactions in this store significantly exceed the normal practice for this type of firm.
- The charge letter relies upon an analysis of SNAP transactions records and only furnishes the owner a listing for small sampling concerning those activities that allegedly constitute unlawful transactions. No specifics are set forth concerning the transactions that occurred at the Appellant. As a result, the owner is not afforded the opportunity to fully answer and challenge the charges lodged against it.
- Particularly troubling is that FNS is aware this firm does not use an optical scanner and that each transaction cannot be traced back as if it were a large supermarket with advanced technology. As a result, FNS can prey on these type of smaller stores and claim without any proof that "trafficking" occurred, thus giving FNS the ability to sanction this firm with a permanent disqualification prior to judicial review.
- The Appellant requests the imposition of a hardship civil money penalty in lieu of disqualification per Section 278.6(a), in order to avoid hardship to SNAP beneficiaries. The Appellant requests an immediate hearing to determine same.
- A substantial portion of the Appellant's sales and revenues (approximately 50%) result from its participation in the SNAP. SNAP sales provide the income necessary to keep the business profitable so it can continue its operation.
- The Appellant's counsel has filed a FOIA demand and requests that any decision or determination herein be held in abeyance until counsel is furnished the information and data demanded, and a final response is submitted. Without this additional information the Appellant will not be afforded an opportunity to properly defend, answer and address these charges and as a result, will be deprived of due process.

- Should FNS determine the Appellant violated Section 278.2(a) of the SNAP regulations, pursuant to Section 278.6(f)(1), the agency should impose a civil money penalty as a sanction in lieu of disqualification as it would be a violation of due process to prosecute the owner for alleged transactions that occurred without any warning letter to correct and cure any issue with one employee.
- The firm has met the criteria listed in 7 CFR 278.6(i) in that it had developed and implemented an effective compliance policy and program which was in operation prior to the occurrence of the SNAP violations. The firm had developed and instituted an effective personnel training program as specified in § 278.6(i)(2). The owner was not aware of, did not approve, did not benefit from, or was not in any way involved in the conducted or approval of trafficking violations as set forth in the charge letter. This is the first occasion in which a member of firm management was aware of the alleged conducted of supposed trafficking violations by the firm.
- Since being authorized to accept SNAP benefits in 2017, the Appellant has continuously trained and tested employees concerning the SNAP regulations and requirements regarding the prohibitions against sales of ineligible items and exchanging SNAP benefits for cash.
- The Appellant’s training program consists of two weeks of intensive, hands on classes, overseen by the store owner. He works with each employee during this period, teaching them the rules and regulations of the SNAP. He ensures that they watch the on-line video and provides them with employee handbooks and other printed materials, which they must read, study and learn prior to engaging in SNAP sales and their full employment in the store. Upon the conclusion of the two week period, the owner gives each employee a test to ensure their compliance with the SNAP regulations. He also trains them to treat all customers and benefit holders with courtesy and respect in accordance with SNAP rules. Any employee that is suspected of failing the test or to comply with the policies of the store is immediately terminated.

ANALYSIS AND FINDINGS

SNAP Authorization

During the review period of June 2021 through December 2021, Ci Gourmet Deli Grocery Corp was classified as a convenience store. When the Appellant was authorized by FNS for participation in the SNAP on April 22, 2021, the owner signed a SNAP application for the store and acknowledged he was aware of the SNAP regulations and understood those regulations. That application included a certification and confirmation that the owner would “accept responsibility on behalf of the firm for violations of the SNAP regulations, including those committed by any of the firm’s employees, paid or unpaid, new, full-time or part-time.” The violations listed on this certification include accepting SNAP benefits in exchange for cash, otherwise known as trafficking, and other violations such as accepting SNAP benefits as repayment on credit accounts or in exchange for ineligible items.

Store Visit Observations

The case file indicates that in reaching a disqualification determination, the Retailer Operations Division considered information obtained during an April 14, 2021 store visit conducted by a FNS contractor to observe the nature and scope of the firm’s operation, stock, and facilities. This information obtained from the store visit was also used to ascertain if there were justifiable explanations for the firm’s irregular SNAP transactions. The available inventory of SNAP-eligible

food at the time of the store visit showed food stock that would be typical of a convenience store, where households normally purchase a limited number of items. The SNAP-eligible food stocked by the store was generally of a low dollar value, consisting mainly of inexpensive canned and packaged goods, snack foods, single-serving food items and accessory food items. The store visit report and photographs documented the following store size, description, and characteristics:

- Approximately 1,000 square feet in size with no additional storage area outside of public view;
- Did not have storage coolers/freezers;
- No shopping carts and no hand-held baskets available for customer use;
- One small checkout counter area with limited check-out counter space;
- One cash register and one EBT point-of-sale (POS) device for use in ringing-up SNAP transactions;
- Did not have an optical scanner;
- Did not have a special pricing structure, such as prices ending in \$.x9;
- Did not round transactions up or down at the checkout counter;
- Had ATM or money transfer service;
- Did not operate through a window;
- No signs posted or flyers available advertising the availability of bulk foods offered at a discounted rate to include meats in bulk, foods sold by the case, and grocery package deals;
- No meat/seafood specials or bundles or fruit/vegetable boxes that might sell for high prices;
- No evidence of a wholesale business such as posted prices or separate entrances for wholesale customers;
- Telephone orders were taken;
- Delivery was not offered;
- The six most expensive (costing \$5.00 and above) SNAP-eligible food items in stock were cereal at \$7.00; Chips Ahoy cookies at \$7.00; Breyers ice cream at \$6.00; coffee at \$6.00; Oreo cookies at \$6.00; and Ritz crackers at \$6.00;
- No fresh or frozen meats, poultry, or seafood;
- The only frozen food item in stock was ice cream;
- Had a kitchen and hot foods were sold;
- Had a deli area in which prepared, made-to-order sandwiches and other refrigerated foods/prepared salads were also sold;
- Prices for deli meats and cheeses sold by the pound were not posted;
- Meat items included units of canned/potted meat, canned fish, bacon, sausage, and eggs;
- Dairy included milk, margarine, butter, yogurt, and cheese;
- Had a limited variety and amount of fresh produce stock;
- Other staple foods available for purchase included such items as juice, pasta, rice, cereal, flour, loaf bread, baking mix, bagels, English muffins, grits, and canned goods;
- Much of the remaining food stock consisted of accessory foods such as candy, carbonated and non-carbonated drinks, condiments, snack foods, cakes/pastries, vegetable oil, and sugar; and
- Ineligible nonfood items included health and beauty aids, paper products, household cleaning supplies, household items, tobacco products, alcohol, tobacco pipes, and pet food.

Charge Letter Attachments

On review, the investigative materials provided by the Retailer Operations Division, including computer printouts of transaction data available from Federal records, store visit observations, information regarding area competitor firms, and household shopping patterns, were analyzed.

Government analyses of stores caught in trafficking violations during on-site investigations have found that transactions involving trafficking consistently display particular characteristics or patterns. These patterns include, in part, those cited in the letter of charges. Based on this empirical data, and in the absence of any reasonable explanations for such transaction patterns, a conclusion can be drawn through a preponderance of evidence that the most likely explanation for “unusual, irregular, and inexplicable” transactions and patterns cited in the letter of charges is trafficking. Transactions having such characteristics sometimes do have valid explanations that support that they were the result of legitimate purchases of eligible food items. This is why opportunities are afforded to charged retailers to explain the questionable transactions cited. In this case, the Retailer Operations Division determined that the Appellant’s contentions did not outweigh the evidence. The issue in this review is whether, through a preponderance of evidence, it is more likely true than not true that questionable transactions were the result of trafficking. As patterns of unusual transactions appear across multiple Attachments, the case of trafficking becomes more convincing.

Repeat Transactions by the Same Household (Charge Letter Attachment 1)

This charge letter Attachment documents 342 sets of transactions (863 total transactions) that total \$119,171.50 in SNAP benefits to meet the parameters of this scan. These transactions were conducted by 243 different households. Multiple transactions conducted by the same household account within a short period of time is a method which violating stores use to avoid single high dollar transactions that cannot be supported by a retailer’s inventory and structure.

The Appellant contends that the transactions documented in this Attachment reflect legitimate business and not trafficking. The owner cannot control how patrons shop. Many of these transactions resulted from individuals who live in close proximity and are going to pick up items they need for convenience or who are picking up their children or low-income seniors who live nearby and frequent the store regularly. Some customers purchase breakfast, lunch and dinner at the subject store for themselves and their families.

Although it is not uncommon for customers to have more than one transaction per day and there are no limits on the number of times EBT cards may be used or the amount of eligible foods that may be purchased, it is not common that such multiple transactions are for large dollar amounts. The SNAP transactions noted in the charge letter are questionable not because they exceed any limits for use, but rather because they display characteristics of use inconsistent with the nature and extent of the Appellant’s stock and facilities and are therefore, indicative of trafficking.

5 U.S.C. § 552 (b)(7)(E).

Although many SNAP households do shop early in the month as opposed to later in the month, most households do not spend all or a majority of their monthly benefit allotment in just one or two days, especially from a convenience store like the Appellant firm that has a limited food stock, a limited variety and amount of fresh produce stock, no fresh or frozen meats, poultry, or seafood, and no frozen food stock other than ice cream.

The report and photographs from the store visit offer no explanation as to why SNAP customers would routinely shop at the Appellant multiple times during a short period or purchase such a large volume of items, there being no great variety of products, price advantage, profusion of large packages, or significant bulk items or food cases for sale. The majority of the Appellant's food stock consists of packaged food items, canned items, accessory food items, snacks, and beverages. The second, third, and subsequent transactions in each set are too large to consist of forgotten items.

In addition, the store visit report, which was completed in collaboration with and signed by the store manager, and the store visit photos indicate that there was only one checkout counter with limited check-out counter space, one cash register and one EBT POS device for use in ringing-up customers, no shopping carts or hand-held baskets available to customers for transporting food within the store, and no optical scanners or conveyor belts to expedite high dollar or rapid consecutive purchases. While the store visit observations support the Appellant's contention that the store takes telephone orders, no evidence was provided by the Appellant, 5 U.S.C. § 552 (b)(7)(E), that placement of advanced orders by customers is the explanation for these purchase transactions. While the Appellant contends that delivery services are offered to customers, the store visit observations indicate that the firm did not offer delivery services and that the Appellant did not offer a profusion of specialty or ethnic goods which would entice SNAP customers to utilize the subject store over other area authorized retail stores.

As to whether or not co-shopping and/or sharing of SNAP cards actually affected the Appellant firm during the review period, this argument is little more than conjecture. The Appellant has provided no evidence to show that co-shopping and/or sharing of SNAP cards is particularly common among SNAP recipients in 5 U.S.C. § 552 (b)(6) & (b)(7)(C). If co-shopping truly impacted Ci Gourmet Deli Grocery Corp as the Appellant suggests, it would stand to reason that co-shopping would affect other nearby firms as well. This would manifest itself in comparable firms having similar transaction patterns – multiple transactions from the same household in a short period of time. But this is simply not the case.

The Appellant contends that there are no other similar providers or eligible SNAP providers in the immediate area. There have been numerous closings of convenience stores in the immediate area. The closest supermarket is approximately ¼ mile away and closes early in the evening. Most customers do not own cars and by virtue of that fact travel on foot and need multiple trips to transport their daily, weekly, and monthly purchases, which are packaged in plastic bags. Many of the store's customers live in the immediate area and do not have the capacity to carry heavy shopping bags from large supermarkets and carry them up into their apartment buildings.

It is recognized that sometimes a firm may have unusual transaction patterns due to a recipient's lack of access to other SNAP authorized stores. However, during the review period there were 33 SNAP authorized retailers located within a 1.0 mile radius of Ci Gourmet Deli Grocery Corp, including 1 super store, 4 supermarkets (one of which is located 0.07 miles away), 1 large grocery store, 2 medium grocery stores, and 4 small grocery stores, that could meet the nutritional needs of SNAP customers. Some of these area authorized stores offer a comparable or greater quantity and variety of food products at comparable or better prices as compared to the subject store.

In addition, the record indicates that SNAP customers who shopped at Ci Gourmet Deli Grocery Corp during the review period also shopped at other area grocery stores and, therefore, transportation

to other stores is not an issue for these customers. Therefore, lack of access to other authorized stores or the availability of other food stores does not appear to be an explanation for the Appellant's abnormally high SNAP transaction amounts conducted within a short timeframe of each other.

Unfortunately, the Appellant has not provided any evidence to show that the transactions listed in this Attachment were legitimate purchases of eligible foods and not the result of trafficking of SNAP benefits. The arguments presented by the Appellant hold little weight without some kind of evidence to substantiate its claims. The Appellant has the burden to provide relevant evidence to rebut the trafficking charges. This burden has not been met.

Excessively Large Purchase Transactions (Charge Letter Attachment 2)

This charge letter Attachment documents 2,148 SNAP transactions, as large as \$1,254.29, that total \$412,195.45. These large transaction amounts are not consistent with the store's observed characteristics and food inventory. The frequency of high dollar purchases in the review period calls into question the legitimacy of these transactions.

The Appellant contends that these transactions are the result of SNAP customers who are unable to get to the larger supermarkets and rely upon local grocery stores for their primary food shopping. They also buy items on their way home from picking up their children from school or to and from church using this store as a primary source of daily food for their families. The store is designed to accommodate the needs of regular and repetitive customers of this business. The Appellant's food stock is more than adequate to explain these transactions. The store visit observations indicate that the store was fully stocked.

However, the food stock and facilities of the Appellant as reported in the store visit documentation do not appear sufficient to provide for all of one's food needs. People generally do not spend large sums at such stores. They usually stop at convenience stores to pick up a few staple food items, such as bread, milk, or a can or two of food that they may consider are not worth a trip to the supermarket to purchase. The Appellant contends that the large transactions are not the result of trafficking of SNAP benefits. However, it is rare for a convenience store such as Ci Gourmet Deli Grocery Corp to have purchases like those included in this Attachment to the charge letter.

The Appellant contends that many of these transactions were conducted shortly after patrons received their monthly SNAP deposits, prompting them to spend much of their balances at the subject store. As noted previously, although many SNAP households do shop early in the month as opposed to later in the month, most households do not spend all or a majority of their monthly benefit allotment in just one or two days, especially from a convenience store like the Appellant firm that has a limited food stock, a limited variety and amount of fresh produce stock, no fresh or frozen meats, poultry, or seafood, and no frozen food stock other than ice cream.

The Appellant contends that the store is approximately 800 square feet in size with 200 square feet of storage in the back of the store, and that there is one long refrigerator with several doors displaying numerous food products. While FNS does not dispute the Appellant's approximation of the store's square footage, the store visit observations indicate that there is no storage area out of public view and that there were no storage coolers/freezers. The store visit report and photos also indicate that there was no long refrigerator with several doors displaying foods. However, the Appellant had a deli/prepared food section in which a few staple foods, such as butter, margarine, yogurt, bacon, deli

meats and cheeses, etc., were stocked. While the store visit observations confirm that the firm had a chest freezer, the only frozen food stocked in this freezer was ice cream.

The store visit observations also confirm the Appellant's claim that the store has a 12 foot register counter. However, there were many items stocked on the counter limiting the amount of space for customers to place items for ringing-up on the register. The store visit report and photos indicate that the firm had one cash register, one EBT POS device and no optical scanner. In addition, there were no shopping carts or hand-held baskets in which to transport the large number of items required to make up these large transaction amounts. Without these, it is unlikely that such large dollar value transactions could be for actual food purchases and more likely they are trafficking. In addition, there was no evidence provided by the Appellant that placement of advanced orders by customers is the explanation for these excessively large purchase transactions. In addition, the store visit report, which was completed in collaboration with and signed by the store manager, indicates that delivery was not offered by the firm.

While there is no definition in the SNAP regulations for an excessively large purchase or transaction, FNS makes its determination based on the store type, characteristics and stocked inventory. The burden is on the Appellant to prove transactions FNS identified as large for the store type (in this case, a convenience store) are for legitimate purchases. According to the store visit, the subject store did not have inventory to support the numerous large transactions. **5 U.S.C. § 552 (b)(7)(E).**

The Appellant contends that these large transactions occurred during the COVID-19 crisis where **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** was in a virtual lockdown. During this period the owner donated items to customers to protect them and their families so that they would not go hungry during the pandemic. However, the six month review period began in June 2021, over a full year after the outbreak of the COVID-19 pandemic. It may be an exaggeration to classify **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** as still, over one year later, in "virtual lockdown" status. It is also unclear what the Appellant means by it allowed customers to purchase numerous items during the day; however, the SNAP regulations do not prohibit (at any time, pre or during the COVID-19 pandemic) customers from purchasing more than one transaction per day nor are there limits on the number of times EBT cards may be used or the amount of eligible foods that may be purchased.

The Appellant contends that the store sells large containers of Enfamil and Similac. However, there was no evidence from the store visit observations to indicate that infant formula of any brand/kind was stocked by the store nor did the Appellant provide any evidence of inventory purchases of infant formula. It is also important to note that the majority of households that qualify for WIC Program benefits also qualify for and are SNAP recipients. In most cases, these households utilize their WIC Program benefits to purchase infant formula and infant foods in lieu of their SNAP benefits in order to save their SNAP benefits for other needed food items. The Appellant is not a WIC Program vendor and therefore, it is unlikely that WIC Program recipients would routinely or consistently choose to utilize their SNAP benefits to purchase infant formula and foods at the subject firm.

The Appellant contends that during this past spring through fall when there was very warm weather, numerous customers only wanted to go out when they needed to buy in bulk to avoid going out numerous times in hot weather. The store sells large containers of Ensure, Enfamil and other expensive items. However, the store visit report and photos indicate that there were no signs posted or flyers available advertising the availability of bulk foods offered at a discounted rate to include meats in bulk, foods sold by the case, and grocery package deals, no evidence of meat/seafood specials or bundles or fruit/vegetable boxes that might sell for high prices, and no evidence of a

wholesale business such as posted prices or separate entrances for wholesale customers. In addition, there were only a few expensive SNAP-eligible foods in stock, none of which included cases or large containers of Red Bull or Ensure, that would account for these large amounts.

The Appellant contends that this store is very busy processing 1,500 transactions per month. If FNS averages the amount of purchases, it would find that the average purchase is in the \$40.00 to \$70.00 range, which is not unusual under these circumstances. These large transactions are nothing more than the expensive cost of goods in 5 U.S.C. § 552 (b)(6) & (b)(7)(C), where all food items are costly. 5 U.S.C. § 552 (b)(7)(E).

5 U.S.C. § 552 (b)(7)(E).

The Appellant provided statistics pertaining to the general demographic and the size of families who shop at the Appellant. The Appellant also noted that the store is located near family homeless shelters, rehabilitation centers, and other commercial enterprises, numerous schools and churches, a bus stop and a subway stop. However, these factors are not an indication that questionable transactions would be occurring at any given store. The subject store shows unusual transaction patterns that are not displayed in other similarly stocked stores. If specific household needs are causing these questionable transactions at the subject store, it would be expected that similar patterns would also present themselves at nearby firms as well. But this is simply not the case.

The Appellant contends that while there are larger stores in the area those supermarkets are not preferred by residents as they are crowded with long lines, selling the same items for similar prices. However, no evidence was advanced to support the Appellant's claim that it offers items for similar prices as local supermarkets. As the Appellant is located in an area with larger SNAP authorized stores (i.e., 1 super store, 4 supermarkets, 1 large grocery store, 2 medium grocery stores, and 4 small grocery stores within a 1.0 mile radius), it is unlikely the amount of savings accrued at the Appellant is comparable to the savings that come from purchasing lower cost items available at supermarkets and super stores. Larger stores usually are able to offer items at a lower price than smaller stores/convenience stores due to their ability to purchase foods from suppliers/vendors in larger amounts and at lower prices. As such, it is not practical that SNAP customers would choose to make large or multiple purchases at the Appellant when there is access to multiple larger area authorized stores with lower prices.

5 U.S.C. § 552 (b)(7)(E).

Based on the store layout, infrastructure, and available inventory, it is not credible that the Appellant would so frequently conduct large transactions closely resembling those typically found at a supermarket or super store. It is not plausible that the firm's customers would regularly carry very large amounts of merchandise around the store without the benefit of shopping carts, especially since larger, better-stocked stores are readily available and in the vicinity of the Appellant firm. The Appellant is not set up to process high-dollar transactions, as indicated by its lack of equipment to facilitate large transactions and limited counter space. There are no legitimate bases for SNAP customers' unusual attraction to the firm such as a superior selection of staple foods, price advantages, package specials, bulk or promotional items, an extensive variety of otherwise unavailable ethnic food items, or special services rendered. The Appellant failed to provide convincing evidence to establish the legitimacy of these excessively large transactions, 5 U.S.C. § 552 (b)(7)(E). Based on all of these factors discussed in this section, the large volume of transactions for high-dollar amounts is unlikely to indicate a pattern of legitimate food purchases.

Evidence of Trafficking

Regarding the Appellant's contentions with respect to the reliability of the ALERT system, USDA employs a computerized fraud detection tool to identify EBT transactions that form patterns that have characteristics indicative of trafficking. However, this tool does not, by itself, determine or conclude that trafficking has occurred. The Retailer Operations Division analyzes the transaction data and patterns along with other documentation such as, information from the onsite store visit report including photographs of stock and the store layout, an analysis of recipient shopping behavior, and comparisons with similar store types in local area, to render a determination as to whether or not the questionable transaction patterns were, more likely than not, the result of trafficking. The regulations at 7 CFR § 278.6(a) state that FNS may disqualify any authorized retail food store if the firm fails to comply with the Food and Nutrition Act of 2008, as amended, and that such disqualification shall result from a finding of a violation on the basis of evidence that may include facts established through, inconsistent redemption data, and evidence obtained through a transaction report under an electronic benefit transfer system.

FOIA

The Appellant contends that counsel has filed a FOIA demand and requests that any decision or determination herein be held in abeyance until counsel is furnished the information and data demanded, and a final response is submitted. Without this additional information the Appellant will not be afforded an opportunity to properly defend, answer and address these charges and as a result, will be deprived of due process. However, as of the date of this Final Agency Decision, no FOIA request was submitted by counsel to the FNS FOIA office.

It is also important to note that effective October 26, 2020, changes to 7 CFR § 278.6 and 7 CFR § 279.4 went into effect which allow FNS to take administrative action against a firm, even if the firm has submitted a FOIA request or appeal for records. According to recently published regulations: "278.6(p) Freedom of Information Act (FOIA) requests and appeals. A FOIA request or appeal for records shall not delay or prohibit FNS from making a determination regarding disqualification or penalty against a firm under paragraphs (c) and (d) of this section, or delay the effective date of a disqualification or penalty listed in paragraph (e) of this section."

With regard to the Appellant's contentions with respect to lack of due process, prior to a disqualification determination, the firm was given ample opportunity to reply to the charge letter and provide any information to justify as legitimate the transaction patterns detailed in the charge letter Attachments. The Appellant, through counsel, provided information in response to the letter of charges on April 15, 2022.

The second level of due process involves an administrative review, of which the Appellant, through counsel, has likewise availed itself and in the process of which the Appellant was granted an additional three weeks within which additional information may be provided in support of the request for review. Therefore, any evidence and information that the Appellant presented to the Retailer Operations Division, as well as any such information submitted subsequently, have now been considered in this administrative review in rendering the final agency administrative decision in this case. The record does not indicate any departure from established policy or procedures with regard to the Appellant's right to a fair and thorough review. The Appellant has exercised its opportunity to

reply to the charge letter and its administrative review rights, and by doing so has availed itself of the full complement of the agency's statutory obligations with regard to due process.

No Warning

The Appellant contends that there has been no prior action taken by FNS to warn the firm about the possibility that violations are occurring. 7 CFR § 278.6(d)(2) and (3) of the SNAP regulations provides that "The FNS office making a disqualification or penalty determination ... shall consider ... any prior action ... to warn the firm about the possibility that violations are occurring...." The citation simply requires FNS to consider any prior warnings when determining a sanction. It does not require FNS to give such warnings. FNS did not consider prior actions to warn the Appellant about the possibility that violations were occurring because there were no prior warnings.

Compliance History

The Appellant contends that the firm was authorized to accept SNAP benefits in 2017 and has no prior history of noncompliance. It would defy logic for the store owner with a long history of compliance to suddenly start trafficking for the de minimus amounts set forth in the charge letter.

The record indicates that the Appellant was authorized for participation in the SNAP on April 22, 2021. The Appellant is correct that the firm has not been cited for prior violations. However, a record of participation in the SNAP with no previously documented instance of violations does not constitute valid grounds for dismissal of the current charges of violations or for mitigating the impact of those charges.

Neither the Food and Nutrition Act of 2008, as amended, nor the accompanying regulations cite any minimum dollar amount of cash or SNAP benefits, or number of occurrences, for such exchanges to be defined as trafficking. Nor do they cite any degrees of seriousness pertaining to trafficking of SNAP benefits. Trafficking is always considered to be extremely serious, even when the exchange of SNAP benefits for cash is dollar-for-dollar or is conducted by a nonmanagerial store clerk. This is reflected in the Food and Nutrition Act, which reads, in part, that disqualification "shall be permanent upon . . . the first occasion of a disqualification based on . . . trafficking . . . by a retail food store." In keeping with this legislative mandate, § 278.6(e)(1)(i) of the SNAP regulations states that FNS must disqualify a firm permanently if personnel of the firm have trafficked. There is no agency discretion in the matter of what sanction is to be imposed when trafficking is involved.

Financial Hardship

With regard to the Appellant's contention that a SNAP disqualification would impose a financial hardship on the firm, there is no provision in the SNAP regulations or internal agency policy directives for waiver or reduction of an administrative penalty assessment on the basis of possible economic hardship to the firm resulting from imposition of such penalty. To allow store ownership from being excused from assessed administrative penalties based on purported economic hardship to the firm would render virtually meaningless the enforcement provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of the USDA.

Moreover, giving special consideration to economic hardship to the firm would forsake fairness and equity, not only to competing stores and other participating retailers who are complying fully with program regulations, but also to those retailers who have been disqualified from the program in the

past for similar violations. Therefore, the Appellant's contention that the firm may incur economic hardship based on the assessment of an administrative penalty does not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

Customer Hardship

With regard to the Appellant's contention that a SNAP disqualification would impose hardship on participating SNAP households, 7 CFR § 278.6(f) of the SNAP regulations provides for civil money penalty assessments in cases where disqualification would cause "hardship" to SNAP households because of the unavailability of a comparable participating food store in the area to meet their needs. However, this regulation also sets forth the following specific exception to such assessments there under: "A civil money penalty for hardship to SNAP households may not be imposed in lieu of a permanent disqualification". Therefore, since this case involves a permanent disqualification action, the civil money penalty provision is not applicable to the present case.

Hearing Request

With regard to the Appellant's request for an immediate hearing, this disqualification is an administrative action and the SNAP regulations do not provide for a hearing, but rather for an administrative review of the action. The Act and regulations provide that any firm aggrieved by an administrative review determination may seek judicial review of the determination in Federal court or a State court of record having competent jurisdiction. In such event, trial de novo proceedings ensure the firm of a full evidentiary hearing on the agency action at issue.

CIVIL MONEY PENALTY

In the April 7, 2022 charge letter the Appellant was informed by the Retailer Operations Division that, under certain conditions, FNS may impose a civil money penalty (CMP) of up to \$59,000 in lieu of permanent disqualification of a firm for trafficking. Per Section 278.6(i) of the SNAP regulations, four criteria must be met in order to be considered for a trafficking civil money penalty. If requesting a trafficking CMP, an Appellant must meet each of the four criteria listed and provide the documentation as specified within ten days of the Appellant's receipt of their charge letter.

If the Appellant's request for a trafficking CMP and the required documentation are not submitted on time, it will lose its right for any further consideration for a trafficking CMP. The SNAP regulations are specific at 7 CFR §278.6(b)(2)(iii) that "if a firm fails to request consideration for a civil money penalty in lieu of a permanent disqualification for trafficking and submit documentation and evidence of its eligibility within the 10 days specified, the firm shall not be eligible for such a penalty". The regulations do not provide the agency discretion to extend the time within which documentation and evidence in support of a trafficking civil money penalty may be submitted.

The Appellant requests the imposition of a civil money penalty in lieu of a permanent SNAP disqualification and contends that the firm has met the criteria listed in 7 CFR 278.6(i) in that it had developed and implemented an effective compliance policy and program which was in operation prior to the occurrence of the SNAP violations. The Appellant has an intensive training program for employees on the SNAP rules and regulations.

While the Appellant's request for consideration for a civil money penalty in lieu of a permanent disqualification for trafficking was timely submitted, the record supports that the firm did not submit

timely substantial evidence and documentation of its eligibility within the 10 days specified in accordance with 7 CFR §278.6(b)(2)(iii). Therefore, the Retailer Operations Division's decision not to impose a civil money penalty in lieu of disqualification is sustained as appropriate pursuant to 7 CFR § 278.6(i).

CONCLUSION

The Retailer Operations Division's analysis of the Appellant's EBT transaction record, upon which charges of violations are based, together with observations made during the store visit and an analysis of customer shopping behaviors, provide substantial evidence that questionable transactions during the focus period have characteristics and display patterns that are not consistent with legitimate sales of eligible food to SNAP benefit customers at a store of this type, size and makeup. Rather, the characteristics are indicative of illegal trafficking in program benefits. The Appellant's contentions do not outweigh this evidence.

The record has yielded no indication of error or discrepancy in the reported findings by the Retailer Operations Division that program benefits were accepted in exchange for cash or consideration other than eligible food. Therefore, based on a review of the evidence in this case, it is more likely true than not true that program violations did, in fact, occur as charged. Therefore, the decision to impose a permanent disqualification from participation in the SNAP against Ci Gourmet Deli Grocery Corp is sustained.

RIGHTS AND REMEDIES

Your attention is called to Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. 2023) and to Section 279.7 of the Regulations (7 CFR § 279.7) with respect to your right to a judicial review of this determination. Please note that if a judicial review is desired, the Complaint, naming the United States as the defendant, must be filed in the U.S. District Court for the district in which you reside or are engaged in business, or in any court of record of the State having competent jurisdiction. If any Complaint is filed, it must be filed within thirty (30) days of receipt of this Decision.

Under the Freedom of Information Act, FNS is releasing this information in a redacted format as appropriate. FNS will protect, to the extent provided by law, personal information that could constitute an unwarranted invasion of privacy.

LORIE L. CONNEEN
ADMINISTRATIVE REVIEW OFFICER

July 12, 2022