

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

E-market,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0248596

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 E-market (hereinafter “E-market” 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 E-market.

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 November 5, 2021, the Retailer Operations Division informed the Appellant that E-market 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 November 8, 2021.

In a response to the Retailer Operations Division of November 17, 2021, the Appellant, through counsel, replied to the letter of charges. The response included a request for the imposition of a civil money penalty in lieu of a permanent SNAP disqualification and supporting affidavits from the owner, the owner's spouse, and two employees.

The record reflects that on November 18, 2021, the Appellant's counsel requested an extension in time for providing additional information in response to the letter of charges. Counsel's time extension was granted until December 10, 2021. On December 3, 2021, counsel requested a second time extension. Counsel's time extension was granted to December 18, 2021.

In a response to the Retailer Operations Division of December 20, 2021, the Appellant, through counsel replied to the letter of charges and provided various supporting documents.

The record reflects that in a letter of December 21, 2021, the Appellant's counsel requested information and documents from FNS with regard to the agency's case against E-market pursuant to the Freedom of Information Act (FOIA). Counsel's FOIA request is pending.

The record reflects that on January 21, 2022, the Retailer Operations Division determined that the charge letter sent to the Appellant did not have the FNS store visit report attached. As such, a copy of the store visit was provided to counsel.

In a response to the Retailer Operations Division of January 28, 2022, the Appellant, through counsel, replied to the letter of charges and provided numerous pizza purchase register and EBT receipts in support thereof.

After considering the Appellant's responses and the evidence in the case, the Retailer Operations Division issued a determination letter dated February 9, 2022, informing the Appellant that E-market 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 February 14, 2022, the Appellant, through counsel, requested an administrative review of the Retailer Operations Division's determination. FNS granted the Appellant's request for administrative review by letter dated March 3, 2022. On March 24, 2022, the Appellant, through counsel, submitted additional information in support of the request for administrative review.

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 covered in the Food and Nutrition Act of 2008, as amended, 7 U.S.C. § 2021, and promulgated through regulation under Title 7 CFR Part 278. In particular, 7 CFR § 278.6(a) and (e)(1)(i) establish the authority upon which a permanent disqualification may be imposed against 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 April 2021 through September 2021. This involved the following SNAP transactions patterns which are indicative of trafficking:

- There were multiple transactions made from the accounts of individual households within a set time period;
- The bulk of the households' remaining benefits were depleted within short timeframes; 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 replies to the charge letter, in the administrative review request, and in subsequent correspondence, the Appellant, through counsel, stated the following summarized contentions, in relevant part:

- The Appellant denies the trafficking charges.
- The only support for the charge is the raw ALERT system data.
- The Appellant should not be held vicariously liable for unauthorized acts of employees.
- Neither the owner or the manager was aware of, nor approved any trafficking violations, and the store has not benefitted from and was not in any way involved in conducting or approving any trafficking violations.
- Both store clerks know the store policy required compliance with the SNAP rules, know that the store maintains a strict zero tolerance policy for any SNAP violation, including but not limited to any trafficking offense, know that the store policy prohibits cash from ever being disbursed in return for SNAP benefits, know that no clerk has the authority to engage in any

transactions exchanging cash for SNAP benefits, and know that no clerk has the authority to bind the corporation.

- Intent by the store is a necessary element of such a violation. 7 CFR § 278.6(d).
- The alleged trafficking misconduct cannot be directly attributed to the owner, her spouse, or the Appellant because those acts would be completely outside the scope of the clerk's employment. See *Plaid Pantry Stores, Inc. v. United States*, *Cippollone v. Liggett Group*, *Ramirez v. United States*, and *Nelson v. Colorado*.
- FNS has improperly interpreted 7 U.S.C. § 2021 by enacting or interpreting a regulation that treated the action of any store personnel as the action of the firm. FNS has adopted this regulation and its interpretation without regard either to the actual statute or the fundamental legal property rights and relationship.
- The combined effect of these actions constitutes both an arbitrary and capricious construction of the statute, and an interpretation that violates the store owner's right both to procedural due process and to not be deprived of a valid property interest without due process. See *Bells Banking Co. v Jackson Ctr., Inc.*, *Morristown Furniture Co. v. People's Nat. Fire Ins. Co.*, *Webber v. State Farm Mut. Auto. Ins. Co.*, *Hughes v. Metro. Gov't of Nashville & Davidson County*, *Regions Bank v. Bric Constructors, LLC*, and *SecurAmerica Bus. Credit v. Schledwit*.
- Neither the owner nor her spouse ever vested a clerk with authority to engage in trafficking transactions of any kind, and never even contemplated, much less authorized, a clerk to violate basic store policy. Nor did either of them ratify any illegal and criminal conduct.
- It is obvious that a principal is not responsible for unauthorized criminal acts of an agent, particularly when those acts violate store policy and were never within the contemplation of the principle. See *Morris v. Collis Foods, Inc.*
- The Supreme Court has previously found that in determining vicarious liability for purely federal law violations, that the federal courts should apply the comparable principles of the Restatement of Agency applied by the 5 U.S.C. § 552 (b)(6) & (b)(7)(C) courts. See, e.g., *Kolstad v. ADA*.
- Per the owner's affidavit and submitted sample receipts, pizza invoices, and inventory purchase records, the Appellant's successful promotion of Hunt Brother's pizza and wings constitutes a full and complete explanation of the challenged transactions.
- Customers routinely combine EBT purchases of multiple pizzas or multiple wings, or both, with purchases of either extra pizza toppings or additional food items.
- Customers may buy the frozen pizza with SNAP benefits, sometimes ordering extra ingredients, and the store cooks the pizza for free once that purchase is completed.
- It is not uncommon for pizza customers to purchase multiple pizzas. A customer who buys three "everything extra" pizzas would pay over \$50.00 just for those pizzas, without adding wings, drinks, or any other food items. Customers utilizing SNAP benefits on pizza typically also purchase other food at the same time.
- The Appellant is the only source of Hunt Brothers Pizza for SNAP customers within normal shopping distance of the majority of the store's customers.
- Due to the volume of sales and business and the limited available space, it is virtually impossible to save all paper sales receipts and therefore, the Appellant cannot produce paper sales receipts for the review period. The Appellant cannot extract this information from its POS system. The submitted invoices show the weekly delivery of pizza. Each invoice shows the number of pizzas and wings sold the previous week. The number of pizzas and wings sold is not calculated by the store but by the pizza supplier's driver. He takes

inventory of crusts, wings, and ingredients, and tabulates them in the Hunt Brothers system, which produce the invoice the Appellant receives.

- The sample pizza receipts show sufficiently large purchase amounts to account for the values flagged by the ALERT system. Those receipts represent continuous sales history for pizza sales, but it is not infrequent to have sales even larger than any of those receipts.
- The additional inventory purchase records demonstrate the volume of food the store carries on a regular basis.
- Customer shopping habits frequently result in “back-to-back” or nearly simultaneous purchases.
- The store has a single glassed in cashier’s booth that has two cash registers. Each register has an accompanying EBT machine. The registers operate independently and can ring up purchases, including SNAP purchases, at the same time.
- The Hunt Brothers pizza program is designed to promote the customer completing a pizza purchase, then waiting in the store for the pizza to be cooked. Customers then continue to shop and make additional purchases with their SNAP benefits while waiting for their pizza.
- Prior to receiving the charge letter, store policy permitted SNAP families to check out simultaneously at both registers and use the EBT card first at one and then the other. The Appellant’s clientele includes a number of customers who split up orders and check out in very short sequence. The Appellant has now instructed clerks to cease allowing the same SNAP card to be used at two different registers at the same time and has actively tried to discourage this practice.
- The Appellant’s other SNAP sales records demonstrate that the volume of legitimate purchases contradict the conclusory assertions of the charge letter.
- With regard to the transactions documented in Attachment 2, it is the habit of some customers to use all of their SNAP benefits at the Appellant despite its being a convenience store.
- Eighty percent of the Appellant’s customers primarily walk to the store and because of the lack of nearby large grocery stores, customers have limited access to other sources of food.
- Since the onset of COVID, customer fear of infection by the virus has led many customers to shop at the Appellant rather than risk going to a large grocery store.
- The Appellant requests the imposition of a civil money in lieu of a SNAP disqualification.
- The submitted affidavits indicate that the Appellant had established and implemented an effective compliance policy and program to prevent violations of the program per § 278.6(i) and both the policy and program were in operation prior to the dates noted in the charge letter.
- The store developed and instituted an effective personnel training program as specified in § 278.6(i)(2).
- Employees have been informed by the Appellant that any violations of the SNAP regulations will result in immediate termination. Employees have participated in SNAP training on a continuous basis by communication with the owner, reviewing how to use the store’s SNAP card reader and how to identify SNAP-eligible items to ensure that customers can purchase only eligible items, no cash can be exchanged for SNAP benefits, and that employees must always follow the SNAP rules. The Appellant has reinforced this training by verbal instruction on a regular basis, but at least once every six months.
- While the Appellant has not kept a formal log of every single training session, the store is a small convenience/grocery store, not a large business. Even without a specific training log, the evidence submitted qualified as substantial. SNAP cases make clear that “substantial

compliance” can be demonstrated by affidavit and by a procedure focused on verbal instruction. See *Shreegi Enters. v. United States* and *Ahmed v. United States*.

- Neither the owner nor the Appellant is aware of any alleged violation, and neither she nor the corporation have benefitted from any alleged violation.
- To the extent that FNS is now interpreting the regulations as prohibiting any extension of the initial ten day period for charging letter response, or any extension of the CMP request deadline, the Appellant contends that this procedure constitutes a systematic deprivation of due process by the nature of the procedure established.
- The Appellant contests the legitimacy of the ten-day limit on submitting CMP evidence, and on FNS’s misinterpretation of the statutes in articulating an unduly rigid paradigm for proof of adequate compliance and training policies. *Cf. Ahmed v. United States; Affum v. United States*.
- The Appellant requests an in-person hearing on this charge. Refusal to afford an in-person hearing during the administrative process violates the right to due process. The Appellant cited *Chevron, U.S.A, Inc. v. Natural Resources Defense Council* and *Marincas v. Lewis* in support thereof.
- As noted by the agency in its adoption of regulation 7 CFR § 278.6(p), USDA has severed the previous relationship between SNAP violations charges and FOIA requests. See 85 FR 52471. By adopting § 278.6(p), USDA has effectively permitted to charge firms while denying the extension necessary to obtain evidence to defend the charge. This draconian solution defies our nation’s notions of fundamental justice and fair play. The USDA action has violated the spirit of the Administrative Procedures Act.

In support of these contentions, the Appellant, through counsel, submitted the following information for review:

- Affidavit of two store clerks dated November 18, 2021;
- Affidavit of store owner dated November 18, 2021;
- Affidavit of store owner’s spouse dated November 18, 2021;
- 40 pages (20 of which were blank) which include 40 monthly register reports titled “EBT Monthly Reports”;
- 1 Excel spreadsheet titled “Hunt Brothers Invoices Spreadsheet Exhibit” showing transactional history ranging from April 5, 2021-September 27, 2021;
- 18 pages of photos depicting store and store stock;
- 24 pages titled “Pizza Sample Sales Receipts” depicting register and EBT receipts ranging from November 15, 2021-December 8, 2021; These receipts show pizza sales by customers;
- 36 pages of card processing statements from April 1, 2021-September 30, 2021; and
- 216 pages of register and EBT receipts depicting pizza sales in December 2021 and January 2022.

ANALYSIS AND FINDINGS

SNAP Authorization

FNS authorized E-market for participation in the SNAP on February 7, 2013. During the review period of April 2021 through September 2021, E-market was classified as a convenience store. 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 a July 29, 2021 store visit conducted by a FNS contractor to observe the nature and scope of the firm’s operation, stock, and facilities. 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. 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 store visit report and photographs documented the following store size, description, and characteristics:

- Approximately 1,496 square feet in size with approximately 60 square feet of additional storage area outside of public view;
- Had storage coolers/freezers;
- No shopping carts and no hand-held baskets available for customer use;
- Two cash registers and two EBT point-of-sale (POS) devices for use in ringing-up SNAP transactions;
- One small checkout counter area with limited check-out counter space as each register was surrounded by a Plexiglas barrier;
- Had optical scanners;
- Had an ATM or money transfer service;
- 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;
- Did not utilize an unusual pricing structure, such as prices ending in \$.x9;
- Transaction totals were not rounded up or down at the checkout counter;
- Telephone and on-line orders were not taken and delivery was not offered;
- Had some empty shelves;
- The six most expensive (i.e., costing \$5.00 and above) SNAP-eligible food items in stock were Hunt Brothers pizza at \$10.99 per 14” pizza; Members Mark water at \$9.99 per 45-pack (3 units in stock); deli turkey at \$7.99 per 1 pound; deli cheddar cheese at \$7.99 per 1 pound; Circle B smoked sausage at \$7.99 per 2 pounds 12 ounces; and deli meats at \$6.69 per 1 pound;
- No fresh or frozen meats, poultry, or seafood;
- Frozen food items included such items as pizza, ice cream, burgers, Hot Pockets, and chimichangas;
- Had a kitchen and hot foods were sold;

- Had a deli or prepared food section and deli meats and cheeses were sold by the pound (prices posted);
- Meat items included units of canned/potted meat, hot dogs, sausage, eggs, meat jerky, and canned fish;
- Dairy included milk, margarine, and cheese;
- Fresh produce stock consisted of a few (each) bananas, oranges, and onions;
- Other staple foods available for purchase included such items as juice, pasta, rice, flour, loaf bread, cereal, oats, corn meal, pitas, and canned goods;
- Much of the remaining food stock consisted of accessory foods such as candy, carbonated and non-carbonated drinks, condiments, cakes/pastries, snack foods, sugar, and vegetable oil; and
- Ineligible nonfood items included gasoline, lottery tickets, tobacco products, alcohol, mobile phones/phone cards, automotive supplies, health and beauty aids, household cleaning supplies, gift items/party goods/souvenirs, clothing, paper products, and office supplies.

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 43 sets of transactions (120 total transactions) that total \$7,619.90 in SNAP benefits to meet the parameters of this scan. These transactions were conducted by 32 different SNAP 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 the store has two cash register with each having an accompanying EBT machine. The registers operate independently and can ring up purchases, including SNAP purchases, at the same time. Prior to receiving the charge letter, store policy permitted SNAP families to check out simultaneously at both registers and use the EBT card first at one and then the other. The

Appellant's clientele includes a number of customers who split up orders and check out in very short sequence.

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.

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 moderate food stock, little fresh produce stock, no fresh or frozen meats, poultry, or seafood, and a limited variety and amount of frozen food stock.

The store visit report, which was completed in collaboration with and signed by a store employee, and photographs from the store visit as well as the stock photos submitted by the Appellant offer no explanation as to why SNAP customers would routinely shop at E-market multiple times during a short period or purchase such a large volume of items, there being no great variety or advertisements of products, price advantage, profusion of large packages, or significant bulk items or food cases for sale. The store visit observations also indicate that the firm offered no special or custom services to customers, such as on-line or telephone orders and/or delivery services, or a profusion of specialty or ethnic goods which would entice SNAP customers to utilize the subject store over other area authorized retail stores. The available inventory of SNAP-eligible food is 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 second, third, and subsequent transactions in each set are too large to consist of forgotten items.

The store visit observations indicate that the firm had a small checkout area with limited check-out counter space and the registers were surrounded by a Plexiglas barrier, and no conveyor belts to expedite high dollar or rapid consecutive purchases. There were no shopping carts or baskets available to customers for transporting food within the store. The customers have no place to put multiple purchases while shopping. 5 U.S.C. § 552 (b)(7)(E).

The Appellant contends that the Hunt Brothers pizza program is designed to promote the customer completing a pizza purchase, then waiting in the store for the pizza to be cooked. Customers then continue to shop and make additional purchases with their SNAP benefits while waiting for their pizza. FNS acknowledges that the Appellant offers Hunt Brothers pizza for sale as was noted in the store visit observations. 5 U.S.C. § 552 (b)(7)(E).

5 U.S.C. § 552 (b)(7)(E).

The Appellant contends that due to the volume of sales and business and the limited available space, it is virtually impossible to save all paper sales receipts and therefore, the Appellant cannot produce paper sales receipts for the review period. The Appellant cannot extract this information from its POS system. However, the Food and Nutrition Act of 2008 Sec. 9(c) states "Regulations issued

pursuant to this Act shall require an applicant retail food store or wholesale food concern to submit information, which may include relevant income and sales tax filing documents, purchase invoices, records relating to electronic benefit transfer equipment and related services, transaction and redemption data provided through the electronic benefit transfer system, or program-related records, *which will permit a determination to be made as to whether such applicant qualifies, or continues to qualify*, for approval under the provisions of this Act or the regulations issued pursuant to this Act. The regulations may require retail food stores and wholesale food concerns to provide written authorization for the Secretary to verify all relevant tax filings with appropriate agencies and to obtain corroborating documentation from other sources so that the accuracy of information provided by the stores and concerns may be verified.” As such, the Appellant was aware that the Agency could request certain records, such as register and EBT receipts, while authorized to participate in the SNAP. The inability of the retailer to maintain proper record keeping methods is not a valid reason to mitigate the possible penalties received.

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.

Bulk of SNAP Benefits Exhausted (Charge Letter Attachment 2)

This charge letter Attachment documents 19 suspicious transaction sets (64 total transactions) which ranged from \$78.91 to \$398.13 and totaling \$3,574.66. These transactions were conducted by 17 different SNAP households. Depleting the household’s entire allotment in one or a few transactions, or within one or two days, leaving little or no benefits for the rest of the month is inconsistent with the normal shopping behaviors of SNAP benefit households.

The Appellant contends that it is the habit of some customers to use all of their SNAP benefits at the Appellant despite its being a convenience store. However, a review of the store visit report, which was signed by and completed in cooperation with a store employee, as well as the stock photos indicate that E-market offers a moderate stock of SNAP eligible foods with no fresh meats, poultry, or seafood, no frozen meats, poultry, or seafood, little fresh produce stock, a limited variety and amount of frozen food stock, and has a lack of an abundant depth and breadth of staple foods. The store visit inventory report and photos also show only a few expensive eligible foods in stock that would account for these large amounts, 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, specials such as buy one food item and get one for free, 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.

Although many 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 only a few transactions or in a single day. Depleting one’s entire allotment in one or two days or in a single day, especially in a moderately stocked convenience store, leaving no benefits for the remainder of the month, is inconsistent with the normal shopping behavior of SNAP households. Rather, large single transactions, or multiple and high cumulative transactions which diminish balances over a short

period of time soon after benefit issuance, are indicative of SNAP benefit trafficking and attempts to diminish attention to signs of the same.

5 U.S.C. § 552 (b)(7)(E).

The Appellant contends that eighty percent of the store's customers primarily walk to the store and because of the lack of nearby large grocery stores, customers have limited access to other sources of food. Since the onset of COVID, customer fear of infection by the virus has led many customers to shop at the Appellant rather than risk going to a large grocery store.

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 15 SNAP authorized retailers located within a 1.0 mile radius of E-market 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 E-market during the review period also shopped at other area grocery stores and, therefore, transportation to other stores or fear of shopping at a large grocery store due to COVID 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.

The Appellant did not provide any compelling justification or evidence as to why SNAP households are spending the majority or all of their SNAP benefits in short periods of time at E-market or evidence that all of the irregular transactions cited in this charge letter Attachment were for eligible food items only. Based on the analysis above and in the absence of any other reasonable explanation, the irregular transaction patterns are more likely than not to be a result of trafficking in SNAP benefits.

Excessively Large Purchase Transactions (Charge Letter Attachment 3)

This charge letter Attachment documents 371 SNAP transactions, as large as \$215.00, that total \$20,450.07. 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 per the owner's affidavit and submitted sample receipts, pizza invoices, and inventory purchase records, the Appellant's successful promotion of Hunt Brother's pizza and wings constitutes a full and complete explanation of the challenged transactions. Customers routinely combine EBT purchases of multiple pizzas or multiple wings, or both, with purchases of either extra pizza toppings or additional food items. A customer who buys three "everything extra" pizzas would pay over \$50.00 just for those pizzas, without adding wings, drinks, or any other food items.

FNS originally received 24 pages titled "Pizza Sample Sales Receipts" from the Appellant which depict register and EBT receipts (dated November 15, 2021-December 8, 2021) that show pizza sales

by customers (see examples below). The lowest receipt transaction submitted was \$29.27 and the highest transaction was \$86.70. 5 U.S.C. § 552 (b)(7)(E).

It is important to note that the Retailer Operations Division gave the Appellant the opportunity provide additional information in response to the charge letter by January 28, 2022. In response, the Appellant submitted an additional 216 pages of pizza sales receipts dated December 2020 through January 2022. These sales receipts are dated outside the review period of April 2021-September 2021 and therefore, have no bearing on the transactions noted in the charge letter. 5 U.S.C. § 552 (b)(7)(E).

5 U.S.C. § 552 (b)(7)(E).

5 U.S.C. § 552 (b)(7)(E).

The Appellant contends that it is the only source of Hunt Brothers pizza for SNAP customers within normal shopping distance of the majority of the store's customers. However, the record indicates that Hunt Brothers pizza is also sold at two other SNAP authorized retailers located within 1.57 miles of the Appellant. These two area stores sell a comparable or larger variety of staple food items at comparable or better prices as compared to E-market, including Hunt Brothers pizza. 5 U.S.C. § 552 (b)(7)(E).

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).

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 the 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. 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.

Owner not Responsible for Employee Actions

The Appellant contends that the firm should not be held vicariously liable for unauthorized acts of employees. Neither the owner nor her spouse ever vested a clerk with authority to engage in trafficking transactions of any kind, and never even contemplated, much less authorized, a clerk to violate basic store policy. Nor did either of them ratify any illegal and criminal conduct. It is obvious that a principal is not responsible for unauthorized criminal acts of an agent, particularly when those acts violate store policy and were never within the contemplation of the principle.

However, prior to becoming authorized to participate in the SNAP in February 2013 and with the most recent SNAP reauthorization application in February 2018, the Appellant completed and submitted a SNAP Application for Retail Stores. When store ownership signed the certification page of the SNAP retailer authorization application to become a SNAP retailer, it confirmed it understood and agreed to abide by program rules and regulatory provisions. It also agreed to accept responsibility on behalf of the firm for SNAP violations including those committed by any of the firm's employees, paid or unpaid, new, full-time or part-time. The certification is clear that store ownership understood by signing the document that violations of program rules can result in administrative actions such as fines, sanctions, withdrawal, or disqualification from the SNAP. 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 for ineligible non-food items or as repayment on credit accounts.

In addition, the Appellant was provided with program training and reference materials which reinforced the statements included in the SNAP Application. The *SNAP Training Guide for Retailers*, which retailers can access online in English and in Spanish (<https://www.fns.usda.gov/snap/retailer/training>) states that "You are legally responsible for your own actions and the actions of everyone who works in your store whether or not they are paid. If you, your employees, or your family break the Program's rules, you can be disqualified from the Program, may be assessed a monetary penalty, and may face criminal prosecution." The Appellant contends that it provided regular training on the SNAP rules to employees; however, the owner failed to understand its agreement to be responsible for the employees she hires to conduct SNAP transactions.

The Appellant contends that under 5 U.S.C. § 552 (b)(6) & (b)(7)(C) law, which applies here since no Federal common law exists, the Appellant is not responsible for the employee's alleged illegal acts. However, state laws do not supersede Federal regulations regarding SNAP compliance.

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. As noted previously, 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.

FOIA

With regard to the Appellant's contention that by adopting § 278.6(p), USDA has effectively permitted to charge firms while denying the extension necessary to obtain evidence to defend the charge, 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. FNS policy notes that under no circumstance may a FOIA request or appeal for records submitted on or after October 26, 2020 delay or prohibit FNS from making a determination regarding disqualification or penalty against a firm, or delay the effective date of a disqualification or penalty.

Case Laws

With regard to the case laws cited by the Appellant, it is beyond the scope and authority of this review to determine the applicability of same. This review is limited to consideration of whether or not the Retailer Operations Division duly adhered to the Food and Nutrition Act of 2008, as amended, and the implementing regulations, and whether or not the action taken is sustainable by a preponderance of the evidence. Therefore, the application of any judicial precedent is better addressed via judicial review. Accordingly, no further findings or conclusions are rendered in this regard.

Due Process

With regard to the Appellant's contentions with respect to a 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. In responses to the Retailer Operations Division of November 17, 2021, November 18, 2021, December 3, 2021, December 20, 2021, January 21, 2022, and January 28, 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 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. The Appellant, through counsel, submitted additional information in support of the request for administrative review on March 24, 2022. 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.

CIVIL MONEY PENALTY

In the November 5, 2021 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. As specified in 7 CFR § 278.6(i), in determining the minimum standards of eligibility of a firm for a civil money penalty in lieu of trafficking, the firm shall, at a minimum, establish by substantial evidence its fulfillment of each of the following four criteria:

Criterion 1. The firm shall have developed an effective compliance policy as specified in 7 CFR § 278.6(i)(1);

Criterion 2. The firm shall establish that both its compliance policy and program were in operation at the location where the violations(s) occurred prior to the occurrence of violations cited in the charge letter;

Criterion 3. The firm had developed and instituted an effective personnel training program as specified in 7 CFR § 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.

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, through counsel, submitted a timely request for the imposition of a civil money in lieu of a SNAP disqualification. The Appellant contends that the firm had established and implemented an effective compliance policy and program to prevent violations of the program per § 278.6(i) and both the policy and program were in operation prior to the dates noted in the charge letter. The store developed and instituted an effective personnel training program as specified in § 278.6(i)(2). Neither the owner nor the Appellant is aware of any alleged violation, and neither she nor the corporation have benefitted from any alleged violation. In support thereof, the Appellant submitted an affidavit of two store clerks and an affidavit from the store owner and her spouse.

The Retailer Operations Division determined that the Appellant was not eligible for a trafficking civil money penalty in lieu of a disqualification under 7 CFR § 278.6(i) because the Appellant failed to submit sufficient evidence to demonstrate that the firm had established and implemented an effective compliance policy and program to prevent SNAP violations. 5 U.S.C. § 552 (b)(7)(E).

The standards of eligibility for a trafficking CMP are high. They require substantial proof that a compliance policy and program was established and implemented prior to the occurrence of violations. These standards exist to thwart attempts to falsely present compliance policies and programs that were not actually implemented prior to violations. As the Appellant did not provide the required supporting documentation, 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 E-market 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

May 16, 2022

ADMINISTRATIVE REVIEW
OFFICER