

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

Harvest Market,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0219706

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 permanent disqualification of Harvest Market (hereinafter “Appellant”) from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP) as imposed by FNS’s Retailer Operations Division.

ISSUE

The issue accepted for review is whether the Retailer Operations Division, in its administration of SNAP, took appropriate action, consistent with Title 7 Code of Federal Regulations (CFR) Part 278, when it imposed a permanent disqualification against Harvest 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.”

SUMMARY OF CHARGES

The Appellant was charged with trafficking and subsequently permanently disqualified from SNAP based on an analysis of EBT transaction data from April 2019 through June 2019. This data included the following transaction patterns that are indicators of possible trafficking:

- There were multiple transactions made from individual household accounts within a set time period.
- The store conducted EBT transactions that were large based on observed store characteristics and recorded food stock.

CASE CHRONOLOGY

The agency's record shows that FNS initially authorized Harvest Market for SNAP participation as a convenience store on February 3, 2012. In a letter dated September 9, 2019, the Retailer Operations Division charged the Appellant with trafficking, as defined in Section 271.2 of the SNAP regulations, based on a series of irregular SNAP transaction patterns that occurred between the months of April 2019 and June 2019. The letter noted that the penalty for trafficking is permanent disqualification as provided by 7 CFR § 278.6(e)(1). The letter also stated that the Appellant could request a civil money penalty (CMP) in lieu of permanent disqualification for trafficking, but noted that such a request must be made and supporting documentation submitted within 10 days of receipt of the charge letter under the conditions specified in 7 CFR § 278.6(i).

In a letter dated September 19, 2019, the Appellant, through counsel, submitted an initial reply to the charge letter, but did not offer any rebuttal to the allegations. Instead, the Appellant notified the Retailer Operations Division that it had submitted a request for case file information in a request made under the Freedom of Information Act (FOIA). In accordance with agency policy at the time, this request put a hold on any obligation of the firm to further reply to the charges until after FNS had completed its response to the FOIA request. It is noted that in its initial response, the Appellant did not request a CMP in lieu of disqualification or submit any evidence to show that it would be eligible for this alternative penalty. The CMP requirements were not affected by the FOIA request.

On August 18, 2021, FNS provided its response to the Appellant's FOIA request. The response included a seven-page letter and 350 pages of responsive documents.

In letter dated September 20, 2021, the Appellant, through counsel, provided its official reply to the July 2017 charge letter. The reply included a 15-page letter and a large amount of supporting evidence, including copies of agency letters and other FNS documents obtained through the FOIA process. The Appellant also submitted a three-page written declaration signed by store manager Farid Akkari; store tax records, including a California Sales & Use Tax Return document from the three-month review period; 186 pages of inventory invoices and receipts; and an inventory purchase summary spreadsheet for the review period.

In its response letter, the Appellant denied that any trafficking of SNAP benefits had occurred at the store and contended that the transactions listed in the charge letter attachments did not constitute evidence of trafficking. For purposes of brevity, the details of the Appellant's response will not be listed here, as virtually identical arguments have been made in the Appellant's request for an administrative review. These arguments are listed in the section below, entitled "Appellant's Contentions," beginning on Page 5.

After evaluating the Appellant's response and further considering the evidence in the case, the Retailer Operations Division concluded that trafficking had occurred as charged and issued a determination letter dated October 13, 2021. This letter informed the Appellant that it would be permanently disqualified from SNAP upon receipt of the letter in accordance with 7 CFR § 278.6(c) and § 278.6(e)(1). The letter also stated that the Retailer Operations Division considered the Appellant's eligibility for a trafficking CMP according to the terms of Section

278.6(i) of the SNAP regulations, but that a CMP was not appropriate 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.

In an e-mail dated October 19, 2021, the Appellant, through counsel, appealed the Retailer Operations Division's determination by requesting an administrative review. The request was granted and the case was assigned to an administrative review officer.

On November 30, 2021, Appellant's counsel submitted a 16-page letter detailing its contentions in the case.

On January 21, 2022, the case was reassigned to review officer Jon Yorgason.

STANDARD OF REVIEW

In an appeal of adverse action, such as disqualification from SNAP participation, an appellant bears the burden of proving by a preponderance of the evidence that the administrative action should be reversed. This means that an 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 AND REGULATIONS

The controlling law in this matter is found 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.

7 U.S.C. § 2021(b)(3)(B) states, in part:

...[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, in part:

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, [or] evidence obtained through a transaction report under an electronic benefit transfer system....** [Emphasis added.]

7 CFR § 278.6(e)(1)(i) states:

FNS shall disqualify a firm permanently if personnel of the firm have trafficked as defined in § 271.2.

7 CFR § 271.2 states, in part:

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 § 271.2 states, in part:

Eligible foods means: Any food or food product intended for human consumption except alcoholic beverages, tobacco and hot food and hot food products prepared for immediate consumption...

7 CFR § 278.6(b)(1) states, in part:

Any firm considered for disqualification...under paragraph (a) of this section...shall have full opportunity to submit to FNS information, explanation, or evidence concerning any instances of noncompliance before FNS makes a final administrative determination. The FNS regional office shall send the firm a letter of charges before making such determination. The letter shall specify the violations or actions which FNS believes constitute a basis for disqualification.... The letter shall inform the firm that it may respond either orally or in writing to the charges contained in the letter within 10 days of receiving the letter...

7 CFR § 278.6(c) states, in part:

The letter of charges, the response, and any other information available to FNS shall be reviewed and considered by the appropriate FNS regional office, which shall then issue the determination. In the case of a firm subject to permanent disqualification under paragraph (e)(1) of this section, the determination shall inform such a firm that action to permanently disqualify the firm shall be effective immediately upon the date of receipt of the notice of determination from FNS, regardless of whether a request for review is filed in accordance with part 279 of this chapter.

7 CFR § 278.6(b)(2)(ii) states, in part:

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... 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).

7 CFR § 278.6(b)(2)(iii) states:

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 a penalty.

7 CFR § 278.6(i) states, in part:

FNS may impose a civil money penalty in lieu of a permanent disqualification for trafficking ... if the firm timely submits to FNS substantial evidence which demonstrates that the firm had established and implemented an effective compliance policy and program to prevent violations of the Program...

APPELLANT'S CONTENTIONS

The Appellant, through counsel, made the following contentions in its request for administrative review, summarized by the review officer for purposes of brevity and relevance:

- Appellant denies that any trafficking took place at the store at any time. The permanent disqualification was not based on a preponderance of the evidence and should be reversed, and the store's SNAP authorization reinstated.
- The agency's determination was not based on any direct evidence that trafficking took place. Rather, it was founded upon circumstantial evidence from FNS's fraud detection system known as ALERT. While ALERT may flag patterns of allegedly suspicious activity, a determination of trafficking cannot be supported without substantial additional investigation.
- The ALERT system is replete with bias and is not subject to proper statistical and other controls.
- A permanent disqualification without supporting direct evidence is arbitrary and capricious. Except for a single store visit lasting under an hour, FNS primarily relies on store and household transaction data in deciding whether to disqualify SNAP retailers. FNS does not interview SNAP beneficiaries, which represents an abdication of FNS's responsibility to adjudicate disqualification proceedings fairly and equitably.
- After receiving the charge letter, the firm attempted to conduct a comprehensive investigation into the allegations. As part of that investigation, the firm sent a FOIA

request to FNS in September 2019. Nearly two years later, it received FNS's response, but most of the responsive records were redacted in whole or in part.

- FNS's failure to provide Harvest Market with the complete administrative record when it is faced with permanent disqualification from SNAP violates the due process clause of the Constitution of the United States. FNS personnel will review the entire unredacted administrative record, but Harvest Market has not had the benefit of reviewing the same records and has not been provided with a full and fair opportunity to review and respond to the "evidence." Simply put, FNS's administrative process is not a level playing field, and requiring retailers to seek judicial review following permanent disqualification in order to obtain the complete administrative record is fundamentally inequitable and an abuse of authority delegated to it by Congress.
- Harvest Market is a small grocery store in an impoverished neighborhood. The store sells a wide array of staple food items, including numerous relatively expensive ones, such as the following [list shortened for purposes of brevity]:
 - Red Bull (12 ounce – 24 pack) - \$90.00
 - Red Bull (8 ounce – 24 pack) - \$71.99
 - Coca Cola (20 ounce – 24 pack) - \$69.99
 - Monster Energy Drink (24 ounce – 12 pack) - \$59.99
 - Pepsi (20 ounce – 24 pack) - \$54.00
 - Monster Energy Drink (16 ounce – 24 pack) - \$47.99
 - Starbucks Coffee (16 ounce – 24 pack) - \$47.99
 - Enfamil (24.5-ounce container) - \$39.00
 - Bang Energy Drink (16 ounce – 12 pack) - \$35.99
 - Sunny D Orange Juice (8 ounce – 40 pack) - \$37.50
 - Gatorade (28 ounce – 15 pack) - \$33.75
 - Enfamil (12.5-ounce container) - \$21.99
- The purchase of only one or two such expensive items would result in the transaction exceeding the average SNAP redemption at convenience stores in California.
- There were only 13 other SNAP-authorized retailers within one mile of the store, and of those within a reasonable walking distance, none were larger or better stocked.
- While hardship to SNAP beneficiaries is not a regulatory consideration in trafficking cases, FNS should be aware that permanent disqualification of the store has had profound impacts on recipients in the area who do not have cars.
- The store did substantial SNAP business during the review period, totaling approximately 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in redemptions. Gross receipts for all sales during the same period were 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The store's federal tax return also suggests that the store spent approximately 5 U.S.C. § 552 (b)(6) & (b)(7)(C) on inventory during the period. No other SNAP authorized store in the vicinity sold eligible food items in these volumes at comparable prices.
- The analysis related to Attachment 1 of the charge letter is flawed because it is based on arbitrary thresholds. There is no study, report, or other basis for FNS's belief that redeeming 5 U.S.C. § 552 (b)(7)(E) is suspicious or evidence of trafficking, especially when a SNAP-authorized store is the only one in the vicinity that carries a substantial array of eligible food products.
- To the extent that FNS concluded that Harvest Market engaged in trafficking because its average SNAP redemption is higher than other SNAP-authorized convenience stores in

Los Angeles County or in California, its conclusion was unsupportable because it was a small grocery store rather than a convenience store and because it was based on data associated with convenience stores that sell few staples and engaged in far few SNAP transactions with lower average redemptions.

- Because there are so few SNAP-authorized stores in the food desert in which Harvest Market is located, SNAP recipients spent more at the store than FNS may have anticipated. This is especially true since there are no large SNAP-authorized stores within a reasonable walking distance of the store.
- FNS's analysis is flawed because it mischaracterized the store as a convenience store, ignored the items it sold, and ignored the characteristics of the surrounding community.
- The store's cash registers were not sophisticated and were not integrated with the EBT terminal. While the store provided receipts to its customers, the receipts did not list specific items purchased. Because there are no federal or state laws or regulations requiring the store to keep receipts, the Appellant did not do so. There is no FNS guidance that has required or even suggested that SNAP retailers obtain a point-of-sale system that could generate itemized receipts.
- Approximately 30 percent of the store's gross sales during the review period were for eligible food items, and approximately 21 percent were SNAP redemptions and were generally consistent month-to-month. The store's SNAP redemption and transaction history did not change dramatically after the charge letter was issued.
- FNS has not explained why the transactions in Attachment 1 and 2 were conclusive evidence indicative of a pattern of SNAP trafficking. The charge letter does not identify why "repetitive patterns" can support a store's permanent disqualification from SNAP, especially since a retailer is not allowed to treat SNAP customers differently from cash customers. It would also not make economic sense to turn away business from SNAP customers who redeem substantial amounts at the store.
- The charge letter impermissibly attempted to shift the burden of proof to the store to conclusively refute the allegations, as opposed to disqualifying stores only when FNS possesses a preponderance of evidence that establishes that trafficking took place. Saddling retailers with the burden to disprove trafficking violates the Food and Nutrition Act of 2008 and the U.S. Constitution. While this is not a criminal case, FNS has, in effect, treated the store as guilty until proven innocent.
- Charges based solely upon circumstantial analysis of computerized sales records do not satisfy constitutional concerns, particularly a retailer's due process rights. In cases like this, FNS typically accuses a small retailer of committing trafficking violations based upon arbitrary and capricious criteria that are not the subject of rulemaking and which are not supported by peer-reviewed statistical analysis.
- It is not a violation of the Act or regulations for households to shop multiple times a day or to redeem all of their monthly benefits at one time, even if all such benefits are redeemed for the same item. Similarly, the regulations are silent as to what might constitute an excessively large EBT transaction or what multiple transactions from a household within a set period of time means. If FNS had regulations defining these terms and prohibited such transactions, trafficking charges based upon those grounds might have merit if a vendor could not rebut them.

- Under constitutional principles, there is no supportable basis for FNS to conclude that a retailer engaged in trafficking based solely on a forensic analysis of transaction records utilizing vague and arbitrary standards.
- Routine activities by households, coupled with substantial amounts of food sold at the store, provide a reasonable explanation for the transactions listed in Attachments 1 and 2.
- Regarding the large transactions in Attachment 2, the volume of goods sold and the purchase invoices strongly support the legitimacy of the transactions.
- A review of the attachments reveals little other than SNAP households exercising their right to redeem their benefits in varying amounts and at different times.
- FNS has refused to voluntarily provide the store with the names and other contact information of those SNAP households whose EBT cards were used in the allegedly illegal transactions. The sworn testimony of its customers would allow FNS to definitively determine whether the transactions were legitimate, and would allow the firm to properly defend itself.
- Variations in SNAP redemptions are expected because the spending habits of SNAP households vary.
- Many of the transactions in Attachment 1 were duplicated in Attachment 2. After excluding duplicates and transactions under \$100.00, the aggregate value of the remaining transactions is an insignificant percentage of the firm's EBT transactions and overall gross receipts.
- The firm's purchase invoices for eligible food items strongly support reversal of the agency's determination. (The invoices and spreadsheets only detail some of the firm's purchases, as some invoices could not be located.) There is no doubt that the store's reported gross receipts were consistent with the store's cost of goods sold and greatly exceeded the value of SNAP redemptions during the review period.
- Regarding Attachment 1:
 - All but nine of the sets of transactions took place more than an hour apart. This is neither surprising nor unusual, especially when considering the array of eligible foods, its location in an extreme food desert, and lack of comparable retailers within walking distance.
 - Many customers redeemed their SNAP benefits shortly after they received their monthly allotment.
 - As to the nine sets of transactions that occurred under an hour, these are a very small percentage of the store's SNAP transactions. When the store was not busy and a customer came to the registers with many items, the clerk would total the purchases on both registers, resulting in two payments, one on each register, using the same EBT terminal.
 - SNAP customers occasionally shopped with friends or relatives and used the EBT card to buy items for them. On occasion, these customers would ask the clerk to provide a subtotal for their own items plus a subtotal for their friends' items, resulting in EBT transactions processed in quick succession.
 - FNS has refused to provide identifying information about EBT households to allow the firm to conduct a proper investigation based on direct evidence. FNS has also not contacted any of the store's customers to determine whether their purchases at the store were legitimate.

- Regarding Attachment 2:
 - Appellant denies that these transactions are evidence of trafficking. Rather, the firm's customers purchased substantial amounts of soda, juice, energy drinks, infant formula, milk, candy, and other high-dollar, SNAP-eligible items.
 - The store is prohibited by regulations from asking customers about their purchases, including why they were spending so much at one time, and prohibited from refusing to conduct such transactions or otherwise discriminating against SNAP households for using EBT benefits.
 - The transactions in Attachment 2 represent only approximately 5 percent of the store's SNAP transactions during the review period. Only 38 of the transactions exceeded \$100.00. This is not a pattern of trafficking, but an extreme outlier.
- The evidence submitted by the firm in response to the charge letter and in its request for administrative review conclusively rebuts any concerns that FNS may have had that the store violated SNAP regulations. Appellant requests reversal of the disqualification determination and immediate reinstatement of its SNAP authorization.

In support of its contentions, the Appellant submitted copies of the same evidence it provided to the Retailer Operations Division, including a written declaration signed by store manager Farid Akkari; store tax records; 186 pages of inventory invoices and receipts; and an inventory purchase summary spreadsheet. It is noted that the signed declaration from Mr. Akkari is largely a duplication of the above contentions, so this review finds it unnecessary to summarize it further.

The preceding may represent only a brief summary of the Appellant's contentions presented in this matter. However, in reaching a decision, full attention was given to all evidence and contentions submitted, including any not specifically summarized in this section or explicitly referenced in the analysis section below.

ANALYSIS AND FINDINGS

This section provides detailed analyses and findings relating to the agency's determination of trafficking and an analysis of the Appellant's contentions and supporting documentation.

ALERT / Administrative Record

One of the Appellant's key arguments relates to FNS's use of a fraud detection/SNAP transaction monitoring system known as ALERT. The Appellant contends that the determination in this case was arbitrary and capricious because it was not based on direct evidence; rather, it was based on circumstantial evidence generated by ALERT. According to the Appellant, ALERT may flag patterns of allegedly suspicious activity, but a determination of trafficking cannot be supported without substantial additional investigation, including interviews with SNAP recipients. The Appellant further argues that the ALERT system is replete with bias and is not subject to proper controls.

The Appellant additionally argues that FNS has violated Harvest Market's right to due process because it did not provide the store with the complete, unredacted record prior to making a disqualification determination.

As to the Appellant's contentions related to ALERT, this review concedes that a conclusion of trafficking cannot be drawn from EBT transaction data alone. It is acknowledged that USDA uses ALERT to identify EBT transactions that form patterns having characteristics indicative of trafficking. However, this tool does not, by itself, determine or conclude that trafficking has occurred. The Retailer Operations Division must still analyze the transaction data and patterns with other factors, such as observations from a store visit, an analysis of customer shopping behavior, and a comparison with similar stores in the area, and then render a determination as to whether the questionable transactions were, more likely than not, the result of trafficking.

The legality of this method is described in 7 CFR § 278.6(a) which states, in part, "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, [or] evidence obtained through a transaction report under an electronic benefit transfer system**" [Emphasis added.]

Prior to a disqualification determination, an accused firm is given ample opportunity to reply to the charges and provide any information it deems appropriate in justifying as legitimate the transaction activity detailed in the charge letter.

This review has examined the information provided by the Retailer Operations Division in this case and has found no evidence to suggest that the agency simply manufactured statistical data and declared it to be trafficking. From all indications, the Retailer Operations Division obtained the EBT data, found it to be suspicious in comparison to other area stores of similar size, and then completed a thorough analysis before concluding that trafficking was likely occurring.

It is important to restate here that in an appeal of adverse action, the onus is on the Appellant to prove by a preponderance of the evidence that the administrative action should be reversed. After reviewing the agency's information, this review finds that the Retailer Operations Division has adequately presented a likely case of trafficking. Therefore, the remainder of this review will analyze whether the Appellant has proven by a preponderance of the evidence that the agency's conclusions were erroneous and that trafficking likely did not occur.

This review recognizes the Appellant's objections to FNS's methodologies in EBT transaction cases. But unless compelled by statute, regulation or the courts to abandon its methodologies in such cases, FNS will likely continue using ALERT and related investigative techniques to identify potential trafficking violations, and an administrative review officer has no authority in the matter.

As for the Appellant's contention that it has not been given access to the complete unredacted record, including analysis documents created by the Retailer Operations Division, this review renders no opinions or findings. FNS's August 18, 2021 FOIA response makes it clear why some documents were withheld in whole or in part, and an administrative review officer has no authority in this regard. It perhaps should be noted that administrative proceedings related to SNAP retailer compliance do not include formal discovery procedures or an adversarial hearing. However, due process rights are protected by the provision within the law which provides for

judicial review. Once an administrative review decision has been made, if the Appellant is dissatisfied with the determination, 7 U.S.C. § 2023 provides for the right to a judicial review and a trial de novo.

Contractor Store Visit

The case file indicates that in reaching a disqualification determination, the Retailer Operations Division considered not only the Appellant firm's EBT transactions, but also information obtained from a June 11, 2019 store visit which was conducted by an FNS contractor to observe the nature and scope of the firm's operation, stock, and facilities. This store visit information was used to ascertain if there were justifiable explanations for the firm's irregular SNAP transaction patterns. The store visit report and photographs documented the following store size, description, and characteristics:

- Harvest Market is approximately 3,000 square feet in size, operating in the city of Lancaster, California. The store is classified on agency records as a convenience store. Based on the firm's self-reported sales percentages, this review finds that the classification of Harvest Market as a convenience store is appropriate.
- According to the inspector, the firm had one shopping cart and three handheld shopping baskets. A review of the contractor's photographs shows that the shopping cart was located in the back of the store in a storage area, away from public view. Inside the cart was what appeared to be boxes and other miscellaneous supplies, giving the impression that the cart was not likely used by customers, but rather by store personnel for stocking and other purposes.
- The store visit report lists one cash register and agency records reflected the use of one EBT point-of-sale terminal for SNAP purchases.
- The store's staple food stock was sufficient for program eligibility in each of the four staple food categories and is typical of a convenience store or small corner market. There was no evidence of fresh fruits or vegetables or fresh meats.
- The report indicated that the store sold SNAP-eligible, non-staple accessory food items, such as carbonated and uncarbonated drinks, snacks, candy, and condiments. The store also sold ineligible nonfood items, including tobacco products, lottery tickets, health and beauty items, cleaning supplies, and other miscellaneous household merchandise. Harvest Market is also a liquor store, and there were large quantities of alcoholic beverages throughout the store. Liquor products appeared to represent the vast majority of merchandise in the storage areas.
- The checkout area was typical of a convenience store, with a small counterspace next to the cash register. The checkout area did not appear to be very suitable for conducting large or rapid transactions.
- There was no indication from the report that the firm had a special pricing structure. Most prices appeared to end in a cents-value of 9, which is typical of retail stores.
- According to the report, the most expensive SNAP-eligible item in the store was a 3-ounce package of beef jerky selling for \$7.99. There was no evidence of items being sold in bulk or by the case. There was also no indication that the store sold expensive individual items such as infant formula.

The available inventory of SNAP-eligible food at the time of the store visit showed stock that would be typical of a convenience store, where households normally purchase a limited number of items to supplement their overall dietary needs. There was no indication that SNAP households would be inclined to regularly visit Harvest Market to purchase large quantities of groceries, especially considering the constricted checkout area, the limited overall inventory, the absence of shopping carts, and the availability of larger grocery stores in the area, including a medium-sized grocery store about a block away and a supermarket just under a mile away. Given the available inventory and the store's characteristics, this review could find no reason why the Appellant's SNAP redemption patterns differed so significantly from comparable stores.

SNAP Transaction Analysis

Charge Letter Attachment 1: Multiple transactions were made from the accounts of individual SNAP households within a set time period. This attachment lists 25 sets of transactions (57 transactions in all) totaling \$4,565.69 in SNAP benefits, averaging \$80.10 per transaction, or \$182.62 per set of transactions. 5 U.S.C. § 552 (b)(7)(E).

For example, 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

5 U.S.C. § 552 (b)(6) & (b)(7)(C)

It is difficult to comprehend why these households would so frequently and repeatedly choose to spend large amounts of money in a store with no shopping carts and limited overall inventory, when a single trip to a nearby supermarket likely could have sufficed. That such large, repetitive transaction sets occurred at a small store like Harvest Market is highly unusual and indicative of trafficking.

The Appellant contends that the patterns found in Attachment 1 are neither surprising nor unusual, especially when considering the array of eligible foods, its location in an extreme food desert, and lack of comparable retailers within walking distance. The Appellant further contends that the numbers of transactions listed in this attachment are a very small percentage of the store's overall transactions.

As for the claim that the store is located in an "extreme food desert" and that there are no comparable authorized retailers within walking distance, this review finds these claims to be inaccurate. According to USDA's Economic Research Service (ERS), the store borders, but is not located in a food desert¹, and agency records show the presence of a medium-sized grocery store with substantially greater inventory in the immediate vicinity, approximately a block away, or a three-to-four-minute walk. The most recent store visit for that grocery store shows that it carries not only more overall inventory and numerous shopping carts and baskets, but also a wide variety of fresh produce whereas Harvest Market had no fresh produce. Agency records also show the presence of a full-sized supermarket less than a mile from Harvest Market, and two comparable convenience stores less than a third of a mile away.

¹ See ERS's Food Access Research Atlas at <https://www.ers.usda.gov/data-products/food-access-research-atlas/go-to-the-atlas>.

Agency records further show that many of the households who were involved in the transactions in Attachment 1 had access to and shopped at large supermarkets and superstores located farther away than the stores mentioned in the previous paragraph. For instance, 5 U.S.C. § 552 (b)(6) & (b)(7)(C). It is reasonable that households would shop at a convenience store for food items to supplement their overall grocery needs or to pick up snacks or drinks for immediate consumption, even on a repetitive basis. But it makes little sense that SNAP households would spend large portions of their monthly allotments in rapid succession at Harvest Market, particularly when they have access to larger, better stocked stores. As such, this review finds it reasonable for the Retailer Operations Division to conclude that trafficking violations were likely occurring at Harvest Market.

As to the small percentage of suspicious transactions in relation to the firm's overall transactions, this review finds this argument to be largely immaterial. Trafficking need not be the lion's share of transactions for it to be considered a program violation.

Charge Letter Attachment 2: The store conducted EBT transactions that were large based on observed store characteristics and recorded food stock. This attachment lists 163 SNAP transactions totaling \$12,707.73, for an average transaction amount of \$77.96. These large transactions are not consistent with a convenience store in the state of California. The Retailer Operations Division has determined that during the review period, the average SNAP transaction amount for a convenience store in California was \$7.22. The average in Los Angeles County, where Harvest Market is located, was even lower, at \$6.96 per transaction. The average transaction in Attachment 2 is more than 10 times larger than the average purchase amount for this store type.

Given that the Appellant firm has a modest inventory of staple foods and other SNAP-eligible items, including snacks and drinks, it is likely that there would be an occasional instance where the transaction amount is high, perhaps exceeding \$40.00 or even \$50.00. As such, there may be some legitimate SNAP transactions among the transactions listed in Attachment 2. However, as noted earlier, there is no evidence that the firm would be likely to have SNAP redemption patterns that differ significantly from nearby, similar-sized competitors. The substantial number of high-dollar transactions in a three-month period calls into question the legitimacy of these transactions.

Attachment 2 lists 11 transactions for \$150.00 or more during the review period, including a high of 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Another 27 transactions were between \$100.00 and \$149.99, and 32 transactions were between \$75.00 and \$99.99. Considering how many food items it would typically take to add up to \$75.00 or more, and considering that the store has a constricted checkout area, no apparent shopping carts to help a customer transport large amounts of food, and no compelling evidence that food is sold in bulk, this review finds it difficult to believe that every large transaction in Attachment 2 was a legitimate purchase of eligible food.

Not only did the firm have a peculiar number of large transactions, Attachment 2 also demonstrated some very unusual patterns within those large transactions. For instance, 5 U.S.C. § 552 (b)(7)(E). When a store clerk is committing a trafficking violation, it is not uncommon for them to attempt to mask the violation by entering in a dollar amount that they think will have the

appearance of a legitimate purchase. For instance, 5 U.S.C. § 552 (b)(7)(E). That a number of randomly selected items would so frequently result in transaction totals ending in 5 U.S.C. § 552 (b)(7)(E), is highly unlikely and is, instead, indicative of trafficking.

The Appellant argues that it sells substantial amounts of expensive foods, including energy drinks, sodas, and other beverages for as high as \$90.00 per case; containers of infant formula for between \$21.99 and \$39.00; and other food items in large or bulk packages at expensive prices. However, these claims are unconvincing. As noted earlier, the store visit in this case occurred during the final month of the review period. Very few of the cases of beverages or expensive items listed by the Appellant are visible in the photos, and those that were visible appeared to be in storage areas. Importantly, none was mentioned by the inspector as even available for purchase in bulk quantities. It is notable that the on-site employee who authorized the inspector to conduct the visit and with whom the inspector collaborated to complete his report was Farid Akkari, the store manager who submitted the written affidavit in this case. There is no evidence that Mr. Akkari ever pointed the inspector to the supposed expensive items or even mentioned that any items were sold by the case. Additionally, items such as infant formula did not appear to be stocked by the store at all, and the Appellant's evidence does not prove otherwise. In short, the Appellant's list of expensive items appears to this review to be contrived for purposes of justifying the firm's suspiciously large transactions.

Except for the rule that SNAP benefits are to be used only for the purchase of eligible food, the regulations do not govern or mandate how a SNAP household should spend its benefit allotment, including how many times a household may use its EBT card at a particular location or how large an individual transaction can be. However, the transactions noted in the charge letter are questionable not because they exceed any limits for use, but because they display patterns of use that are inconsistent with the store's documented physical characteristics. It should be further noted that the transactions identified in the charge letter are not marginally abnormal, but decidedly so, especially in comparison with other nearby SNAP-authorized stores with similar characteristics. This review does not contend that repetitive or large EBT transactions are overtly suspicious when they occur on an occasional or intermittent basis, but when such transactions form questionable patterns on a consistent basis over a substantial period of time, such activity is considered highly irregular, and a firm's intent to comply with program regulations is called into question.

In an appeal of adverse action, the onus is on the Appellant to prove, by a preponderance of the evidence, that the administrative action should be reversed. This means submitting sufficient and compelling evidence that would lead a reviewer to conclude that trafficking did not occur. This review finds that the Appellant's contentions and evidence do not meet this standard.

Appellant's Evidence

As noted earlier, the Appellant submitted documentation that included store tax records, inventory invoices and receipts, and an inventory purchase summary spreadsheet. According to the Appellant, the inventory and tax information is evidence that the firm purchased and sold

substantial amounts of food during the review period (greatly exceeding the value of the SNAP redemptions) and supports its claim that the transactions listed in the charge letter were legitimate and were not the result of trafficking.

With regard to the Appellant's inventory records, this review finds the documentation to be of little probative value. Of the 186 pages of invoices, nearly 90 percent were either partially or entirely illegible. On the vast majority of receipts, dates were unreadable and inventory descriptions were too blurry or faint to be deciphered. In short, there is no way for this review to corroborate any of the Appellant's claims regarding its inventory. The Appellant's tax records and inventory spreadsheets certainly imply that the firm had more available inventory than SNAP redemptions, but that alone is insufficient to exclude possible trafficking from the equation.

Coherent inventory records may help substantiate an appellant's claims regarding its transaction activities. But in most cases, inventory records reflect only a small part of the picture. They frequently offer little insight regarding what occurred between customers and store clerks at the point of sale. That is unquestionably the case in this instance, as the inventory records are in far too poor a condition to be of real use in this matter.

Point-of-sale documentation, such as itemized cash register receipts or other records showing what was purchased during each transaction, would be far more valuable in a case such as this. While there is no rule or law that requires retailers to obtain sophisticated cash register systems, the maintaining of cash register receipts is strongly encouraged by USDA. Page 14 of FNS's *SNAP Training Guide for Retailers* states the following: "You should retain all register receipts for at least one-year for program eligibility and integrity purposes."

Unfortunately, the Appellant has offered no such evidence to help demonstrate that the transactions in question were legitimate purchases of eligible food.

Civil Money Penalty

As noted earlier, the Retailer Operations Division determined that the Appellant firm was not eligible for a civil money penalty in lieu of permanent disqualification for trafficking because it did not submit sufficient evidence to demonstrate that it had established and implemented an effective compliance policy and program to prevent SNAP violations. In accordance with regulations at 7 CFR § 278.6(b)(2), in order for a CMP to be considered, a firm must not only notify FNS that it desires the agency to consider a trafficking CMP in lieu of permanent disqualification, but it must also submit appropriate supporting documentation within 10 days of receipt of the charge letter. The case record shows that the Appellant did not request a trafficking CMP within the required 10-day period or provide any evidence of a compliance policy or training program.

Therefore, in accordance with 7 CFR § 278.6(b)(2)(iii) and § 278.6(i), a civil money penalty in lieu of permanent disqualification for trafficking is not an option in this case.

CONCLUSION

An analysis of the Appellant's EBT transaction record was the primary basis for the decision by the Retailer Operations Division to permanently disqualify Harvest Market from SNAP participation. This data provided sufficient evidence for this review to conclude that the questionable transactions and patterns listed in the charge letter were more likely than not the result of trafficking violations committed by the Appellant. Likewise, the Appellant has not proven, by a preponderance of the evidence, that the administrative action should be reversed.

Based on a review of all available information in this case, the decision to impose a permanent disqualification against the Appellant, Harvest Market, under the ownership of Barbara M. Newsome, Rami Dorghalli, and Reem G. Dorghalli, is sustained.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and in Section 279.7 of the SNAP regulations. 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 the Appellant owner resides or is engaged in business, or in any court of record of the State having competent jurisdiction. If a complaint is filed, it must be filed within 30 days of receipt of this decision. The judicial filing timeframe is mandated by the Act, and this office cannot grant an extension.

Under the Freedom of Information Act, we are 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.

JON YORGASON
Administrative Review Officer

May 11, 2022