

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

Brooklyn Mini Mart,

Appellant,

v.

**Office of Retailer Operations and
Compliance,**

Respondent.

Case Number: C0247904

FINAL AGENCY DECISION

The U.S. Department of Agriculture, Food and Nutrition Service (FNS), finds that there is sufficient evidence to support the determination by the Office of Retailer Operations and Compliance to impose a permanent disqualification against Brooklyn Mini Mart (hereinafter Appellant) from participating as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

The issue accepted for review is whether the Office of Retailer Operations and Compliance took appropriate action, consistent with Title 7 of the Code of Federal Regulations (CFR) § 278.6(a), (c) and (e)(1)(i), when it imposed a permanent disqualification against Appellant.

AUTHORITY

According to 7 U.S.C. § 2023 and the implementing regulations at 7 CFR § 279.1, “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

By letter dated December 15, 2021, the Office of Retailer Operations and Compliance charged Appellant with trafficking based on a series of irregular SNAP transaction patterns that occurred in January 2021 through June 2021. The letter noted that the penalty for trafficking is permanent disqualification as provided by 7 CFR § 278.6(e)(1). The letter also noted that the Appellant could request a trafficking civil money penalty (CMP) in lieu of a permanent disqualification within ten days of receipt under the conditions specified in 7 CFR § 278.6(i).

Appellant requested and was approved on December 23, 2021, for an extension of time to respond that established January 3, 2022, as the deadline to respond to the charges.

Appellant failed to respond to the charges and did not request a CMP or provide any supporting documentation as required. The Office of Retailer Operations and Compliance notified Appellant by letter dated February 11, 2022, that the firm was permanently disqualified from participation as a SNAP retailer in accordance with 7 CFR § 278.6(c) and 278.6(e)(1) for trafficking violations. This letter also stated that Appellant was not eligible for the CMP because insufficient evidence was submitted to demonstrate that it had established and implemented an effective compliance policy and program to prevent SNAP violations.

By letter sent via email on February 14, 2022, Appellant appealed the Office of Retailer Operations and Compliance's assessment and requested administrative review. The appeal was granted. Subsequent correspondence was received from Appellant, through counsel.

STANDARD OF REVIEW

In an appeal of an adverse action, Appellant bears the burden of proving by a preponderance of evidence that the administrative action should be reversed. That means Appellant has the burden of providing relevant evidence that a reasonable mind, considering the record as a whole, would accept as sufficient to support a conclusion that the argument asserted is more likely to be true than untrue.

CONTROLLING LAW

The controlling law in this matter is contained in the Food and Nutrition Act of 2008, as amended (7 U.S.C. § 2021), and implemented through regulation under Title 7 CFR Part 278. In particular, 7 CFR Part 278.6(a) and Part 278.6(e)(1)(i) establish the authority upon which a permanent disqualification may be imposed against a retail food store or wholesale food concern in the event that personnel of the firm have engaged in trafficking SNAP benefits.

7 CFR § 278.6(a) states: "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."

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." Trafficking is defined in part as, "The buying, selling, stealing, or otherwise effecting an exchange of SNAP benefits for cash or consideration other than eligible food". Trafficking includes "Intentionally purchasing products originally purchased with SNAP benefits in exchange for cash or consideration other than eligible food".

7 CFR §278.6(i) states: "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.”

7 CFR §278.6(b)(2)(ii) states: “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).” Part 278.6(b)(2)(ii) further states that if a firm fails to request a civil money penalty in lieu of a permanent disqualification for trafficking and submit documentation and evidence of its eligibility within the specified 10 days, the firm shall not be eligible for such a penalty.

SUMMARY OF THE CHARGES

The issue in this review is whether, through a preponderance of evidence, it is more likely true than not true that the questionable transactions were the result of trafficking. The charges on review were based on an analysis of SNAP EBT transaction data during the six month period of January 2021 through June 2021. This involved two patterns of EBT transaction characteristics indicative of trafficking:

1. Multiple transactions were made from individual benefit accounts in unusually short time frames.
2. Excessively large purchase transactions were made from recipient accounts.

APPELLANT’S CONTENTIONS

The following may represent a summary of Appellant’s contentions in this matter; however, in reaching a decision, full attention and consideration has been given to all contentions presented, including any not specifically recapitulated or specifically referenced herein:

Appellant’s February 14, 2022, request for administrative review:

- Customers come to the store on a regular basis with some coming more than once a day from the same household; and,
- Large transactions are from the addition of chicken, fish, and other foods. Ownership is not sure why there weren’t photos from the FNS visit or the store may have been out of stock. Moreover, you will see the increase of the prices in the attached invoices.

Appellant submitted 11 invoices dated within the review period in support of these contentions.

Appellant’s subsequent correspondence dated March 7, 2022:

- The firm is far larger than a convenience store and is a small grocery store where customers are able to purchase items that are far more expensive and in larger quantities than typically found in a convenience store;

- The invoices provided show large quantities of chicken and fish which were then resold to customers at costs of \$15.00-\$50.00. The photos provided show the wide variety of products being sold demonstrating that it would be easy to spend more than \$100.00 given this is essentially a small grocery store;
- The photos also show that sales of fried fish and chicken are a large part of the firm's business and given the prices for these items it would not be uncommon for a customer to have a bill that would be considered extraordinary for most convenience stores, but not for this type of a grocery store. The Sam's Club invoices evidence the quantity of product being purchased for resale as part of the restaurant portion of the firm's sales. In essence, this store has become a neighborhood grocery store and restaurant for the residents surrounding its location and as a result it is commonplace for customers to incur large purchases;
- It is not uncommon for different family members to all be in the store on multiple occasions making charges for food, especially in light of the fact that the firm serves not only as a grocery store but also as a small restaurant. It is a regular occurrence for a customer to come into the firm on more than one occasion during any given day to purchase food and related products. Another reason for multiple charges in one day is the customers will make a purchase to determine what amount is left on the card and/or to determine if a certain grocery item is a qualified purchase. Frequently, two purchases are made within minutes of one another. If there is a prohibition against multiple sales in one day, we are unaware of that provision; and,
- The firm is very careful to abide by all regulations imposed upon it and at no time has it undertaken any activity contrary to those regulations. The business is located in a lower income neighborhood that is within walking distance of many of the customers who rely upon it for groceries. The disqualification from the SNAP Program desperately impacts those residents.

Appellant previously emailed numerous invoices for inventory purchases as well as photos of the store in support of these contentions.

ANALYSIS AND FINDINGS

Stores caught in trafficking violations consistently display particular, characteristic transaction patterns including those cited in the charge letter. Nevertheless, transactions having such characteristics are sometimes valid and sufficient evidence that support that they were the result of legitimate purchases of eligible food items is provided. This is why opportunities are afforded to charged retailers to explain the questionable transactions cited and to provide evidence that they are legitimate. Without supporting evidence and rationale, assertions that the firm has not violated program rules do not constitute valid grounds for overturning the determination.

In the absence of evidence for the legitimacy of such transaction patterns, a conclusion can be drawn through a preponderance of evidence that the unusual, irregular, and inexplicable transactions and patterns evidence trafficking as the most likely explanation. Each Attachment furnished with the charge letter represents the questionable and unusual patterns of SNAP transactions indicative of trafficking which were conducted at the Appellant firm during the

review period. As patterns of unusual transactions appear across multiple Attachments, the case of trafficking becomes more convincing.

Store Background and FNS Store Visit

FNS initially authorized the firm on August 20, 2015, as a convenience store. The record indicates that in reaching a disqualification determination, the Office of Retailer Operations and Compliance considered information obtained during a May 19, 2021, store visit conducted by an FNS contractor to observe the nature and scope of the firm's operation, stock, and facilities. This information was then used to ascertain if there were justifiable explanations for the firm's suspicious SNAP transactions. The store visit documented the following store size, description, and characteristics:

- The firm was a spacious convenience store of 2,000 SF per the store manager. The store had wide aisles and a large center island containing various hot and cold drink dispensers.
- The store offered a very limited quantity and variety of staple foods and carried no unique items or offered any distinctive services. The store primarily stocked traditional American products and had no ethnic or specialty food items.
- The store visit report and photos showed no shopping carts or hand baskets for customer use thus severely limiting the amounts of food that could be moved to the checkout.
- No food packages, bundles, bulk items, case sales, or other sales were evident that would explain the unusual transactions and no SNAP eligible cased items were available for purchase outside of cases of bottled water.
- The store visit report specifically noted that the firm was not a specialty food store and that there were no meat bundles, fish specials, or fruit/vegetable boxes for sale.
- The checkout area was approximately 2.0 feet deep by 4.0 feet wide with many displays on both sides leaving a limited area for customers to place their purchases. The small checkout area would make it problematic to process large orders. The checkout area had two cash registers, one POS device, and no optical scanner as confirmed by the store manager.
- The firm had a medium sized deli case and a small hot foods display case in addition to a very large commercial kitchen and food prep areas. These contained many reach-in coolers and freezers, a chest freezer, a stainless steel prep table with cooler under, other stainless steel prep tables, a large Nacho cheese warmer, a cooktop grill, commercial exhaust hood, multiple deep fat fryers, a small oven, microwave oven, commercial slicer, commercial scale, etc. There were many 35 pound cases of frying oil, many foam clamshells for hot foods, foil heating pans, many bags of sub sandwich rolls, three pound bags of frozen grilled Mesquite chicken fillets, many boxes of frozen French fries, boxes of frozen fish, etc. Large menu boards advertised a variety of cold sub sandwiches with multiple toppings and different sizes of hot fish or chicken tender [sic] dinners as well as different types and quantities of chicken wing dinners. Hot side orders included different sizes of French fries and fried Okra as well as pan and half pan sizes of fries with cheese and/or meat toppings. There also were various sizes of Nachos with cheese, beef, and Jalapenos for sale. There was no signage indicating that any of the foods being sold hot were also available for purchase cold or frozen. The deli case did offer individual grilled Mesquite chicken fillets for sale. The store manager also stated that the firm would be

expanding the size of the hot food area. The store visit report noted that the store manager also stated that store food stock was not used in the preparation of the hot and cold prepared foods and that deli meats/cheeses were available for purchase by the pound.

- The firm had a very limited stock of relatively inexpensive staple foods that also included single serving and pre-packaged items with a significant portion of inventory in accessory foods (soda, candy, snacks, other drinks) and many ineligible items.
- The firm had no fresh or frozen unprocessed meat or seafood, no dried seafood, a very limited quantity and variety of processed meats and seafood (jerky, deli meats, canned meat/poultry/fish, and one three pound package of grilled Mesquite chicken fillets), no hot dogs, no packaged lunch meats, no salami, no sausages, no bacon, no brown and serve sausages, no frozen entrees, no frozen dinners, eggs, almost no fresh fruits or vegetables (several red onions and potatoes, two lettuce, and two tomatoes), no frozen fruits or vegetables, no dried fruits or vegetables, packaged nuts, 100 percent fruit and vegetable juices, no fruit cups, canned soups, a very limited stock of canned and packaged staple food items, packaged cheese, no cheese sticks, an extremely limited variety of deli cheese, no cream cheese, no large containers of yogurt, no single serving yogurt, no single serving yogurt drinks, four margarine, no butter, four sour cream, one gallon of fresh milk, no single serving containers of fresh milk, single serving milk drinks (Nesquik), no canned milk, no shelf stable milk, no coconut milk, no soy milk, no Lactaid milk, no powdered milk, no half & half, three bread, two rolls, no croissants, no tortillas, no taco shells, no tostadas, no pitas, no corn meal, AP flour, sugar, no brown sugar, rice, cold cereal, no single serving cold cereal, hot cereals, many single serving noodle soups, no canned pasta, no single serving pasta, dry pasta, no dry noodles, pancake mix, five mac&cheese, no single serving size mac&cheese, baking mixes, no Hot Pockets, no Lunchables, no single serving frozen heat n' eat foods, cooking oil, no olive oil, honey, coffee, no tea, no cocoa, no baby foods, no baby cereals, no infant formula, no baby juices, and no diapers.
- Ineligible items included: tobacco, smoking accessories, vape products, hot foods, hot drinks, ATM, health and beauty items, household products, paper products, auto products, hats, clothing, incense, electronics accessories, and jewelry. Accessory foods included: many un/carbonated drinks, snacks, baked goods, a large stock of candy, ice cream, condiments, spices, cooking oil, no olive oil, baking mixes, honey, sugar, no brown sugar, coffee, no tea, and no cocoa.
- The firm was open 9 AM-9 PM Monday-Saturday and 10 AM-7 PM Sunday.
- Signage was in English and there were no SNAP posters (anti-fraud, eligible items, reporting trafficking, etc.) visible in the store.
- Many food items were individually priced. The FNS store visit report, completed in conjunction with the store manager, showed that most food prices end in .x9 cents. A price ending in .x9 cents is a common pricing structure for stores of this type. The FNS store visit report listed the six most expensive food items costing more than \$5.00 for sale in the store as being: five 20 pound bags of Basmati rice priced at \$21.99, a single three pound bag of grilled Mesquite chicken fillets priced at \$15.99, deli Pastrami priced at \$8.99 per pound, deli Cajun or honey roasted turkey priced at \$7.99 per pound, and six containers of Folgers Coffee priced at \$6.59. This listing of the most expensive items was provided by the store manager during the store visit.

- The store visit report and photos noted that the store had some empty or minimally stocked shelves.
- The firm was not a WIC vendor and did not stock any baby foods, cereals, juices, or formula.

Multiple Transactions in Unusually Short Time Frames

This Attachment documents 47 individual transactions in 21 sets of two or more transactions conducted by 14 different households in a short period of time. Individual transaction amounts range from \$20.59 to \$150.77 with 29 transactions exceeding \$50.00 and four transactions for \$100.00 or more. There are transaction set totals as high as \$219.83, \$209.03, \$189.36, \$186.99, \$171.81, \$160.14, \$152.34, \$150.78, \$128.25, \$124.52, \$123.89, \$113.60, \$105.84, \$101.67, \$100.58, and \$100.33 to list the highest dollar value sets. The dollar amounts of subsequent transactions in each set are substantial and equal or exceed \$20.59 in each of the 21 sets with subsequent purchases exceeding \$40.00 in 17 sets and \$100.00 in two sets. The span of time for transaction sets ranges from three minutes and 31 seconds to more than 31 hours with 14 of the 21 sets occurring over multiple days. Only one of the 21 transaction sets occurs in under two hours and 35 minutes. Five sets are comprised of three individual transactions while the remaining 16 sets are comprised of two transactions. It is not a usual shopping pattern to see so many purchases, in a short period of time, by the same recipients as documented in this Attachment. Multiple transactions conducted by the same household within a short period of time is a method which violating stores use to avoid single high dollar transactions that cannot be supported by store inventory and structure. These sets of transactions appear to be in amounts which are indicative of trafficking.

Appellant's contentions regarding this charge are addressed below.

SNAP households have no limit on the number of times they may use their benefits or the dollar value of eligible foods they may purchase. The SNAP transactions listed in this Attachment 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 store's food stock and facilities and are thus indicative of trafficking. These transaction sets do not contain the characteristics associated with a household purchasing a forgotten item after checking out or of multiple members of the same household shopping together and making separate purchases using the same EBT card in quick succession or household members checking their balances as all but one of the 21 transaction sets occur in two hours and 36 minutes or more time. Contrary to Appellant, it makes no sense that a household would conduct as many as three separate transactions over a short period of time that total to a substantial part of the household's monthly SNAP issuance when that household is also shopping at many larger stores. The transaction sets also do not contain the characteristics of a household returning later in the day or sending their child to purchase a forgotten item or two as all of the sets have subsequent transactions in amounts equaling or exceeding \$20.59 with subsequent purchases exceeding \$40.00 in 17 sets and exceeding \$100.00 in two sets, far more than the cost of a forgotten item or two.

It is further noted that the September 2020 FNS report on *Benefit Redemption Patterns in SNAP in FY 2017* states that while households on average did spend 77.6 percent of their benefits by

mid-month with over half being expended in the first week after issuance, that 82.1 percent of all benefits were spent at a super store or supermarket. Only 0.7 percent of households shopped exclusively at grocery stores while only 4.6 percent did not shop at a super store or supermarket. On average, households conducted 9.4 transactions per month that averaged \$27.36. Accordingly, the transaction patterns contained in the charge letter Attachments are not typical, but are unusual and indicative of trafficking.

It is certainly not unusual for a small number of SNAP households to conduct multiple transactions in a short period of time. However, it is unusual that subsequent transaction dollar amounts are substantial in these transaction sets and that all of the sets in this Attachment total \$75.96 or more when the comparable average convenience store SNAP transaction amount in Allen County during the review period was \$9.69. These multiple transactions indicate that the amounts were contrived in an attempt to avoid suspiciously high transactions that would be indicative of trafficking by breaking them into multiple, smaller amounts. FNS transaction data shows that this same pattern of multiple transactions in unusually short time frames was not evident at other nearby grocery stores further supporting that trafficking was occurring at the Appellant firm during the period under review.

The Office of Retailer Operations and Compliance's analysis of shopping patterns for households listed in this Attachment shows they have ready access to transportation as evidenced by their shopping at a variety of larger food stores located nearby and at a distance from Appellant's location, including a variety of super stores and supermarkets. Appellant's contentions fail to offer any explanation or rationale as to why households who are shopping and spending large dollar amounts at many larger and better stocked stores would conduct multiple purchases totaling to high dollar values at a convenience store with a very limited stock of staple foods. Common sense dictates that it is improbable that households would choose to spend large dollar amounts at the Appellant firm if their purchases consisted solely of eligible food items that could be purchased at any of the super stores and/or supermarkets they were already regularly shopping at and therefore more likely than not that these households were trafficking SNAP benefits at the Appellant firm.

For example:

One of the households in this Attachment spent \$95.22 at a super store located 4.95 miles north of Appellant's location and two days later spent \$59.95 at a super store located 5.26 miles north of Appellant's location. Two days later this household spent \$106.42 at the Appellant firm and five hours later travelled to the first super store spending \$18.68. The next day it returned to the Appellant firm and spent \$65.39. In summary, this household spent \$173.85 in three transactions at two super stores both located several miles north of Appellant's location while spending \$171.81 at Appellant's convenience store that offered a very limited stock of staple foods in two transactions. This household conducted a total of 30 transactions at the Appellant firm during the six month review period with 24 transactions exceeding \$40.00 and six for more than \$100.00. During this same time, it conducted 32 transactions at five super stores all of which were located in a cluster from 4.26-7.96 miles north of the Appellant firm. Common sense dictates that this household most likely resided in or near this cluster of super stores and had to travel

past them where it regularly shopped in order to reach the Appellant firm. This clearly shows that this household had ready access to transportation and did not consider the Appellant firm to be its primary grocer.

It is unusual and suspicious that this household had three manually keyed transactions at the Appellant firm while having none at any of the other stores where it shopped. Manual transactions are those in which the magnetic strip on the household's EBT card is not being read by the store's POS device when the card is swiped and the clerk must manually key enter the lengthy EBT card number. A review of other EBT transactions at the firm on the dates of the manual transactions show that Appellant's POS device was functioning properly as there were swipe transactions immediately before and after the manual transactions. When the magnetic strip on an EBT card fails, it can no longer be swiped and replacement EBT cards contain different identification numbers. It is an indication of trafficking when the same card is used for both manual and swipe transactions. In cases of trafficking, the manual transactions occur when a household gives a retail store its EBT card number as well as the PIN so that store employees can manually key enter the card number and then enter the PIN without needing to have the actual EBT card.

It is inexplicable, based on the Appellant firm's very limited stock of staple foods and lack of any unique food items, that any SNAP household would regularly spend \$40.00-\$155.00 in legitimate purchases of eligible food items at the Appellant firm when it was also shopping at a far better stocked super stores before and after the purchases at the Appellant firm. This unusual and erratic shopping pattern is indicative of trafficking. The Food and Nutrition Act of 2008, as amended, requires only one occurrence of trafficking to permanently disqualify a SNAP retailer.

It is further noted that the number of "Multiple transactions in unusually short time frames" in this Attachment decreased drastically in the month following the firm's receipt of the FNS charge letter. Specifically, the number of individual transactions dropped from 47 during the review period to two during January 2022 while the number of transaction sets decreased from 21 to one. The significant decrease in these transactions is substantial evidence that the unusual and suspicious transactions at the Appellant firm during the review period can most likely be attributed to the trafficking of SNAP benefits.

There may be legitimate reasons why a SNAP household might return to a store during a short period of time, but the examples in this Attachment indicate a series of SNAP purchases that total to large dollar amounts. Multiple transactions over a short period of time, especially those of high dollar values, are indicative of attempts to obscure trafficking by dividing a large dollar value transaction into a series of smaller dollar value transactions and are a method which violating stores use to avoid high dollar transactions that cannot be supported.

High Dollar Value Transactions

This Attachment lists 487 individual EBT transactions ranging from \$35.43 to \$155.37 with 222 transactions exceeding \$50.00 and 12 exceeding \$100.00. While these high dollar amounts may

not be unusual for a big box super store, the substantial number of extremely high dollar transactions is uncharacteristic for a convenience store offering a very limited stock of staple foods and calls into question the legitimacy of these transactions. The transactions are also substantially higher than the average SNAP transaction amount of \$9.69 for this store type in Allen County during the review period. This is unusual and indicative of trafficking.

The evidence under review shows that many SNAP households shopping at the Appellant firm are also shopping at many full-line supermarkets and super stores that offer a greater quantity and variety of SNAP eligible foods items for better prices than customers can find at the firm. These high dollar value transactions remain questionable when considering the proximity of other stores that would be better shopping options for consumers. Based on their shopping patterns, transportation does not appear to be an issue for these households. Yet, they continue to shop and spend suspicious high dollar amounts at the Appellant firm, where the eligible food stock is very limited, often on the same day, or within 24-72 hours of purchases at larger food stores.

For example:

A household spent \$39.77 at a super store located 9.47 miles from the Appellant firm. The very next day it spent \$85.56 at the Appellant firm and the following day spent \$34.81 at a super store located 4.95 miles from Appellant's location. In summary, this household spent \$74.58 at two super stores located a considerable distance from Appellant's location whole spending \$85.56 at the Appellant firm in between the transactions at the two super stores. It is unlikely that the Appellant firm would stock any eligible food items that could not be purchased at any of the super stores where this household is routinely shopping, and likely for less money. This household conducted additional suspicious transactions throughout the review period. The Food and Nutrition Act of 2008, as amended, requires only one occurrence of trafficking to permanently disqualify a SNAP retailer.

A different household spent \$165.20 at a super store located 5.56 miles from Appellant's location and \$95.98 at a second super store located 4.22 miles from Appellant's location. The very next day this household spent \$47.66 at the Appellant firm. In a different month, this household spent \$144.05 at a super store located 2.00 miles away and the next day spent \$50.76 at the Appellant firm. This household also conducted additional suspicious transactions throughout the review period.

A third household spent \$12.54 at a super store located 2.00 miles away and 25 minutes later spent \$38.95 at the Appellant firm. The very next day it spent \$14.94 at a super store located 3.96 miles from Appellant's location. In summary, this household spent \$27.48 in transactions at two super stores before and after a transaction for \$38.95 at the Appellant firm. It is highly suspicious that a SNAP household with extremely limited food dollars would spend more in a single transaction at the Appellant firm that it did in two transactions at far better stocked super stores located at a distance from Appellant's location that occurred immediately before and after the \$38.95 transaction at the Appellant firm. This makes no sense since the Appellant firm carried no unique food

items and had the same eligible food stock that could be found at any of the larger stores where it regularly shopped.

Appellant offered no justification as to why households would spend significant amounts of their very limited SNAP benefits at Appellant's convenience store with a very limited quantity and variety of staple food within minutes or hours of shopping at larger and better stocked stores that would have offered a greater selection of staple foods at lower prices. These suspicious transactions are indicative of trafficking at the Appellant firm. The Food and Nutrition Act of 2008, as amended, requires only one occurrence of trafficking to permanently disqualify a SNAP retailer.

Both the FNS 2011 and the 2020 reports titled "*Benefit Redemptions in the Supplemental Nutrition Assistance Program*" for fiscal years 2007 and 2017, respectively, show that households most often redeemed their benefits at supermarkets and super stores with only four percent of households never shopping in a super store or a supermarket. Participating households typically made several (just over nine on average) relatively small purchases (\$27.36 on average for 2017) with SNAP benefits each month. Making single or multiple transactions of large dollar amounts or cumulatively large dollar amounts, and/or depleting substantial amounts of one's allotment in a period of hours, leaving a marginal amount or no benefits for the rest of the month, is inconsistent with typical shopping behavior of SNAP benefit households. Rather, transactions over a short period of time of large value, or large cumulative value, in which SNAP benefits are exhausted are an indicator of trafficking.

No explanation or rationale has been offered by Appellant as to why households that are regularly shopping at larger stores offering a greater quantity and variety of SNAP eligible foods at lower prices and who apparently have no transportation limitations would be conducting high dollar transactions at a much smaller and very minimally stocked convenience store. It is highly unlikely that the Appellant firm stocked any eligible food items that would not be available at the super stores, supermarkets, and other larger grocery stores the households in this Attachment were regularly shopping at and these stores would also likely have significantly lower food prices yet these households continued to spend large dollar amounts at a convenience store with a very limited stock of staple foods and no shopping carts or even handheld baskets that would be needed for the high dollar value transactions in this Attachment. There is no legitimate reason why these households would spend so much of their SNAP allotments at the Appellant firm when they clearly had access to and frequently shopped at supermarkets and super stores located nearby and at a distance. The more plausible explanation is that these households were trafficking SNAP benefits at the firm. Based on this discussion, trafficking is the most viable explanation for these irregular shopping patterns.

FNS records show there were at least six comparably sized or larger authorized retail food stores within a 0.98 mile radius of Appellant's location that included two super stores in addition to four convenience stores. There were many larger stores located slightly further away that included super stores, supermarkets, and other larger grocery stores. The households listed in the charge letter Attachments regularly shopped at these larger stores as well as at additional larger stores located further away during the review period. These larger stores would offer greater

quantities and varieties of staple food items at lower prices than would be found at Appellant's very minimally stocked convenience store.

The difference in the total SNAP transaction dollar volume, the total SNAP transaction count, and the average SNAP transaction amount for Allen County convenience stores during the review months and at the Appellant firm is significant. Appellant's average SNAP transaction dollar volume was 196.67 percent larger than like type Allen County stores while its total SNAP transaction count was 74.41 percent larger than the county average and its average SNAP transaction amount was 70.07 percent larger. A comparison of Appellant's SNAP redemptions to that of nearby like type stores having redemptions for the review period shows that none exhibited the same suspicious transaction patterns listed in the charge letter for the Appellant firm even though all are located in proximity to Appellant's location and would therefore be expected to share the same SNAP customer base and shopping patterns. This is a further indication that the transactions in the charge letter Attachments do not represent legitimate food purchases. The Office of Retailer Operations and Compliance considered all of these to be indicators of unusual and suspicious activity.

The firm also had irregular SNAP transaction data compared to like type stores in Allen County. A comparison of Appellant's redemption data to the average for County convenience stores using ten dollar increments showed that Appellant's transaction count and dollar volume was significantly higher than like type stores in all ranges up to the \$150.00-\$159.99 range at which point transactions stopped. It is very unusual that transactions at the Appellant firm stopped at the \$150.00-\$159.99 range while the transaction averages at like type stores dropped below one transaction after the \$80.00-\$89.99 range, almost one-half that of the Appellant firm. This transaction pattern does not appear in the transaction patterns or in the transaction count and dollar volume averages for other like type stores. These large dollar transactions are considered to be irregular and suspicious based on the firm's food inventory. The Office of Retailer Operations and Compliance determined there was no credible reason for the firm to have transactions at these dollar levels given the very limited stock of staple foods and the lack of any specialty, bulk, or ethnic foods that might sell for large dollar amounts and also considered this to be a strong indication of trafficking. None of Appellant's contentions explain these unusual and suspicious differences.

Appellant's contentions regarding this charge are addressed below.

Appellant is mistakenly equating a firm having sufficient stock to be qualified as a SNAP retailer with being a well-stocked store. This also applies to a store that is somewhat larger than average convenience stores. While the Appellant firm does have adequate stock to qualify as a SNAP retailer, one has to look at the quantity and variety of a store's eligible food inventory before one can make a statement as to how well a store is stocked. A store can meet the minimum stocking criteria under Criterion A to become a SNAP retailer by offering for sale, on a continuous basis, no fewer than three different varieties of food items in each of the four staple food categories with a minimum depth of stock of three stocking units for each food variety, and at least one variety of perishable foods in at least two staple food categories. In other words, a store can qualify with as few as 36 units of staple foods.

Even a cursory review of the May 19, 2021, FNS store visit report and photos would show that the firm had a very limited staple food stock that would not compare to that found at nearby super stores and supermarkets where these same households were regularly shopping. The firm's high priced items have been listed previously and provide proof that outside of a limited stock of deli meats and five bags of rice, the firm stocked virtually no expensive eligible food items. While some households may purchase some of the firm's highest priced items, it is unlikely they would be purchased multiple times and would account for the many transactions exceeding \$100.00 in this Attachment. In reality, and as evidenced by the FNS store visit, the firm's actual quantity and variety of staple food stock is very limited making it unlikely that SNAP households that shop at super stores and supermarkets on a regular basis would consider the firm to be their primary grocery store. Accordingly, Appellant's claims regarding the store being well-stocked with items that are "far more expensive and in larger quantities" than what is typically found in a convenience store have not been substantiated by the evidence and therefore are not sufficient to prove the legality of the charge letter transactions.

Although the subject store may have contained sufficient inventory to satisfy any single charge letter transaction, this does not explain why a SNAP household would spend up to \$155.37 in a single transaction at a convenience store with a very limited stock of staple foods, that is not optimized for bulk sales, and that is located in proximity to superiorly stocked competitor stores.

Information obtained during the May 19, 2021, FNS store visit shows that the Appellant firm offered a very limited quantity and variety of SNAP eligible staple food items, many accessory foods, and many ineligible items. It is specifically noted that the firm had no fresh or frozen unprocessed meat or seafood, no dried seafood, a very limited quantity and variety of processed meats and seafood (jerky, deli meats, canned meat/poultry/fish, and one three pound package of grilled Mesquite chicken fillets), no frozen entrees, no frozen dinners, almost no fresh and no frozen fruits and vegetables, and a very limited stock of canned and packaged staple food items. The fact that tobacco, smoking accessories, vape products, hot foods, hot drinks, ATM, health and beauty items, household products, paper products, auto products, hats, clothing, incense, electronics accessories, and jewelry are not eligible for purchase with SNAP benefits also provides no justification for the large transaction amounts.

Higher food prices make it even more unlikely that SNAP recipients, with very limited food dollars, would want to spend a considerable part of their benefits in a store that does not address all of their food needs when they are already shopping at larger, fully stocked stores that would offer a greater variety of foods at lower prices. Many of these stores also offer store brand products at lower prices, weekly specials, and have multiple large shopping carts and checkouts with built-in scanners and conveyor belts to facilitate processing purchases quickly. Additionally, Appellant furnished no itemized cash register and EBT receipts for the period under review to document the legitimacy of these excessively large transactions. The firm also had a small checkout area and no shopping carts that were available to customers thereby making it extremely difficult to facilitate the great quantities of eligible food items required to make up these large dollar transactions. The fact that the firm carries a very limited stock of staple food items also makes it improbable that the high dollar transactions in this Attachment were for the purchase of eligible food items and more likely that the amounts were contrived.

The Office of Retailer Operations and Compliance analyzed the invoices/receipts provided after excluding any ineligible items on individual invoices/receipts and removing invoices/receipts dated outside the review period. The review of invoices and receipts also shows that many of the eligible items purchased are restaurant sized products (e.g., five pound containers of sour cream, gallon containers of mustard, gallon containers of taco sauce, gallon containers of sliced Jalapenos, etc.) and inexpensive accessory foods such as snacks, soda and other beverages, and lots of candy in addition to many ineligible items (many tobacco products and accessories, household products, cleaning products, health and beauty products, charcoal, food preparation products, clothing, and other nonfood items. A standard 40 percent markup was applied to the invoice total of \$37,716.55 resulting in potential eligible food sales of \$52,803.30. SNAP redemptions for the same period amounted to \$81,084.30 showing that the firm did not have sufficient food inventory to support its SNAP redemptions during the review period. This analysis did not consider any credit/debit/cash sales which would further widen the \$28,281.00 gap between the inventory and SNAP redemptions.

SNAP redemptions at the Appellant firm fluctuated unusually following receipt of the charge letter on December 17, 2021. Following the receipt, the volume of SNAP redemptions at the Appellant firm decreased 22.31 percent from November 2021 to January 2022 while the number of SNAP transactions decreased 18.66 percent and the average dollar amount of SNAP transactions decreased 4.51 percent during the same period. A pronounced fluctuation in SNAP redemptions following receipt of the charge letter is a clear indication of trafficking since, if trafficking were not occurring, there would be no abnormal fluctuations in redemption amounts. This substantial decrease in sales volume, the average transaction amount, and the number of transactions is substantial evidence of suspicious transactions at the Appellant firm that can most likely be attributed to trafficking of SNAP benefits.

Based on these discussions, Appellant did not provide adequate evidence to support the legitimacy of the excessively large transactions in this Attachment.

Other Contentions

The purpose of this review is to either validate or to invalidate the earlier decision of the Office of Retailer Operations and Compliance and is limited to what circumstances were at the basis of the action at the time such action was made. In an appeal of an adverse action, Appellant bears the burden of proving by a preponderance of evidence that the administrative action should be reversed. That means the Appellant has the burden of providing relevant evidence that a reasonable mind, considering the record as a whole, would accept as sufficient to support a conclusion that the argument asserted is more likely to be true than untrue. Assertions that the firm has not violated program rules, by themselves and without supporting evidence and rationale, do not constitute valid grounds for dismissal of the current charges of violations or for mitigating their impact. 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, fulltime, 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. Additionally, a record of participation in SNAP with no previously documented instance of violations does not constitute valid grounds for dismissal of the current charges of violations or for mitigating the impact of those charges. Appellant's other contentions are addressed in this section.

Appellant's claim that the firm offered chicken, fish, and other expensive foods for sale during the review period is not supported by the evidence. The FNS store visit conducted on May 19, 2021, showed only one bag of frozen grilled Mesquite chicken fillets available for purchase on the store sales floor and what appears to be a tray containing four individual chicken fillets in the deli case. The freezers in the kitchen/food prep area did contain several boxes of frozen fish and chicken as well as boxes of French fries and breaded okra, but there was no signage or other indication that these products were available for purchase by customers as SNAP eligible uncooked food products. Additionally, while the volume of these products purchased by the firm during the review period would have been sufficient for the firm's hot food sales, it would not have been sufficient for retail sales as well. Based on the evidence, the explanation that SNAP recipients were purchasing these foods appears to have been contrived in an attempt to avoid the permanent disqualification.

Appellant also claims, "The photographs further depict that the sales of fried fish and chicken are a large part of the business of Brooklyn Mini Mart and given the prices at which these items are sold, it is not uncommon for a customer to have a bill that would be considered extraordinary for most convenience stores, but not for this type of a grocery store. The invoices forwarded to you from Sam's Club evidence the quantity of product being purchased for resale as part of the restaurant portion of the Brooklyn Mini Mart. In essence, this store has become a neighborhood grocery store and restaurant for the residents surrounding its location and as a result it is commonplace for customers to incur large purchases." The evidence does show that fried chicken, fish, French fries, and okra were available for purchase at the firm as hot foods during the review period. However, hot foods cannot be purchased using SNAP benefits and firms that are restaurants are not eligible for authorization as SNAP retail food stores.

The owner and the firm were charged with trafficking based on a computer analysis of the store's transactions for the review period. The charges do not derive from the use of a confidential informant or independent investigator who visited the store and made illegal purchases to support findings of trafficking, but by a computer program used by SNAP Administrators. While traditional undercover operations are still in use by USDA, for many years federal regulations have also authorized the use of evidence consisting of EBT transaction data in investigations of SNAP retail stores to determine if trafficking is occurring and U.S. District Courts have long upheld the validity of EBT transaction data.

The issue under review involves a charge of trafficking SNAP benefits based on EBT transaction data. EBT transaction data is covered in SNAP regulations at 7 CFR § 278.6(a) and is addressed below. Trafficking is always considered to be the most serious violation even if it is a first offense therefore a temporary suspension or lesser penalty would not be applicable. SNAP regulations at 278.6(e)(1) clearly state that, "FNS shall disqualify a firm permanently if personnel of the firm have trafficked as defined in § 271.2." SNAP regulations at 7 CFR

§ 271.2, define trafficking as, “The buying, selling, stealing, or otherwise effecting an exchange of SNAP benefits for cash or consideration other than eligible food”. SNAP regulations at 7 CFR § 278.6(a) clearly 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, 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”. In the present case, the data presented in the Attachments is solely based on the SNAP EBT transactions conducted at the Appellant firm during the review period. This firm was selected as a result of a series of complex algorithms that make numerous data comparisons with other like type firms during the review period. All of the transactions were then reviewed and analyzed by the Office of Retailer Operations and Compliance staff before the decision was made to issue a charge letter. This investigative process included a detailed examination of information obtained from various sources, including, but not limited to the inventory report and photos from the FNS store visit, a transaction comparison and analysis of like type and larger stores, and analysis of shopping patterns for recipient households conducting transactions at the Appellant firm during the review period. This analysis also included a review of the firm to ensure its store classification was correct and the data comparisons with like type firms valid. Additionally, there are nearby like type stores whose transaction data does not form these suspicious patterns and are therefore not at risk of disqualification for trafficking. There is also no regulatory requirement that trafficking disqualifications be based solely on on-site undercover operations.

Based on this empirical data, and in the absence of sufficient evidence for the legitimacy of such transaction patterns, a conclusion can be drawn, through a preponderance of evidence that the “unusual, irregular, and inexplicable” transactions and patterns cited in the charge letter evidence trafficking as the most likely explanation for the questionable transactions listed. It is herein determined that Appellant did not provide a preponderance of evidence demonstrating that the transactions contained in the charge letter were more likely due to eligible food sales than not. Under review, the evidence more substantially supports a conclusion that the transaction activity in the charge letter Attachments is due primarily to trafficking in SNAP benefits.

The Food and Nutrition Act of 2008, as amended, and the regulations issued pursuant thereto do not cite any minimum dollar amount of cash or SNAP benefits, or number of occurrences, for such exchanges to be defined as trafficking. Nor do they cite any degrees of seriousness pertaining to trafficking of SNAP benefits. Trafficking is always considered to be the most serious violation, even when the exchange of SNAP benefits for cash is dollar-for-dollar or is conducted by a non-managerial store clerk. This is reflected in the Food and Nutrition Act, which reads, in part, that disqualification “shall be permanent upon the first occasion of a disqualification based on trafficking by a retail food store.” In keeping with this legislative mandate, Section 278.6(e)(1)(i) of the SNAP regulations states that FNS shall disqualify a firm permanently if personnel of the firm have trafficked. There is no agency discretion in the matter of what sanction is to be imposed when trafficking is involved and second chances are not an authorized option under existing regulations.

CIVIL MONEY PENALTY

A CMP for hardship to SNAP households may not be imposed in lieu of a permanent disqualification as specified in SNAP regulations at 7 CFR § 278.6(f). Trafficking is a permanent disqualification so Appellant is not eligible for a hardship CMP.

The Office of Retailer Operations and Compliance determined that the Appellant was not eligible for a trafficking CMP in lieu of a disqualification under 7 CFR 278.6(i) because Appellant failed to request or to submit sufficient evidence to demonstrate that the firm had established and implemented an effective compliance policy and program to prevent SNAP violations within the specified timeframe. As such, the Office of Retailer Operations and Compliance determined that Appellant was not eligible for a trafficking CMP in lieu of permanent disqualification.

It is noted for the record that the December 15, 2021, FNS charge letter stated that, “If you request a CMP, you must meet each of the four criteria listed and provide the documentation as specified within 10 calendar days of your receipt of this letter. No extension of time can be granted for making a request for a CMP or for providing the required documentation.”

Based on the above discussion and the evidence under review, Appellant failed to meet the regulatory standard for a trafficking CMP as it did not request a CMP or provide substantial evidence that it met all four criteria required by 7 CFR §278.6(i). Based on the above, the Office of Retailer Operations and Compliance’s decision not to impose a CMP in lieu of disqualification is sustained as appropriate pursuant to 7 CFR §278.6(i).

CONCLUSION

The Office of Retailer Operations and Compliance presented a case that Appellant has likely trafficked in SNAP benefits. Their analysis of Appellant’s EBT transaction record was the primary basis for its determination to permanently disqualify Appellant. This data provided substantial evidence that the questionable transactions during the review period had characteristics consistent with trafficking violations in SNAP benefits. This is evidenced by: the suspicious patterns in two Attachments of EBT transaction data, the inadequacy of the store’s staple food stock as observed during the store visit to support large transactions in short time frames, the lack of adequate evidence for customer spending habits given that there are other SNAP authorized stores located within proximity to Appellant that likely offer a greater selection of eligible food items at competitive prices, and the irregular SNAP transaction data of Appellant as compared to other like type and larger stores in the county and state.

The retailer has not provided sufficient evidence to rebut the case that Appellant most likely trafficked in SNAP benefits. Therefore, based on a review of all of the evidence in this case, it is more likely true than not true that program violations did, in fact, occur as charged. Based on the discussion above, the determination to impose a permanent disqualification against Appellant is sustained. Furthermore, the Office of Retailer Operations and Compliance properly determined that Appellant was not eligible for a trafficking CMP according to Section 278.6(i) of the SNAP regulations.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in 7 U.S.C. § 2023 and 7 CFR § 279.7. If a judicial review is desired, the complaint must be filed in the U.S. District Court for the district in which Appellant's owner resides, is engaged in business, or in any court of record of the State having competent jurisdiction. This complaint, naming the United States as the defendant, must be filed within thirty (30) days of receipt of this decision.

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.

ROBERT T. DEEGAN
ADMINISTRATIVE REVIEW OFFICER

May 17, 2023