

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

**N & Out Market LLC,**

**Appellant,**

**v.**

**Retailer Operations Division,**

**Respondent.**

**Case Number: C0256714**

**FINAL AGENCY DECISION**

The U.S. Department of Agriculture (USDA) Food and Nutrition Service (FNS) finds that there is sufficient evidence to support the determination by the Retailer Operations Division to impose a permanent disqualification from participating as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP) against N & Out Market LLC (hereinafter “Appellant”).

**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 N & Out Market LLC.

**AUTHORITY**

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

**CASE CHRONOLOGY**

N & Out Market LLC was initially authorized to participate in SNAP on September 15, 2021. In a letter dated November 14, 2022, the Retailer Operations Division charged 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 December 2021 through May 2022 and information obtained during a visit to the store by an FNS contractor on January 29, 2022. The attachments enclosed with the charge letter specified the questionable and unusual SNAP transactions indicative of trafficking that were conducted at Appellant’s firm during the review period. The letter noted that the penalty for trafficking is permanent disqualification, as

provided by 7 CFR § 278.6(e)(1). It informed Appellant of the right to respond to the charges within 10 days of receipt to explain the irregular SNAP transaction patterns and provided that Appellant may request a civil money penalty (CMP) in lieu of permanent disqualification for trafficking within 10 days of receipt of the charge letter, under the conditions specified in 7 CFR § 278.6(i).

The record reflects that on November 28, 2022, and December 12, 2022, Appellant requested extensions of time for responding to the letter of charges. The Retailer Operations Division granted the extensions.

By email, on November 27, 2022, Appellant provided a written reply to the Retailer Operations Division denying trafficking occurred. This reply included a one-page product price list and four undated photographs of the store's stock. In part, Appellant explained the unusual transaction activity in the charge letter resulted from the store's location in a high population density area with numerous multifamily buildings, customers lacking transportation relied upon Appellant, two area stores leaving the SNAP, and inflation.

In a December 19, 2022, telephone call, Appellant explained the transaction activity was the result of customers having no other food options and lacking transportation, the store's "You Buy, We Fry" service, bulk sales, other store closures, increases in neighborhood population due to COVID, and inflation.

By email, on December 22, 2022, Appellant provided store fliers advertising its "You Buy, We Fry" service, Bundle sales priced between \$49.99 and \$289.99, and a document titled "Management Info on Retailers Eligibility," which primarily consisted of the FNS Policy Memo titled *Retailer Eligibility – Prepared Foods and Heated Foods*.

By email on December 27, 2022, and December 29, 2022, Appellant responded to the Retailer Operations Division's questions about where the attachments provided on December 22, 2022, were exhibited and for how long they had been exhibited. Appellant stated they were exhibited behind the store's counter in a sleeve near the calendar and on display screens for approximately a year.

After evaluating 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 January 30, 2023. This letter informed 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 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 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 email dated February 9, 2023, Appellant, through counsel, appealed the Retailer Operations Division's determination by requesting an administrative review. The request was granted. After

receiving an extension of time to provide additional information in support of its position, Appellant, through counsel, submitted additional information on March 22, 2023.

## **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 § 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...

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

7 CFR § 278.2(a) states, in part:

[SNAP benefits] may be accepted by an authorized retail food store only from eligible households...only in exchange for eligible food. [SNAP benefits] may not be accepted in exchange for cash...[and] may not be accepted in payment of interest on loans or for any other nonfood use.

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(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(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(e)(1)(i) states:

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

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(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.

### **SUMMARY OF CHARGES**

FNS charged N & Out Market LLC with trafficking based on an analysis of FNS records, which included observed store characteristics, recorded food stock, and store pricing gathered during a store visit, as well as Electronic Benefit Transfer (EBT) transaction data for December 2021 through May 2022. The attachments enclosed with the charge letter reflected the following transaction patterns, which may be indicators of trafficking:

- **Charge Letter Attachment 1:** Multiple transactions made from the accounts of individual SNAP households within a set time period.
- **Charge Letter Attachment 2:** Transactions that depleted the majority or all of a recipient's monthly SNAP benefits made in short timeframes.
- **Charge Letter Attachment 3:** EBT transactions that were large based on the observed store characteristics and recorded food stock.

### **APPELLANT'S CONTENTIONS**

Appellant, through counsel, submitted a voluminous brief which included a considerable number of contentions targeted to broadly question the validity of trafficking cases based on SNAP benefit redemption data, as well as the processes used to develop and decide these cases. Appellant also argues, in part, that normal SNAP household shopping behaviors, local business conditions, and other factors can explain the transactions identified in the charge letter. Appellant cites case law and past administrative review decisions in support of its contentions. For purposes of brevity, these broader arguments will not be specifically listed here.

Contentions specific to Appellant's case are summarized below:

- Appellant denies the trafficking allegations.
- The inspector's list of higher-priced items was not exhaustive, as other items in the inventory were documented but not listed by price.
- Many of Appellant's customers are SNAP participants from surrounding neighborhoods.
- Appellant is near a high density of what appears to be single-family homes. In addition, the store is near a bus stop, school, recreation center, the African American Hall of Fame, and several churches.
- Regarding Charge Letter Attachment 1:
  - These transactions are the result of Appellant's business practices, forgotten items, co-shopping, and/or the habits of SNAP clientele.
  - Appellant's customers' shopping habits are like those of other SNAP households, which studies show spend more than half of its benefits in the first week and three-quarters by the second week.
  - Customer co-shopping is on the rise.
  - A number of SNAP households come into the store multiple times a day, often sending children on separate shopping trips to pick up items from time to time.
  - Customers make purchases for friends, for large gatherings, or to satisfy needs that are not obvious.
  - There are no logistic barriers to the transactions in Attachment 1.
  - Telephone orders caused transactions on this attachment.
  - Appellant's inventory is sufficient to account for the transactions.
  - SNAP participants shop at Appellant because it is more convenient, and/or they lack consistent transportation.
  - SNAP customers make back-to-back purchases at Appellant because they are unemployed, bored, or use in-person shopping as a recreation event.
- Regarding Charge Letter Attachment 2:
  - These transactions are the result of co-shopping, the store being used as a primary grocer for some customers, and the lack of local competition.
  - SNAP participants exhaust their benefits at Appellant because it is more convenient.
  - Appellant's inventory is sufficient to account for the transactions.
- Regarding Charge Letter Attachment 3:
  - These transactions are the result of Appellant's pricing structure, local SNAP household demographics and shopping habits, inventory, co-shopping, a portion of local participants relying on Appellant as a primary grocery, and/or are the normal reflection of SNAP participants' shopping habits.
  - Appellant is not responsible for monitoring SNAP household shopping habits.
  - Sweetened beverages and salty snacks are within the top 10 expenditures for SNAP households. It is reasonable to expect SNAP customers to spend large amounts and/or the majority of their benefits at Appellant's store given its inventory.
  - Households in the charge letter are likely to be large, resulting in large transaction amounts.
  - These are not very large transactions. The largest transaction was for 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

- The high-priced items in the store do not require the store to have a huge amount of counter space for transactions. Given that a number of items are roughly \$10 each, six items would not be difficult to carry and could be set in the space set out in the store visit photographs.
- The transactions are tied directly to the store's inventory and convenience for households that do not have regular access to transportation.
- Other stores nearby do not offer similar inventory.
- Most other grocers in Appellant's geographical area are likely to have the same number (or greater) of similar transactions.

In support of its contentions, Appellant provided the following documentation as evidence:

- An ALERT Correlation Coefficient Calculation.
- *Benefit Redemption Patterns in the SNAP in FY 2017 Final Report*, Insight Policy Research.
- *U.S. Grocery Shopping Trends Annual Report*, FMI, 2016.
- An article titled, "What does SNAP benefit usage tell us about food access in low-income neighborhoods?"
- An article titled, "Shopping pattern and food purchase differences among SNAP households and non-SNAP households in the United States."
- A one-page profile of SNAP households in Appellant's congressional district.
- *Foods Typically Purchased by SNAP Households*, FNS, November 2016.
- An article titled, "Online grocery shopping knowledge, attitudes, and behaviors among SNAP participants."
- Recent and Upcoming USDA Economic Research Service (ERS) Research presentation: SNAP and Retail.
- *Super Stores' Impact on the Availability of Supplemental Nutrition Assistance Program-Approved Stores*, ERS Report, June 2021.

These explanations may represent only a brief summary of Appellant's contentions. However, in reaching a decision, full consideration has been given to all contentions presented and evidence submitted.

## ANALYSIS AND FINDINGS

This review examines the relevant information regarding the Retailer Operations Division's trafficking determination. The record must contain evidence sufficient to raise a presumption that trafficking occurred. In a trafficking determination, this evidence includes SNAP transaction data, considered together with other available information, such as store visit observations, the location and characteristics of competitor firms, and household shopping patterns. Once the presumption is established, Appellant bears the burden of providing relevant evidence to support a conclusion, considering the record as a whole, that it did not engage in trafficking. If Appellant fails to show this, the case will be sustained.

Retailers are provided opportunities to submit evidence accompanied by explanations of the legitimacy of questionable transactions, both to the Retailer Operations Division and here on

administrative review. Without supporting evidence and rationale, assertions that the firm has not violated program rules do not constitute valid grounds for overturning the determination.

Based on the evidence in this case, the SNAP transactions listed in the November 14, 2022, charge letter were indicative of trafficking. Appellant has not provided reasonable explanations supported by sufficient credible and convincing evidence to demonstrate that these transactions were more likely due to reasons other than trafficking. Accordingly, the permanent disqualification is sustained. Discussed below are elements of the Retailer Operations Division's record, Appellant's contentions, and the findings of this review.

### **Administrative Reviews Independent of FOIA Process**

Appellant alleges it is unable to meaningfully respond to the charges because it is not provided with all the information on which the charges are based. Along with the charge letter, Appellant was provided with a detailed list of suspect transactions and the store visit documentation.

Appellant also contends not holding determinations in abeyance while FOIA responses are pending violates 7 CFR §278.6(b)(1) according to *Triple E Express vs. ROD*, Case No. C0191279 because Appellant is not given a full opportunity to respond. The finding in *Triple E Express* is based on outdated regulations. Since October 26, 2020, holding determinations and administrative reviews in abeyance while FOIA responses are pending is prohibited.

### **Store Characteristics**

In reaching a disqualification determination, the Retailer Operations Division considered information obtained during the January 29, 2022, store visit conducted by a USDA contractor to observe Appellant'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 documented the store size, description, available stock, and characteristics. The report also described the store's checkout counter space area and noted the effect of any limitations of the available surface area on placing large purchases or processing more than one customer at a time.

With a few exceptions, the SNAP eligible food stocked by the store was generally of a low dollar value consisting mainly of inexpensive canned and packaged goods, snack foods, single-serving food items, and accessory food items. Given the available inventory, there was very little sign that the firm would likely have SNAP redemption patterns that differed significantly from those of similarly sized competitors, especially competitors that sell similar food items.

### **SNAP Transaction Analysis**

The charge letter attachments specify the unusual transactions and transaction patterns found at Appellant's store.

**Charge Letter Attachment 1: Multiple transactions were made from the accounts of individual SNAP households within a set time period. 5 U.S.C. § 552 (b)(6) & (b)(7)(C).** Abnormally



repetitive transactions over short periods of time at rates substantially greater than expected can be an indication that trafficking violations are occurring. During the review period, Appellant conducted an average of more than 25 transactions per month that met the parameters of this attachment.

**5 U.S.C. § 552 (b)(6) & (b)(7)(C).**

Although it is not uncommon for customers to have multiple transactions in a day or two, it is uncommon that, at a convenience store, such multiple transactions total large dollar amounts. The SNAP transactions noted in the charge letter are questionable not because they exceed any limits for use, but rather because they display characteristics of use inconsistent with the nature and extent of Appellant's stock and facilities and are therefore indicative of trafficking.

Appellant contends that it is located in an area with many SNAP participants and that it is located near high-density housing, public transportation, churches, a recreation center, a school, and the African American Hall of Fame Museum. While this may be true, the Retailer Operations Division identified similar and larger stores within one mile of Appellant. There appeared to be no basis for unusually high customer attraction to Appellant, there being no great price advantage, profusion of otherwise unavailable ethnic goods, or special or custom services rendered.

Appellant contends the transactions in this attachment are due to customers making purchases for friends, for large gatherings, or to satisfy needs that are not obvious. Appellant has offered no evidence to support these contentions. As to whether or not co-shopping actually affected Appellant during the review period, this argument is little more than conjecture. Appellant has provided no evidence to show that co-shopping is particularly common among SNAP recipients in Peoria, Illinois. Appellant has also not provided an explanation for why, if such behaviors were occurring, these purchases would occur at Appellant much more frequently than at nearby similarly situated stores. It is unlikely that a family relying on SNAP to supplement their nutritional needs would share these benefits with another family that purchases and prepares meals separately. Unsubstantiated arguments such as these do not provide a valid basis for dismissing the charges or for mitigating the penalty imposed.

Appellant stated that back-to-back purchases are because Appellant is more convenient, SNAP customers lack access to transportation, Appellant's inventory is superior to nearby stores, and two area stores left the SNAP. Appellant provided no evidence in support of these contentions. The record reflects that nearly all of the customers conducting rapid, repetitive, and large transactions at Appellant also spent SNAP benefits at better-stocked and more competitively-priced grocery stores, sometimes on or about the same day they shopped at Appellant. Unsubstantiated arguments such as these do not provide a valid basis for dismissing the charges or for mitigating the penalty imposed.

Appellant stated telephone orders caused some of the transactions in this attachment. During the store visit, the contractor noted the store offers telephone orders. However, 74 percent of the transaction sets on this attachment occurred more than one hour apart. It is unclear how Appellant's explanation that telephone orders were sometimes broken up into separate orders at

the request of the SNAP household could explain the majority of the transaction activity noted in this attachment.

Finally, Appellant contends SNAP customers make back-to-back purchases at Appellant because they are unemployed and bored, because shopping is a recreational activity, or because customers return to the store to make a second purchase after going home. Again, while there are legitimate reasons why a SNAP recipient might return to a convenience store in a short period of time, the examples in the attachment indicate a series of purchases that total to large amounts. SNAP benefits are intended to supplement the food budget for households whose net income is near or below the Federal Poverty Level. Anecdotal arguments offer little insight into the transactions in question and do not verify what took place between the customers and the store clerks at the point of sale.

Without compelling evidence from Appellant to show that the transactions in Attachment 1 were legitimate, this review finds that trafficking was a likely cause of the unusual patterns.

**Charge Letter Attachment 2: Transactions that depleted the majority or all of a recipient's monthly SNAP benefits made in short timeframes. 5 U.S.C. § 552 (b)(6) & (b)(7)(C).**

In some cases, SNAP customers depleted SNAP account balances to within pennies of a zero balance and/or depleted balances during the first week of the month.

**5 U.S.C. § 552 (b)(6) & (b)(7)(C).**

Appellant contends the transactions on this attachment were caused by customers using the store as a primary grocer, the store's inventory, the lack of local competition, and SNAP households finding the store convenient.

Regarding Appellant's contentions about local competition and serving as a primary grocer, the Retailer Operations Division identified at least 14 other SNAP-authorized stores within one mile of Appellant, including a supermarket. This demonstrates that households shopping at Appellant were nearby other SNAP authorized stores, including a larger store that may have lower prices and better inventory, making it less likely that SNAP recipients would expend their SNAP benefits in large amounts at Appellant's convenience store. Further, the record shows that each household in Attachment 2 completed transactions at other SNAP authorized stores during the review period.

Regarding Appellant's contentions about the store's inventory, the inventory available at the time of the store visit did not appear to provide an explanation for the transaction activity in Attachment 2. In its reply to the Retailer Operations Division, Appellant provided four undated photographs, a one-page product price list for items currently priced from \$4.96 to \$14.99, a store flyer advertising a "You Buy, We Fry" service, and a store flyer advertising four bundles priced from \$49.99 to \$289.99. Neither the contractor report, completed in collaboration with the store owner, nor the signage visible during the store visit showed these bundles or "You Buy, We Fry" service. Because there is no way for this review to determine that these undated photographs, product price list, and store fliers reflect store conditions at the time of the review period, this review finds them to be of little probative value. Appellant has not provided

evidence, such as inventory invoices, to document the store's inventory or that the store purchased stock to support bundle or package sales during the review period. Unsubstantiated arguments do not provide a valid basis for dismissing the charges or for mitigating the penalty imposed.

Appellant referenced a government report on SNAP shopping patterns that found that SNAP households typically have less than a quarter of their benefits remaining two weeks after receiving their monthly SNAP benefits. While it is true that many SNAP households spend their benefits early in the issuance month, this behavior does not fully explain why so many households spent the vast majority of their allotment in a matter of minutes or hours at Appellant. Exhausting one's benefits in this manner, leaving the household with little to no remaining funds for the rest of the month, has been shown to be indicative of trafficking violations.

The Retailer Operations Division compared Appellant to two stores offering similar stock within one mile. Appellant completed significantly more transactions where the bulk of the household's benefits were depleted within short time frames.

5 U.S.C. § 552 (b)(6) & (b)(7)(C).

As noted earlier, in an administrative review, the burden of proof lies with Appellant to prove by a preponderance of the evidence that the allegations are erroneous, and a reversal of the disqualification is warranted. Absent from Appellant's argument in this case is compelling evidence, such as itemized cash register receipts, to show that the specific transactions in question were legitimate purchases of eligible food. Without such evidence, it is reasonable for this review to conclude that the patterns found in this attachment were likely the result of trafficking.

**Charge Letter Attachment 3: EBT transactions that are large based on the observed store characteristics and recorded food stock.** 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Notably, these large transactions accounted for more than 19% of the firm's SNAP transactions during the review period.

Appellant contends that because sweetened beverages and salty snacks are within the top 10 expenditures for SNAP households, it is reasonable to expect SNAP customers to spend large amounts and/or the majority of their benefits at Appellant, given its inventory. Further, Appellant argues the largest transaction is not very large given the store's inventory. 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

Within Attachment 3, there were unusual patterns of repeating dollar values. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Nothing in the store visit or Appellant's reply appeared to explain these unusual repeating dollar values. Clusters of transactions in large dollar values, without corresponding packages, bundles, or stock priced at those dollar values, is very unusual and likely indicative of trafficking.

As noted above, in its December 22, 2022, reply to the Retailer Operations Division, Appellant presented a flier stating it offered bundle sales priced at \$49.99, \$129.99, \$215.99, and \$289.99. However, the store visit report, completed in collaboration with the store owner, indicated Appellant did not offer package or bundle sales. Other than the flyer, Appellant provided no evidence, such as invoices or cash register receipts, to support this contention. This review noted there were no transactions in Attachment 3 matching the bundle amounts provided by Appellant. An unsubstantiated argument such as this does not provide a valid basis for dismissing the charges or for mitigating the penalty imposed.

Given that Appellant firm did sell a selection of staple foods as well as other SNAP eligible items, including snacks and drinks, it is likely that there would have been an occasional instance where the transaction amount was high, perhaps exceeding \$40.00. As such, there may be some legitimate SNAP transactions among the transactions listed in Attachment 3. However, as noted earlier, there is no evidence that the firm would be likely to have SNAP redemption patterns that differ significantly from nearby, similarly situated competitors. The substantial number of high-dollar transactions in a six-month period calls into question the legitimacy of these transactions.

Attachment 3 includes 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Considering how many food items it would typically take to add up to \$60.00 or more, and considering that the store lacks unique food inventory, has limited staple foods, a constricted checkout area, and no shopping carts to help customers transport large amounts of food, this review finds it difficult to believe that every large transaction in Attachment 3 was a legitimate purchase of eligible food. While there are no logistic barriers to the transactions listed in the charge letter, based on the store layout, infrastructure, and available inventory, it is not credible that Appellant would so frequently conduct such large transactions.

Appellant stated that larger purchases might be because the SNAP households are larger. While this may be true, this does not explain why larger SNAP households are more likely to shop at Appellant rather than other stores offering similar stock within one mile.

Although Appellant claims that some high-priced items were not recorded in the store visit report, it did not provide details about what might have been missed. The store visit photographs support the contractor report, which was completed in collaboration with the store owner.

Appellant, through counsel, has argued that it has no control over and no obligation to monitor customer shopping habits. Appellant further argues that the store operates as a primary grocery for some households. With regard to these contentions, it is true that retailers have no regulatory or statutory obligation to monitor the spending habits of SNAP recipients, including how much a household may spend at a store at a given time. It is also true that some households may choose to spend most or all of their monthly allotment at a single store, especially if that store is conveniently located or offers food items that are not readily available elsewhere. However, as previously noted, the transactions cited 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 and food inventory, and significantly different from patterns found in nearby competitive stores – even those competitors who sell similar food items. The transactions identified in the charge letter are not marginally abnormal, but decidedly so.

In a case such as this one, which is based on an analysis of transaction data, an Appellant must prove, through a preponderance of evidence, that the transactions detailed in the charge letter were more likely than not due to the legitimate sale of eligible food in exchange for SNAP benefits. In the absence of compelling information or documentation weighed in comparison to that provided by the Retailer Operations Division, the agency's determination must be sustained.

### **Household Analysis:**

In addition to determining if households had access to other shopping options, the Retailer Operations Division conducted a household analysis to determine if households conducting suspicious transactions at Appellant actually utilized larger stores during the review period. Larger stores usually have lower prices and better inventory.

The analysis included examples of five households with unusual shopping patterns at Appellant that also regularly shopped at larger stores. The following examples from the Retailer Operations Division show households shopped at better stocked firms on or about the same day as conducting large transactions at Appellant:

5 U.S.C. § 552 (b)(6) & (b)(7)(C).

According to the home addresses provided by the Retailer Operations Division, each of the analyzed households lived more than one mile from Appellant. Each of the households also regularly shopped at larger, better stocked stores. However, despite this access to larger, better stocked stores, these sampled households conducted multiple transactions in set time frames, transactions that depleted the majority of their benefits in short timeframes, and/or transactions that were large based on the observed store characteristics and recorded food at N & Out Market LLC.

### **Comparison with Similarly Situated Grocery Stores:**

The Retailer Operations Division compared Appellant's transaction activity to the transaction activity of two nearby convenience stores identified as carrying similar stock. Appellant had substantially more SNAP transactions meeting the parameters in the charge letter than the two nearby comparably stocked stores.

Appellant's average transaction 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

Appellant's inventory, characteristics, and location do not explain why Appellant had more frequent transactions meeting the parameters in the charge letter and a notably higher average transaction as compared to nearby convenience stores. If Appellants arguments about store location and SNAP household shopping habits were causing the questionable transactions at the subject store, it would be expected that similar patterns would exist at other nearby convenience stores. However, that is not the case.

## **Evidence of Trafficking**

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

Appellant provided a correlation coefficient calculation to support its contention that the relationship between ALERT scans and trafficking is weak. Appellant asserts that it has calculated this based on the results of undercover investigations. These contentions are pure conjecture on the part of Appellant. Appellant does not have the necessary data to perform a reliable correlation analysis.

## **Civil Money Penalty**

As noted earlier, the Retailer Operations Division determined that Appellant was not eligible for a CMP 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 Appellant did not request a trafficking CMP within the required 10-day period. 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.

## **Case Law and Past Administrative Reviews**

With regard to the case law cited by Appellant, it is beyond the scope and authority of this review to determine the applicability of same. This review is limited to consideration of whether or not the Retailer Operations Division duly adhered to the Food and Nutrition Act of 2008, as amended, and the implementing regulations, and whether or not the action taken is sustainable by a preponderance of the evidence. Therefore, the application of any judicial precedent is better

addressed via judicial review. Accordingly, no further findings or conclusions are rendered in this regard.

With regard to the prior Final Agency Decisions cited by Appellant, this administrative review decision is based on the specific circumstances of this case as documented by the materials provided by Appellant and the Retailer Operations Division. This administrative review decision does not establish policy or supersede Federal law or regulations. The determination in this case conforms to SNAP regulations and is consistent with sanctions imposed upon other retailers that have committed similar violations.

## **CONCLUSION**

The Retailer Operations Division's analysis of the EBT transaction record for N & Out Market LLC was the primary basis for its determination to permanently disqualify the retailer. 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 Appellant. Likewise, 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 Appellant, N & Out Market LLC, under the ownership of Willie Simmons, 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.

AMIE CHURCHILL  
Administrative Review Officer

March 31, 2023