

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

Star Market,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0201070

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS) that there is sufficient evidence to support a permanent disqualification of Star Market (hereinafter “Appellant”) from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP) as imposed by FNS’s Retailer Operations Division.

ISSUE

The issue accepted for review is whether or not 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 Star Market.

AUTHORITY

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

SUMMARY OF CHARGES

The Appellant was charged with trafficking and subsequently permanently disqualified from SNAP based on an analysis of EBT transaction data from January 2017 through June 2017. This involved the following transaction patterns which are common trafficking indicators:

- There were multiple transactions made from individual benefit accounts in unusually short timeframes.
- Excessively large purchase transactions were made from recipient accounts.

CASE CHRONOLOGY

The agency's record shows that FNS initially authorized Star Market for SNAP participation on June 19, 2008. Effective December 4, 2009, the firm was reciprocally disqualified from SNAP for a period of three years for violations committed in another USDA program, the Special Supplemental Nutrition Program for Women, Infants and Children (WIC). After serving its disqualification period, the firm's SNAP authorization was reinstated on January 18, 2013.

In a letter dated July 27, 2017, the Retailer Operations Division charged the Appellant with trafficking, as defined in Section 271.2 of the SNAP regulations, based on a series of irregular SNAP transaction patterns that occurred between the months of January 2017 and June 2017. The letter noted that the penalty for trafficking is permanent disqualification as provided by 7 CFR § 278.6(e)(1). The letter also stated that the Appellant could request a civil money penalty (CMP) in lieu of permanent disqualification for trafficking, but noted that such a request must be made and supporting documentation submitted within 10 days of receipt of the charge letter under the conditions specified in 7 CFR § 278.6(i).

In a letter faxed on August 4, 2017, the Appellant, through counsel, requested an extension of time to reply to the charges. The letter stated that by requesting an extension, it was forfeiting its right to request a CMP in lieu of disqualification. On August 7, 2017, the agency granted an extension to August 16, 2017, but stated that the timeframe for requesting a CMP in lieu of disqualification and submitting documentation in support of such a request could not be extended.

On August 14, 2017, Appellant's counsel submitted a request for case file information in a request made under the Freedom of Information Act (FOIA). This request put a hold on any requirement to further respond to the charge letter until after FNS responded to the FOIA request.

On September 20, 2017, FNS provided its response to the Appellant's FOIA request. The response included a four-page letter and 69 pages of responsive documents. The response letter further stated that the Appellant could appeal the agency's response, but must do so within 90 days of the date of the letter.

On December 18, 2017, Appellant's counsel filed an appeal to the agency's FOIA response. This appeal meant that the Appellant was not obligated to provide additional response to the charge letter until after the FOIA appeal process had concluded.

On January 17, 2020, the FOIA appeal response was completed and sent to Appellant's counsel.

In letter dated February 14, 2020, the Appellant, through counsel, provided its official response to the July 2017 charge letter. The response included a 12-page letter and a large amount of supporting evidence, including 19 photographs of the store; four signed affidavits from SNAP customers; 534 pages of inventory invoices and receipts (comprising roughly 150 distinct invoices); six bank statements; a list of payments made to inventory vendors; demographic and shopping-related reports from USDA and the Food Marketing Institute, and an April 2016 article from *Convenience Store News*.

In its response letter, the Appellant insisted that no trafficking was taking place at the store and provided a large number of arguments to support its position. In short, the Appellant argued that the store had sufficient inventory to justify the transactions in the charge letter, particularly its sales of cases of beverages, such as energy drinks, sodas, and juices. The Appellant further argued that the logistics of the store makes it possible to physically conduct the transactions listed in the charge letter. According to the Appellant, nothing in the store's operations would give any credence to the agency's claim that trafficking was occurring at the store. The Appellant also argued that its explanations and evidence provided plausible alternative reasons (that do not involve trafficking) for the unusual transaction patterns listed in the charge letter. Finally, the Appellant stated that in the event FNS determines that trafficking did occur, the Appellant would request a CMP in lieu of permanent disqualification.

After evaluating the Appellant's response and further considering the evidence in the case, the Retailer Operations Division concluded that trafficking had occurred as charged and issued a determination letter dated September 30, 2020. This letter informed the Appellant that it would be permanently disqualified from SNAP upon receipt of the letter in accordance with 7 CFR § 278.6(c) and § 278.6(e)(1). The letter also stated that the Retailer Operations Division considered the Appellant's eligibility for a trafficking CMP according to the terms of Section 278.6(i) of the SNAP regulations, but that a CMP was not appropriate because the Appellant failed to submit sufficient evidence to demonstrate that the firm had established and implemented an effective compliance policy and program to prevent SNAP violations.

In a letter postmarked October 8, 2020, the Appellant, through counsel, appealed the Retailer Operations Division's determination by requesting an administrative review. The request was granted and the case was assigned to an administrative review officer. On November 12, 2020, Appellant's counsel submitted a 20-page brief outlining its contentions in the case. It is noted that on August 18, 2021, the case was reassigned to review officer Jon Yorgason.

STANDARD OF REVIEW

In an appeal of adverse action, such as disqualification from SNAP participation, an appellant bears the burden of proving by a preponderance of the evidence that the administrative action should be reversed. This means that an appellant has the burden of providing relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true.

CONTROLLING LAW AND REGULATIONS

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

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

...[A] disqualification under subsection (a) shall be...permanent upon...the first occasion or any subsequent occasion of a

disqualification based on the purchase of coupons or trafficking in coupons or authorization cards by a retail food store or wholesale food concern or a finding of the unauthorized redemption, use, transfer, acquisition, alteration, or possession of EBT cards...

7 CFR § 278.6(a) states, in part:

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

7 CFR § 278.6(e)(1)(i) states:

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

7 CFR § 271.2 states, in part:

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

7 CFR § 271.2 states, in part:

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

7 CFR § 278.6(b)(1) states, in part:

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

to the charges contained in the letter within 10 days of receiving the letter...

7 CFR § 278.6(c) states, in part:

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

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

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

7 CFR § 278.6(b)(2)(iii) states:

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

7 CFR § 278.6(i) states, in part:

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

APPELLANT'S CONTENTIONS

The Appellant, through counsel, submitted a long list of contentions in its request for administrative review. These are summarized below, in relevant part:

- Appellant vehemently denies that it engaged in trafficking and seeks reversal of the September 30, 2020 decision to permanently disqualify the firm from SNAP.

- Star Market is a small grocery store, approximately 1,200 square feet in size (plus an additional 730 square feet of storage space) and has an inventory with a variety of staple food items, such as frozen chicken, beef, vegetables, fruits, fresh pork, Similac infant formula, orange juice, bacon, frozen tilapia filets in a two-pound bag, chips, milk, cheese, butter, eggs, lunch meat, deli meat, bread, rice, cakes, muffins, cereal, juices, jerky, ice cream, soda, energy drinks, etc.
- In response to the charge letter, the Appellant provided inventory invoices and receipts from the review period to show that the store makes frequent purchases of inventory to stock the store.
- The store serves the surrounding community, which suffers from high poverty rates, and is located directly across the street from a local park. The park generates a considerable amount of walk-in service. The firm has a very good reputation within the community.
- The nearest store is roughly three-tenths of a mile away and most comparison convenient stores are located nearer to each other rather than Star Market.
- The geographic realities have a meaningful impact on the firm's transactions in that the store has a monopoly on sales to SNAP participants that frequent the park (meaning sporting event snacks and drinks and party meals are going to be purchased there), and the frequency of purchases will be higher because there is nowhere else immediately nearby to shop.
- Approximately 10 percent of SNAP households in the area receive SNAP benefits.
- Appellant submitted national SNAP benefit redemption data and information related to shopping trends and behaviors at stores similar in size to Star Market. The data comes from three reports and one article:
 - "Benefits Redemption Patterns in the Supplemental Nutrition Assistance Program: Final Report" (Food and Nutrition Service, February 2011)
 - "Foods Typically Purchased by SNAP Households" (Food and Nutrition Service, November 2016)
 - "U.S. Grocery Shopping Trends, 2016" (Food Marketing Institute and The Hartman Group, Inc., 2016)
 - "Know Your Core, Protect Your Core" (*Convenience Store News* for the Single Store Owner, April 2016)

These reports (copies of which were provided by the Appellant, except for the 2011 report) demonstrate, among other things, that customers nationwide are increasingly shopping at convenience stores, small grocery stores, and ethnic food stores, and using such stores as their primary grocers.

- It is not uncommon for households to make multiple purchases in a short period of time after a customer receives his or her benefits. After they leave the store, participants often realize that they forgot a grocery item or have decided that they want to purchase items they saw during their first trip, but originally opted not to purchase.
- In other instances, multiple members of the same household will shop together and then make purchases separately using the same EBT card in quick succession. In other circumstances, the participants will go on a spending spree wherein they make purchase after purchase without leaving the store or by returning after a brief absence, thereby reducing their benefits in short order.
- SNAP participants buy sweetened beverages, frozen prepared foods, and prepared desserts at a much higher rate than traditional consumers. These purchasing habits, set

against the inventory found at Star Market, shows that the store stocks the majority of a SNAP household's preferred needs, and has sufficient variety and quantity to meet the needs of several households all at once without having to replenish inventory.

- The firm offers a wide range of grocery items and takes special requests for items in bulk. Some of the more popular bulk items include cases of Red Bull, Monster, and Rock Star energy drinks, and cases of other sodas and beverages. Energy drinks range from \$7.99 for a 4-pack of Red Bull to \$67.99 for a 24-pack of Red Bull. Other popular expensive or bulk foods include gallons of ice cream and packages of bacon.
- When making an evidentiary evaluation, the administrative review officer should look at the evidence offered and make a determination regarding which of the following two explanations is more likely: that the store trafficked in SNAP benefits, or that FNS's ALERT system has incorrectly flagged transactions as a result of a difference in business operations, as the Appellant has always maintained.
- The review officer is permitted to consider new evidence and subsequently render a new decision based on whether the additional evidence changes the balance of the evidence in the matter.
- There are two administrative review decisions that discuss the precedent that FNS should be mindful of in this case: *Howard's Quik Mart* and *Gloesis Group*, both of which noted that a determination of permanent disqualification must be supported to such a degree as to conclude that trafficking is the only plausible explanation. In the *Howard's Quik Mart* case, despite the firm providing "meager" documentation, the firm had presented a sufficiently credible case to explain the transactions. In the *Gloesis Group* case, the firm had explained that local purchasing trends had contributed to the patterns noted in the charge letter.
- Neither of the ALERT scans in this case have been tested and demonstrated to have any statistically meaningful correlation to the act of trafficking in SNAP benefits. There is no study to substantiate FNS's claims, no statutory authority from Congress to just indiscriminately accept the transaction categories as de facto violations; just decades old references within FNS's records to a root document that does not exist. There is literally no document within FNS's possession that substantiates the ALERT scans as having a correlation to trafficking. Simply doing something because it's been done for 25 years is not a good enough reason to continue doing it. FNS's compliance process needs to be rooted in evidence somewhere, and it needs to be administered in a way that avoids mistakes. Retailers lose their stores, their family's investments, without cause.
- The store is categorized by FNS as a convenience store despite being much closer to a small grocery store in inventory size, quantity, and variety. According to the contractor who conducted a store inspection during the review period, the store was exceptionally well-stocked.
- The report shows that the firm carried fresh pork, Similac infant formula, and frozen tilapia in a two-pound bag. The average convenience store does not carry any of these items, and certainly not in the quantities identified by the inspector.
- While the inspector identified a few of the store's more expensive items, they missed the entire storage room, and failed to note the cases of energy drinks, sodas, and juices in the price list.

- There is no credible argument that the store was deficient in its inventory in any way or that SNAP households could not make purchases sufficient to satisfy the transactions listed in the charge letter.
- The Appellant categorically denies that any violations occurred during the review period or at any other time. The transactions can easily be the result of legitimate business practices, especially given the lack of evidence to support FNS's theory of trafficking.
- As it is the transaction patterns that constitute the alleged violations – rather than the individual transactions themselves, the Appellant is addressing the patterns and their existence.
- Regarding Attachment 1 (multiple transactions from the same household in unusually short timeframes):
 - *Onukwugha v. U.S.* (2013), found that multiple transactions occurring over the span of hours is not inherently suspicious.
 - Appellant provided a list of seven prior Final Agency Decisions along with counsel's interpretations of what it believed were explanations that FNS found acceptable for these types of transactions.
 - It is not unusual for SNAP participants to spend their benefits within seven days after receiving their monthly allotment. Multiple purchases within 48 hours after receiving SNAP benefits are also not unusual.
 - Co-shopping, where both adult members of an average household are about 50 percent responsible for picking up groceries, is on the rise in the United States. This is manifest at the Appellant firm in the following ways: 1) different household members will shop separately using the same account; and 2) different household members will travel to the store together and then separate their purchases. The first option is statistically preferred by customers.
 - On a regular basis, SNAP participants will make significant grocery purchases from Star Market within 48 hours of receiving their monthly allotment.
 - Transaction timing is the primary component of this ALERT scan. The shortest timeframe between any two transactions in Attachment 1 is roughly two minutes apart. So the pertinent question from a logistics standpoint is, can the store ring up such transactions in that amount of time? In this case, Star Market has only two clerks that operate the register and both have worked at the store for more than a decade and have memorized the prices of the merchandise. And given the prices of many items in the store, it is reasonable to assume that a customer could arrive at a transaction for say, 5 U.S.C. § 552 (b)(6) & (b)(7)(C), in far less than 30 items. So with an efficient clerk and these conditions, there is more than adequate time to physically conduct the transactions.
 - Even if the transactions are logistically possible, FNS's next questions are: Is it likely that the transactions are legitimate? Why would a household want to make a purchase like this? Why would they spend such a large aggregate amount at this store when they could have gone to a larger store instead?
 - It is a fool's errand to speculate about the motivations of a SNAP household's purchasing decisions. These households have lower incomes with limited resources. Most have one or fewer vehicles and the one vehicle they have is reserved for work. So, regular consistent access to larger grocers is more difficult

- to come by, even if not altogether impossible. This means that convenience carries a greater weight than it does for non-SNAP households.
- The store is located in a neighborhood with no competitor stores within a four or five block radius. Furthermore, the Save-A-Lot supermarket located near Star Market is not popular with the local neighborhood. Its prices are not competitive, and with price not being an issue, most locals prefer convenience over variety.
 - Star Market is located across the street from a popular public park where families, leagues and people gather regularly. These events draw customers who make purchases of snacks, drinks (by the case) and other items intended to be consumed at the park. None of the other local stores are so conveniently located and do not enjoy the added foot traffic and business.
 - Star Market is well-known and liked within the local neighborhood. Prices are fair and the store is focused on building an inventory of items that customers are interested in, such as cases of soda and frozen foods. Customer affidavits submitted by the Appellant confirm these points.
 - If FNS starts from the position that households value convenience over modest price differences and take into consideration the store's inventory, it can see why households would want to shop at Star Market rather than retailers that are farther away and harder to get to.
 - Shopping habits such as co-shopping, binge shopping, and splitting larger purchases into smaller transactions so that they can carry the items home play a part in why a SNAP household would choose to make repeat visits to Star Market.
 - Regarding Attachment 2 (large transactions):
 - Considering the firm's inventory, it is not clear why USDA deems the transactions in Attachment 2 as suspicious or "large." The retailer has no control over how a household spends its SNAP benefits. As long as the items purchased are eligible, a retailer must conduct the transaction.
 - Appellant provided a list of five prior Final Agency Decisions along with counsel's interpretations of what it believed were explanations that FNS found acceptable for these types of transactions.
 - FNS's concern is likely to be, "How could this store, with the pictured counter space and a manual register, process 5 U.S.C. § 552 (b)(6) & (b)(7)(C), and 5 U.S.C. § 552 (b)(6) & (b)(7)(C)? How would they ring these items up, let alone have a customer carry the items out of the store? There are only three shopping baskets – and no carts. If these households have no transportation like the retailer claims, how could this be, other than trafficking?"
 - Just because most SNAP households do not have regular access to transportation, it does not mean they completely lack it. Explanations for ALERT scans are difficult to adequately relay because the scope of the review encompasses so many households and their shopping habits.
 - There is no credible argument that there is not enough inventory to account for the transactions in question. The store obviously has more inventory than the largest transaction in Attachment 2 at any given time.
 - The processing of these large transactions is largely done "piecemeal." The customer will collect a number of items, bring them to the register a few at a time, and the clerk will calculate and bag them while the customer gathers more items.

This allows the store to continue processing other transactions and to “tabulate the amounts within the amount of time necessary.”

- Customers are not stacking 5 U.S.C. § 552 (b)(6) & (b)(7)(C) worth of canned foods on the counter and then buying them. Instead, these purchases involve cases of soda (up to \$60 for Red Bull) and cases of other drinks. By definition, every purchase involving a case of soda is included in Attachment 2.
- It is hardly impossible, then, to arrive at 5 U.S.C. § 552 (b)(6) & (b)(7)(C) worth of items in a single trip.
- Given the infrequency of these transactions, it is not as though every customer is making such purchases, but some are.
- Appellant is aware it is being compared to other stores, but it is impossible to deduce what the actual data was that determined what the thresholds were.
- The store’s inventory, which the store inspector noted was exceptionally full, is a driving factor for the transactions. The presence of the park and the convenience of the store to the participants’ homes are additional factors that make purchasing of cases of soda more common (especially in team sports or group celebrations taking place at the park). Other high-dollar items, such as Similac infant formula, frozen tilapia and other bulk items, such as rice, also likely contribute to the dollar amounts listed in this attachment.
- If the store was trafficking, there would be a gross discrepancy in sales, with more SNAP sales than the inventory could account for. But in this case, there is more than enough inventory.
- The transactions in Attachment 2 are not trafficking. They are supported by substantial inventory and are reasonably explained by the store’s location, co-shopping, reliance on the store as a primary grocery for some percentage of the local participants, or a general aberration and statistical outlier to the average whole. That USDA segregated these transactions from the remainder is of little consequence as most other grocers in the area are likely to have the same number of similar transactions, if not greater.
- Should the permanent disqualification be upheld, Appellant alternatively requests that a civil money penalty be imposed instead of disqualification.
- The transaction patterns listed in the charge letter have been explained by the Appellants, and as such, USDA’s finding that trafficking has more likely than not occurred at the store is erroneous. Therefore, Appellant requests that FNS reverse its disqualification determination.

In support of its contentions, the Appellant submitted copies of the same evidence it provided to the Retailer Operations Division, with one addition – a hand-written, undated price list of expensive food items, mostly cases of beverages.

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

ANALYSIS AND FINDINGS

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

ALERT / Prior Administrative Review Decisions

One of the Appellant's key arguments relates to FNS's use of a fraud detection/SNAP transaction monitoring system known as ALERT. The Appellant contends that the ALERT scans have not been tested and demonstrated to have any statistically meaningful correlation to the act of trafficking in SNAP benefits. The Appellant further argues that there has been no study to substantiate FNS's claims and no statutory authority from Congress that would permit FNS to indiscriminately accept the ALERT findings as de facto SNAP violations. Finally, the Appellant contends that FNS's compliance process must be rooted in evidence, but claims that there is no document in FNS's possession that substantiates the ALERT scans as having a correlation to trafficking.

Regarding counsel's complaints about ALERT, this administrative review offers no findings or opinions. Appellant's counsel has a long, well-documented history of objecting to FNS's methodologies in EBT transaction cases. But unless compelled by statute, regulation or the courts to abandon its methodologies in such cases, FNS will likely continue using ALERT and related investigative techniques to identify potential trafficking violations, and an administrative review officer has no authority in the matter. The legality of such methods is identified in SNAP regulations at 7 CFR § 278.6(a) which states, in part, "FNS may disqualify any authorized retail food store ... if the firm fails to comply with the Food and Nutrition Act of 2008, as amended, or this part. **Such disqualification shall result from a finding of a violation on the basis of evidence that may include facts established through on-site investigations, inconsistent redemption data, [or] evidence obtained through a transaction report under an electronic benefit transfer system**" [Emphasis added.]

Appellant's counsel has also identified court cases and prior administrative review decisions where rulings in EBT transaction cases have favored complainants. Similarly, public records show that many administrative review decisions and court rulings in EBT transaction cases have favored the agency. This diversity in decisions suggests that each ruling is based on the merits and facts of the individual case rather than the virtues or shortcomings of the ALERT system or FNS's general methodologies in identifying potential program violators. That is how this review will reach a decision in the present matter. Prior administrative review decisions do not compel this review to render findings one way or another. The decision in this matter will be based on the evidence compiled by the Retailer Operations Division in comparison to the contentions and evidence submitted by the Appellant. As long as the agency has presented sufficient evidence to support a case of trafficking, then the burden of proving that the administrative action should be reversed lies with the Appellant.

This review has thoroughly examined the documentation and information related to Star Market as provided by the Retailer Operations Division and has found it to be compelling and indicative of trafficking. This documentation includes a compilation of ALERT data (including SNAP

transaction records) as well as an analysis of other factors, such as observations from a store inspection, shopping patterns of Star Market customers, and comparisons with similar stores in the area. Based on this data, this review finds that FNS has adequately presented a likely case of trafficking. Therefore, the remainder of this review will analyze whether or not the Appellant has proven by a preponderance of the evidence that the agency's conclusions were erroneous and that trafficking likely did not occur.

Contractor Store Visit

The case file indicates that in reaching a disqualification determination, the Retailer Operations Division considered not only the Appellant firm's EBT transactions, but also information obtained from a June 26, 2017 store visit which was conducted by an FNS contractor to observe the nature and scope of the firm's operation, stock, and facilities. This store visit information was used to ascertain if there were justifiable explanations for the firm's irregular SNAP transaction patterns. The store visit report and photographs documented the following store size, description, and characteristics:

- Star Market is a small corner market, roughly 1,400 square feet in size, operating in the city of New Bedford, Massachusetts. The store is classified as a convenience store on agency records.
- At the time of the contractor's visit, the firm had no shopping carts or handheld shopping baskets, which is not unusual for stores of this size. Customer shopping in convenience stores generally purchase no more than they can carry in their arms. The Appellant has claimed that the store actually had three handheld shopping baskets, and provided an undated photograph of the baskets as proof. But the baskets are not found anywhere in the contractor's report or photographs, suggesting that they were likely added to the store after it received the charge letter. There is also a step one must negotiate to enter the store, so a shopping cart would likely be impractical at this store.
- The store visit photographs showed one cash register and agency records reflected the use of one EBT point-of-sale terminal for SNAP purchases. There was no evidence that the firm used an optical scanner.
- The store's staple food stock was sufficient for program eligibility in each of the four staple food categories and is typical of a convenience store or small corner market.
- The report indicated that the store sold SNAP-eligible, non-staple accessory food items, such as carbonated and uncarbonated drinks, snacks, candy, and condiments. The store also sold ineligible nonfood items, including tobacco products, lottery tickets, health and beauty items, cleaning supplies, and other miscellaneous household merchandise.
- The checkout area sits behind a glass or Plexiglas barrier and transactions are conducted at the bottom of the barrier through a narrow opening. Because of this, it is unlikely that any bagging of groceries takes place at this store. The countertop area in front of the cash register is very small and is not suitable for conducting large or rapid transactions as there is no space to place more than a few small items on the counter at a time.
- There was no indication from the store visit report that the firm had a special pricing structure. The inspector's photographs showed price tags on some items, but the photos are unfortunately not close enough to readily identify prices. The few price tags that can be read appeared to have prices that ended in 9, which is typical of retail stores.

- According to the report, the most expensive SNAP-eligible items in the store were a 12-ounce can of Similac infant formula for \$16.99 (just one in stock); a two-pound bag of frozen tilapia fillets (perhaps three or four in stock); a one-gallon container of orange juice for \$5.49 (two in stock); and a one-pound package of bacon for \$5.49 (four in stock). It is worth noting that infant formula is part of the WIC food package, and typically, SNAP households containing children under the age of five are simultaneously eligible to receive WIC benefits. As such, it is uncommon for SNAP households to purchase expensive infant formula with their limited SNAP benefits when such an item is essentially free through WIC.
- There is no indication from the report that the firm had special food packages for sale or that items were sold in bulk or by the case. The Appellant has indicated that cases of soda and energy drinks are popular items and sell for as much as \$67.99 (24-pack of 12-ounce cans of Red Bull). But according to the store inspector, the question about expensive food items was completed in collaboration with store personnel, and there was apparently no mention of such items being sold by the case. Further, there was no signage anywhere in the store to indicate that cases of soda or energy drinks were even available for purchase or that special requests for such items could be made. Finally, a few of the contractor's photographs showed beverage cases stacked in storage areas, but all drinks in publicly-accessible areas (such as coolers and store shelves) were removed from cases and appeared to be sold individually.

The available inventory of SNAP-eligible food at the time of the store visit showed stock that would be typical of a convenience store, where households normally purchase a limited number of items to supplement their overall dietary needs. There was no indication that SNAP households would be inclined to regularly visit Star Market to purchase large quantities of groceries, especially considering the very constricted checkout area, the absence of shopping carts and baskets, and the availability of much larger grocery stores in the area, including two supermarkets and a superstore located less than half a mile away. Given the available inventory and the store's characteristics, this review could find no reason why the Appellant firm's SNAP redemption patterns differed so significantly from those of its competitors.

SNAP Transaction Analysis

Charge Letter Attachment 1: Multiple transactions were made from individual benefit accounts in unusually short timeframes. This attachment lists 33 sets of transactions (81 transactions in all) totaling \$2,544.65 in SNAP benefits, averaging \$56.67 per transaction, or \$139.10 per set of transactions. 5 U.S.C. § 552 (b)(7)(E).

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

5 U.S.C. § 552 (b)(6) & (b)(7)(C) – an extraordinary amount for a convenience store. Interestingly, earlier that same morning, the household visited a nearby supermarket and a superstore – both with substantially greater inventory and variety – and spent slightly more than half of what it spent at Star Market.

There is no evidence that FNS ever posited that the transactions in Attachment 1 were physically impossible, but it is difficult to comprehend why these households would so frequently and repeatedly choose to spend large amounts of money in a store with no shopping carts or baskets and limited overall inventory, when a single trip to a nearby supermarket likely could have sufficed. That such large, repetitive transaction sets occurred at a small store like Star Market is highly unusual. These transactions have a strong appearance of a store attempting to disguise trafficking by breaking down exchanges of cash into smaller transactions that look legitimate.

The Appellant argues that multiple transactions over a short period of time is not inherently suspicious and claims that it would be foolish to speculate about the motivations of a SNAP household's purchasing decisions. However, it stands to reason that if, as the Appellant contends, it is not unusual for SNAP customers to return to a store to purchase a forgotten item, or if they prefer to shop at a convenience store due to its proximity to their places of residence or lack of transportation, or if they engage in co-shopping, and assuming that such factors led to the patterns identified in Attachment 1, such patterns would be common not only at Star Market, but at other convenience stores as well because the SNAP households who live close to other convenience stores should have similar shopping behaviors. But that does not appear to be the case here. In comparison to similar stores in the area, Star Market stands alone with the kinds of transaction patterns that are found in Attachment 1 (see table below).

5 U.S.C. § 552 (b)(7)(E)

Charge Letter Attachment 2: Excessively large purchase transactions were made from recipient accounts. This attachment lists 158 SNAP transactions totaling \$8,538.48, for an average transaction amount of \$54.04. These large transactions are not consistent with a convenience store in the state of Massachusetts. The Retailer Operations Division has determined that during the review period, the average SNAP transaction amount for a convenience store in Massachusetts was \$7.66. The average in Bristol County, where Star Market is located, was even lower, at \$7.57 per transaction. The average transaction in Attachment 2 is more than seven times larger than the average purchase amount for this store type.

Given that the Appellant firm has a modest inventory of staple foods and other SNAP-eligible items, including snacks and drinks, it is likely that there would be an occasional instance where the transaction amount is high, perhaps exceeding \$30.00 or \$40.00. As such, there may be some legitimate SNAP transactions among the transactions listed in Attachment 2. However, as noted earlier, there is no evidence that the firm would be likely to have SNAP redemption patterns that differ significantly from nearby, similar-sized competitors. The substantial number of high-dollar transactions in a six-month period calls into question the legitimacy of these transactions.

Attachment 2 lists 16 transactions for \$75.00 or more during the review period, including a high of 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Another 77 transactions were between \$50.00 and \$74.99. Considering how many food items it would typically take to add up to \$50.00 or more, and considering that the store has a very small, constricted checkout area, no shopping carts or baskets to help a customer transport large amounts of food, and no compelling evidence that food is sold in bulk, this review finds it difficult to believe that every large transaction in Attachment 2 was a legitimate purchase of eligible food. As with the transactions in Attachment 1, there is no

evidence that the Retailer Operations Division found the large transactions to be impossible to conduct. Rather, considering the store's characteristics, the agency found that such transactions were both impractical and unlikely, at least at the frequency found in Attachment 2. This review agrees.

Among the Appellant's contentions related to Attachment 2, it argues that the store had sufficient inventory to account for the transactions in question and claims that if the store was trafficking, there would have been a gross discrepancy in sales, with more SNAP sales than the inventory could account for. The Appellant also contends that it is of little consequence that the transactions in Attachment 2 were segregated from the firm's other transactions as "most other grocers in the Store's specific geographical area are likely to have the same number (or greater) of similar transactions."

With regard to these contentions, the record shows that the Retailer Operations Division acknowledged that the firm likely had sufficient inventory to cover its SNAP transactions during the review period. However, sufficient inventory is only part of the equation. It does not prove, or even suggest, that the transactions in the charge letter were legitimate purchases of eligible food, as such records offer no insight into what took place at the point of sale. As to the Appellant's claim that that if trafficking were occurring, there would be more SNAP sales than its inventory could account for, this review does not agree with this leap in logic. It would be very simple for a store with large quantities of inventory to conduct trafficking transactions and still have ample inventory to accommodate its clientele. Trafficking need not be the lion's share of SNAP transactions in order to be a program violation.

As to the argument that other stores in the area are likely have the same number (or greater) of similar transactions, this is not accurate. Similar to the patterns found in Attachment 1, Star Market had substantially more "large" transactions over the same six-month review period than its nearest competitors despite having fewer total transactions:

5 U.S.C. § 552 (b)(7)(E)

Notably, the Appellant's transaction patterns changed dramatically after it received the charge letter in July 2017. For the next full year, the average number of monthly SNAP transactions were nearly identical to the review period, but its average monthly SNAP redemptions decreased significantly, from 5 U.S.C. § 552 (b)(6) & (b)(7)(C) – a drop of nearly 33 percent. The firm also had just 57 unusually large transactions from August 2017 to July 2018 (an average of 4.8 per month) compared with 158 for the first six months of 2017. Similarly, the repetitive transactions found in Attachment 1 of the charge letter decreased from 33 suspicious transaction sets in the first six months of 2017 to just one set between August 2017 and July 2018. It is very unlikely that immediately after the store receive the charge letter, the firm's customers suddenly changed their shopping behaviors or that the store decreased its inventory or modified its business model. Rather, it is very common for retailers who believe they have been caught committing program violations to discontinue the practice in the hopes of remaining authorized to accept SNAP benefits. That is likely what happened in this case.

Agency ALERT records show that similar type stores tend to have similar SNAP transaction patterns. Occasional anomalies may draw some attention, but do not necessarily suggest that program violations are taking place. However, long-term or persistent deviations from the norm, when such deviations are not expected, suggest that something beyond valid SNAP transactions may be occurring. In order for the Appellant's arguments to carry much weight in light of the firm's unusual transaction patterns, Star Market should, at a minimum, have a distinct or exceptional business model or characteristics (such as exclusive inventory, uncommonly low prices, or a unique pricing structure) that set it apart from nearby comparable stores or be physically located in an area that would obviously impel customer traffic. This review finds no evidence of such factors in this case. (Some of these factors will be discussed in greater detail below.) It should be noted that the existence of such conditions or characteristics, by themselves, would not necessarily result in a finding that violations were not occurring. Compelling evidence, such as, but not limited to, copies of itemized cash register receipts that correspond to the specific transactions in question and demonstrate what actually occurred at the point of sale, would additionally strengthen the Appellant's position.

The transaction patterns identified in the charge letter are highly irregular and substantially different from comparable stores in the area and are indicative of trafficking in SNAP benefits. In an appeal of adverse action, the onus is on the Appellant to prove, by a preponderance of the evidence, that the administrative action should be reversed. This means submitting sufficient and compelling evidence that would lead a reviewer to conclude that trafficking likely did not occur. This review finds that the Appellant's evidence does not meet this standard.

Appellant's Evidence and Related Contentions

As noted earlier, the Appellant submitted a large amount of documentation, including 19 undated photographs of the store; four signed affidavits from SNAP customers; 534 pages of inventory invoices and receipts; six bank statements; a list of payments made to inventory vendors; a hand-written, undated price list of expensive food items available for sale in the store; and demographic and shopping-related reports from USDA and the Food Marketing Institute, and an April 2016 article from *Convenience Store News*.

The bullets below will briefly address this evidence and related contentions:

- **Bank statements/list of payments to vendors:** These documents have little probative value in this case beyond suggesting that the firm regularly ordered and paid for inventory for the store. The documents offer no insight into the individual SNAP transactions or the unusual transaction patterns listed in the charge letter.
- **Inventory Records/Price List:** The firm's inventory records appear to confirm that the store likely had enough inventory to account for its total SNAP redemptions for the six-month review period. But as noted earlier, adequate inventory is not sufficient proof that the firm was not engaged in trafficking. The Appellant's inventory evidence offers little insight into what took place at the point of sale for the specific questionable transactions listed in the charge letter. This review further finds that the firm's inventory records do not

support its claims that customers purchased items in bulk or by the case, or at the very least, such purchases were likely not as common as the Appellant suggests.

For instance, the Appellant argues that expensive cases of beverages, such as energy drinks, are popular with its customers and claims that the store's convenient location next to a busy park leads to customers regularly purchasing such items. The Appellant contends that this is a likely reason for the transaction patterns in Attachment 2. However, the Appellant's inventory records show that Star Market purchased a total of 51 cases of Red Bull during the review period, and just eight cases of Monster. Assuming each case had 24 cans (although the Appellant's price list suggests that some cases had only 12 cans), this would be a total of 1,224 cans of Red Bull and 192 cans of Monster for the full six-month review period, or enough inventory to sell approximately 6.8 cans per day of Red Bull and one can per day of Monster. If the Appellant's demographic information is accurate, and just 10 percent of households in the area receive SNAP benefits, then it stands to reason that the majority of Star Market's customers do not use SNAP benefits to make purchases. According to agency records, the firm conducted 5 U.S.C. § 552 (b)(6) & (b)(7)(C) SNAP transactions during the review period. This would mean that there were potentially 5 U.S.C. § 552 (b)(6) & (b)(7)(C) or more total transactions of all types at the store for the first six months of 2017. If the firm purchased only 51 cases of Red Bull for its inventory, it would suggest that transactions involving full cases of Red Bull, or a full case of any beverage for that matter, while technically possible, was not nearly as common as the Appellant suggests.

It is likely that the inventory records provided by the Appellant do not reflect all items purchased by the firm during the review period (for example, this review could not find any purchases of Coca-Cola products in the inventory invoices even though the inspector's photographs clearly show that the firm sold individual cans and bottles of such products). But the inventory records that were provided do not support the Appellant's contentions related to large or frequent transactions. Instead, they appear to suggest a typical convenience store with typical inventory. That such unusual transaction patterns exist, like those found in Attachments 1 and 2, implies that program violations were likely taking place.

- **Store Location:** The Appellant states that the store is located directly across the street from a busy city park which hosts family gatherings, sporting events, etc. The Appellant contends that Star Market has a monopoly on sales to SNAP participants that frequent the park, meaning that sporting event and party meals (snacks, drinks, etc.) will be purchased there, and will be done so with more frequency because there is nowhere else immediately nearby to go to.

A review of the area surrounding the store shows that Star Market is indeed located across the street from Ashley Park, at what appears to be the northeast corner of the park. However, it is certainly not the only store where SNAP customers visiting the park can shop. A short walk from the southeast corner of Ashley Park is a large, evidently popular supermarket, whose SNAP redemptions during the review period were more than 5 U.S.C. § 552 (b)(6) & (b)(7)(C) of Star Market. There is nothing in the record that would suggest

that Star Market had a monopoly on sales for park visitors or that Star Market was preferred over the nearby supermarket for any reason.

Further, while the park would conceivably be popular with families and sports leagues during the warmer periods, it is difficult to envision many gatherings taking place during winter months in Massachusetts, with average high temperatures in the 30s or 40s, such as January, February, or March, which is when many of the alleged violations took place. Additionally, the record shows that of the 158 transactions in Attachment 2, 83 of them, or 52 percent, occurred between the two-hour window of 10 a.m. to 12 p.m., which is very peculiar. And most of those transactions occurred on weekdays, when children and families were likely in school or at work. This data suggests that the store's location next to a park likely had little, if any, impact on the store's SNAP transaction patterns.

- **Photographs:** The Appellant submitted 19 photographs of the store and surrounding area. There is no evidence of any dates affixed to the photos, so it is likely they were taken after the firm received the charge letter. The photographs appear to show somewhat greater levels of stock than what the contractor found during its inspection, particularly with regard to cases of beverages in a storage area. However, because there is no way for this review to determine that the Appellant's photos reflect store conditions at the time of the review period, this review finds them to be of little probative value.
- **Customer affidavits:** These are largely unconvincing, as customers engaging in trafficking violations are unlikely to admit to such conduct. Furthermore, affidavits, even if well-intentioned, do not typically represent a household's actual shopping behavior, as households generally do not retain records of transactions and often do a poor job of recalling spending patterns at a particular location. Finally, the affidavits in this case do not address specific transactions from the charge letter or provide any evidence that their SNAP transactions were legitimate purchases of eligible food.
- **Reports and articles:** While informative, this review finds that the reports and magazine article submitted by the Appellant offer little substantive value, as they do not address the specific transactions listed in the charge letter. The reports address demographic information and customer behavior and habits, which play a role in SNAP transaction patterns generally, but their lack of specificity in relation to Star Market renders them ineffectual in this matter.

Prior Decisions Citing Incorrect Standard of Evidence

Appellant's counsel cites two prior administrative review decisions to support his argument that the permanent disqualification action in this matter should be reversed. The two cases are *Howard's Quik Mart* (2017), and *Gloesis Group* (2016), which noted that a determination of permanent disqualification must be supported to such a degree as to conclude that trafficking is the "only plausible explanation" (*Howard's*), or "there is no better explanation other than trafficking" (*Gloesis*).

Regarding these two cases, it is noted that the administrative review officer in the present matter was also the review officer in the *Howard's Quik Mart* case. The phrase "only plausible explanation," was nothing more than a one-sentence, one-time, inadvertent misstating of the standard of evidence required in administrative review cases. The standard in such cases, as noted multiple times in this document as well as throughout the *Howard's Quik Mart* and *Gloesis Group* decisions, is a preponderance of the evidence. In other words, a determination of permanent disqualification must be supported to such a degree as to conclude that trafficking is the *most* plausible explanation. This review finds that in the present case, the Retailer Operations Division has met this standard.

Although Appellant's counsel has been made aware of this earlier error many times before in other cases in which he has been involved, it apparently needs repeating: the phrase "only plausible explanation" is not and never has been the standard of evidence for administrative review decisions and thus, does not affect the present case or any other cases in any way.

Civil Money Penalty

If the permanent disqualification decision is upheld, the Appellant alternatively requests that a civil money penalty be imposed instead of disqualification.

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

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

CONCLUSION

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

Based on a review of all available information in this case, the decision to impose a permanent disqualification against the Appellant, Star Market, under the ownership of Mohammad Mahbub Alam and Md Mashum Billah Sarker, is sustained.

RIGHTS AND REMEDIES

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

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

JON YORGASON
Administrative Review Officer

September 21, 2021