

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

**Union Market,**

**Appellant,**

**v.**

**Retailer Operations Division,**

**Respondent.**

**Case Number: C0214958**

**FINAL AGENCY DECISION**

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

**ISSUE**

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR § 278.6(e)(1)(i) in its administration of the SNAP, when it imposed a permanent disqualification against Union Market.

**AUTHORITY**

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

**CASE CHRONOLOGY**

In a letter dated February 19, 2019, the Retailer Operations Division informed the Appellant that Union Market was in violation of the terms and conditions of the SNAP regulations, 7 CFR § 270 –282, based on EBT SNAP benefit transactions that "establish clear and repetitive patterns of unusual, irregular, and inexplicable SNAP activity for your type of firm." The letter also noted that the Appellant could request a trafficking civil money penalty (CMP) in lieu of a permanent disqualification within 10 days of receipt under the conditions specified in 7 CFR

§ 278.6(i). Per UPS confirmation of delivery, the charge letter was delivered to the Appellant at the store address of record on February 20, 2019.

The record reflects that in a letter received on February 26, 2019, the Appellant's counsel requested information and documents from FNS with regard to the agency's case against Union Market pursuant to the Freedom of Information Act (FOIA). In a letter dated March 22, 2019, FNS provided the Appellant's counsel with a response to the initial FOIA request. The Appellant's counsel appealed the FOIA request in a letter of June 23, 2019. In a letter dated February 2, 2021, FNS provided the Appellant's counsel with a response to the FOIA appeal. The Retailer Operations Division subsequently sent a 10 day letter which was received by counsel on February 9, 2021 providing the opportunity to respond to the letter of charges.

In responses to the Retailer Operations Division of February 26, 2019, February 19, 2021, and July 9, 2021, the Appellant, through counsel, replied to the letter of charges. The record reflects that the Retailer Operations Division received and considered the information provided prior to making a determination.

After considering the Appellant's responses and the evidence in the case, the Retailer Operations Division issued a determination letter dated October 20, 2021, informing the Appellant that Union Market was being permanently disqualified from participation in the SNAP in accordance with 7 CFR § 278.6(e)(1) for trafficking violations. The letter also stated that the Appellant was not eligible for a trafficking civil money penalty (CMP) in accordance with 7 CFR § 278.6(i) as the Appellant did not submit sufficient evidence to demonstrate that the firm had established and implemented an effective compliance policy and program to prevent violations of the SNAP.

In a letter postmarked October 21, 2021, the Appellant, through counsel, requested an administrative review of the Retailer Operations Division's decision to permanently disqualify the firm from participation in the SNAP. FNS granted the Appellant's request for administrative review by letter dated October 28, 2021. In an email correspondence of November 17, 2021, the Appellant, through counsel, submitted additional information in support of the request for administrative review.

### **STANDARD OF REVIEW**

In appeals of adverse actions, the Appellant bears the burden of proving by a preponderance of the evidence, that the administrative actions should be reversed. That means the Appellant has the burden of providing relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true.

### **CONTROLLING LAW**

The controlling statute in this matter is contained in the Food and Nutrition Act of 2008, amended, 7 U.S.C. § 2021 and 278 of Title 7 of the Code of Federal Regulations (CFR). 7 U.S.C. § 2021, Part 278.6(a) and Part 278.6(e)(1)(i) of the Regulations establish the authority upon which a permanent disqualification may be imposed upon a retail food store or wholesale

food concern. There also exist FNS policy memoranda and clarification letters which further explain the conditions necessary in order to permanently disqualify retail stores.

7 U.S.C. § 2021(b)(3)(B) states, inter alia:

... a disqualification under subsection (a) shall be ... permanent upon ... the first occasion or any subsequent occasion of a disqualification based on the purchase of coupons or trafficking in coupons or authorization cards by a retail food store or wholesale food concern or a finding of the unauthorized redemption, use, transfer, acquisition, alteration, or possession of EBT cards ...

7 CFR § 278.6(a) states, inter alia:

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

7 CFR § 278.6(e)(1)(i) states:

Disqualify a firm permanently if: Personnel of the firm have trafficked as defined in § 271.2.

7 CFR § 271.2 states, inter alia:

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

7 CFR § 278.6(f)(1) states, inter alia:

A civil money penalty for hardship to SNAP households may not be imposed in lieu of a permanent disqualification.

7 CFR § 278.6(i) states, inter alia:

FNS may impose a civil money penalty in lieu of a permanent disqualification for trafficking as defined in § 271.2 if the firm timely submits to FNS substantial evidence which demonstrates that the firm had established and implemented an effective compliance policy and program to prevent violations ...

7 CFR § 278.6(b)(2) states, inter alia:

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

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

### **SUMMARY OF CHARGES**

The Appellant was charged and determined to be trafficking based on an analysis of EBT transaction data from July 2018 through December 2018. This involved the following SNAP transactions patterns which are indicative of trafficking:

- There were multiple transactions made from the accounts of individual SNAP households within a set time period; and
- There were EBT transactions conducted that are large based on the observed store characteristics and recorded food stock.

The issue in this review is whether, through a preponderance of evidence, it is more likely true than not true that questionable transactions were the result of trafficking.

### **APPELLANT'S CONTENTIONS**

The following represents a brief summary of the Appellant's contentions in this matter. Please be assured, however, that in reaching a decision, full attention and consideration was given to all contentions presented, including any not specifically recapitulated or specifically referenced herein.

In the replies to the charge letter, in the administrative review request, and in subsequent correspondence to FNS, the Appellant, through counsel, stated the following summarized contentions, in relevant part:

- The Appellant denies that trafficking took place.
- The Appellant occupies 1,400 square feet of space and sells a variety and quantity of staple food items such as bread, eggs, milk, frozen meals, canned meats, pasta, rice, Enfamil, cereal, chips, cakes, ice cream, and additional food items. The vast majority of the store's offerings are qualified items under the SNAP. The store visit report notes that the firm is sufficiently stocked in all four staple food categories.
- Inventory is replenished on a rolling basis and depending upon demand. Inventory at the beginning of the month is typically superior to inventory at the end of the month.

- The Appellant is located in an economically depressed area, surrounded by poverty and many low-income families. According to USDA's *Profile of Households for the District of Columbia Delegate (At Large)*, 14% of the local households receive SNAP benefits.
- The store is within walking distance of multiple schools and low-income housing developments, which draws, houses, or places a significant number of SNAP participants. A material portion of these participants visit the store.
- The store is located in an area where there are not immediate competitors around it. This means less competition and higher dollar volume.
- According to the Case Analysis Document, the store's average transaction amounts and purchase transaction counts have been close to those for the County averages. It appears that the dollar volume, purchase transaction count, and average transaction amounts are all roughly in line with what USDA sees for other stores in the area. The only difference that appears to exist is the average transaction amount, which is a result of the store's inventory.
- FNS' on-site inspection of the store depicted the Appellant in this case, though not in as much detail as the Appellant would have preferred. The store's more expensive items cited in the investigation report include infant formula at \$19.99, Banquet fried chicken at \$9.79, Pedialyte at \$6.99, and Folgers coffee at \$5.99.
- The submitted inventory invoices and tax return substantiate the firm's inventory and demonstrate that there was adequate eligible food items to account for the transactions during the review period.
- As noted by FNS in its *Benefit Redemption Patterns in the Supplemental Nutrition Assistance Program Final Report* (2011), a large portion of households redeem nearly all of their benefits within the first two weeks of the month. Purchases made within the first seven days after receiving benefits is not unusual.
- As noted in the April 2016 edition of Single Store Owner magazine, SNAP participants are more likely to shop at convenience stores and small grocery stores and customers of these stores are among the most loyal customers. Also, SNAP participants are more likely to shop regularly at small grocer/convenience stores than nonparticipants.
- Households with particular demographic information and located in particular geographic areas are more likely to be disqualified which shows a bias towards smaller grocers. Regional differences in disqualification rates and shopping habits support this contention as well.
- Most visits to a store the size of the Appellant are made while the customer is on his/her way to work or school, or while running errands at night. Typically, SNAP participants who visit on a daily or weekly basis are significantly more likely to do so in the morning, or during the late evening.
- In support of the Appellant's discussions regarding SNAP households' shopping habits, the following studies were cited: *Benefit Redemption Patterns in the SNAP in Fiscal Year 2017 Final Report*, Insight Policy Research, September 2020; *Shopping Pattern and Food Purchase Difference Among SNAP Households and Non-SNAP Households in the United States*, Preventative Medicine Reports, June 20, 2017; and *What Does SNAP Benefit Usage Tell Us About Food Access in Low-Income Neighborhoods?*, Social Science & Medicine, 2014.
- With regard to the transactions documented in Attachment 1, they are the result of the store's business practices, co-shopping and/or the shopping habits of the SNAP clientele.

- As stated in the court in *Onukwugha v. U.S.*, “multiple transactions occurring over the span of hours” are not “inherently suspicious” as it is not uncommon for a customer to make multiple trips to the same store on the same day (finding it unclear as to why FNS found certain close in proximity transactions to be consistent with patterns of trafficking “rather than the innocent explanation of a shopper realizing he forgot something or, for example, one household member wanting to make a small purchase . . . while the other household member stays behind to complete a larger purchase).
- Past Administrative Review Branch decisions have identified a number of certain explanations for the presence of Attachment 1 transactions. The Appellant cited numerous administrative review cases and numbers in support thereof.
- FNS has previously conducted research (*Benefit Redemption Patterns in the SNAP*, Final Report 2011) which indicates that purchases made within the first seven days after receiving benefits is not unusual. Such patterns are supported by the *Benefit Redemption Patterns in the SNAP in Fiscal Year 2017 Final Report*, Insight Policy Research, September 2020 which found in an average month during that fiscal year, SNAP households spent more than half of their benefits in the first week and nearly three-quarters by the second week. Furthermore, 14% of the benefits were immediately used within the first 24 hours of receiving them.
- The Appellant services a much higher African American population than the average SNAP retailer to whom their transactions are compared.
- Many of the local SNAP household members are unemployed. To satiate their boredom, these participants will regularly shop at stores to find something to do.
- In some instances, the act of purchasing an item is pleasing, as much of the month they lack the financial ability to do so. So they will either shop regularly on the same day, or they will binge shop and make large purchases because they have the benefits to do so.
- Co-shopping is on the rise where both adult members are responsible for picking up groceries.
- The Appellant is aware that there are a number of SNAP households that come into the store multiple times a day because of convenience, often sending their children on separate shopping trips to pick up items. The Appellant cannot control what SNAP customers do with their cards.
- Some participants make purchases for friends, for large gatherings or to satisfy needs that are not obvious.
- The store does not have an optical scanner, but the clerk has the ability to visually identify and enter items into the register. Item prices are usually consistent if not outright uniform, and are frequently memorized by the clerk through repetition over time. Furthermore, the store will tabulate transactions on a rolling basis, meaning that unlike a grocery store when you line up, set all of your items on the counter and then purchase them, this store permits participants to gather items, bring them to the register, and then return to gather more items. Although the EBT transactions are processed consecutively over a matter of a few minutes, the calculations, bagging and gathering of items can take dozens of minutes if the participant chooses.
- Furthermore, the store has two cash registers and only one EBT terminal. This means that transactions could be split up (in the instance of co-shopping) between two registers, calculated separately, and processed sequentially in a lower amount of time. However,

the transactions set out in the charge letter could have all been conducted on a single register.

- From a physical transportation angle, the groceries are bagged, and often the customers carry the groceries by hand (using their children or friends to carry some items). On occasion, other items (like strollers) can be used to help transport the items out of the store. Nevertheless, they are bagged, by the store and physically carried out by the participants.
- It is much easier for the customer to get through the spaces of a store like the Appellant's than it is for them to go into a supermarket/super store. Accordingly, these customers are more likely to come back for supplemental and quick shopping trips than they otherwise would at an average convenience store with an inferior inventory and a further distance from their homes.
- It is important to consider the store's size, inventory and operation. The store's inventory is sufficient to account for the transactions and greatly exceeds stores around it and has a greater quality and variety than your average convenience store.
- The surrounding SNAP retailers operate in slightly different business environment conditions, or with material differences in operation, location and inventory. There are 25 surrounding SNAP retailers with the nearest store located 0.48 miles away and no SNAP retailer to the northwest. Furthermore, many of these stores are stacked one upon another. This causes a reduction in flow of SNAP participants as they have more direct competition and a smaller portion of the overall business.
- Transportation inconsistency is another reason for the transactions outlined in this Attachment. Participants do not have their own vehicles so trips to larger stores are dependent upon rides from friends or family. A household that cannot depend on those trips is forced to shop nearby.
- Past Administrative Review Branch decisions have identified a number of certain explanations for the presence of Attachment 2 transactions. The Appellant cited numerous administrative review cases and numbers in support thereof.
- The transactions documented in Attachment 2 are the result of co-shopping, the store's pricing structure, reliance on the store as a primary grocer for some minutiae of local participants, or the general aberration and statistical outlier to the average whole.
- According to USDA's research (*Foods Typically Purchased by SNAP Households*, 2016), sweetened beverages and salty snacks are within the top 10 expenditures for SNAP households, as are meats and a number of other items offered by the Appellant. It is therefore reasonable to expect customers to spend large amounts and/or the majority of their benefits at the Appellant on the inventory evidenced in the on-site inspection.
- Participants spend almost 62% of their monthly benefits on meats, sweetened beverages (sodas and energy drinks, Gatorade and the like), vegetables, frozen prepared foods, prepared desserts, high fat dairy/cheese and breads—in that order. It is therefore reasonable to expect SNAP customers to spend large amounts and/or the majority of their benefits at the Appellant store.
- According to the FMI *U.S. Grocery Shopping Trends* 2016 annual report, limited assortment stores saw an increase of consumers who use them as a primary grocery by 3% over 2015; convenience stores likewise saw an increase of 3% in consumers who used their store as their primary grocer; ethnic food stores saw a rise of 1% in primary grocery usage.

- Households that conducted the transactions in Attachment 2 likely have a larger amount of SNAP residents residing in their homes, thus requiring a larger quantity of grocery products each month than those households with less participants.
- Given the higher priced items in the store, it is not difficult to imagine \$60.00 worth of groceries being purchased in a single trip – and being transported by hand back to the store. The remainder of the transactions could easily be transported by two people.
- The number of high priced items in the store does not require the store to have a huge amount of counter space to set all of the items. Given that a number of these items is roughly \$5.00 each, twelve of such items would not be difficult to carry and could be placed on the given space set out in the store visit report.
- Furthermore, visual identification on the part of the store clerk is easier than scanning items as they are aware of the prices because of experience so they need only to identify the items and enter the price on the register.
- Because the Appellant is located much closer to the SNAP participants and its inventory contains such a wide variety of items, these transactions are more likely to occur as a matter of course.
- Furthermore, the only other stores that are nearby do not have the inventory variety that the Appellant has. Accordingly, this store is going to have larger transactions than the average convenience store.
- The physical ability to conduct these transactions was aided by households who shopped in groups, brought their own portable carts, and who gathered their items in groups and brought them to the counter to be bagged and tabulated while they continued shopping.
- USDA does not know the correlation coefficient between ALERT scans and trafficking. The Appellant has calculated this based on results of undercover investigations and determined that it was a positive correlation, but the relationship between the values is weak.
- The ALERT system cannot identify fraud. It is designed to identify “suspicious behavior” at most, but the basis for the system is unknown. See *TG Mini Mart, Inc.* and *Lima Mini Mart Inc.*
- It is likely that the presence of a Confirmation Bias exists, as it does in many cases handled by FNS. The danger of Confirmation Bias is obvious: USDA starts with the theory that trafficking exists because that is allegedly what the ALERT patterns were designed to detect and if the store is flagged often enough, then the automatic hypothesis put forth by USDA that trafficking is occurring.
- The pertinent burden of proof of SNAP disqualification is the “preponderance of evidence” standard, which means that the evidence must be adequate enough which is a reasonable mind, considering the record as a whole, would accept as sufficient a conclusion that the matter is asserted more likely to be true than not true. See *L&M Grocery Market, Inc. vs. Retailer Operations and Compliance*. The Department bears the burden of proof, not the retailer. See *Cardenes Market vs. Retailer Operations and Compliance*.
- The transaction patterns identified have been explained by the Appellant as required in *Skyson USDA, LLC vs. U.S.*
- Recent administrative review cases discuss the precedent that should be considered in this case: *Howard’s Quik Mart vs. Retailer Operations Division* and *Gloesis Group vs. Retailer Operations Division*.

- In the event that FNS determines that trafficking did occur, the Appellant requests imposition of a civil money penalty pursuant to 7 CFR § 278.6(i) which states that to be considered for a CMP, a retailer must demonstrate that the firm had established and implemented an effective compliance policy and program to prevent violations.

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

- Inventory purchase invoices (153 total);
- 2017 U.S. Individual Income Tax Return for store owner;
- Undated stock photos (27 pages total);
- *Profile of SNAP Households in 2018, District of Columbia Delegate District (At Large)*, USDA FNS;
- *Benefit Redemption Patterns in the SNAP in FY 2017 Final Report*, Insight Policy Research;
- *Know Your Core, Protect Your Core*, Convenience Store News for the Single Store Owner, April 2016;
- *U.S. Grocery Shopping Trends Annual Report*, FMI, 2016;
- *Pearson Correlation Coefficient Calculator*, Social Science Statistics;
- *What Does SNAP Benefit Usage Tell Us About Food Access in Low-income Neighborhoods?* Social Science & Medicine, 2014;
- *Shopping Pattern and Food Purchase Differences Among SNAP Households and Non-SNAP Households in the United States*, Preventative Medicine Reports, June 20, 2017; and
- *Foods Typically Purchased by SNAP Households*, FNS, November 2016.

## **ANALYSIS AND FINDINGS**

### **SNAP Authorization**

During the review period of July 2018 through December 2018, Union Market was classified as a convenience store. When the Appellant was authorized by FNS for participation in the SNAP, the owner signed a SNAP application for the store and acknowledged he was aware of the SNAP regulations and understood those regulations. That application included a certification and confirmation that the owner would “accept responsibility on behalf of the firm for violations of the SNAP regulations, including those committed by any of the firm’s employees, paid or unpaid, new, full-time or part-time.” The violations listed on this certification include accepting SNAP benefits in exchange for cash, otherwise known as trafficking, and other violations such as accepting SNAP benefits as repayment on credit accounts or in exchange for ineligible items.

### **Store Visit Observations**

The case file indicates that in reaching a disqualification determination, the Retailer Operations Division considered information obtained during a December 8, 2018 store visit conducted by a FNS contractor to observe the nature and scope of the firm’s operation, stock, and facilities. This information obtained from the store visit was also used to ascertain if there were justifiable

explanations for the firm's irregular SNAP transactions. The store visit report and photographs documented the following store size, description, and characteristics:

- Approximately 1,400 square feet in size with no additional storage area outside of public view;
- Did not have storage coolers/freezers;
- No shopping carts and two hand-held baskets available for customer use;
- One small checkout counter area with limited check-out counter space as it was surrounded by a Plexiglas barrier;
- Two cash registers and one EBT point-of-sale (POS) device for use in ringing-up SNAP transactions;
- Did not have optical scanners;
- Did not have a special pricing structure, such as prices ending in \$.x9 and/or \$.00;
- Did not round transactions up or down at the checkout counter;
- Had ATM or money transfer service;
- No signs posted or flyers available advertising the availability of bulk foods offered at a discounted rate to include meats in bulk, foods sold by the case, and grocery package deals;
- No meat/seafood specials or bundles or fruit/vegetable boxes that might sell for high prices;
- No evidence of a wholesale business such as posted prices or separate entrances for wholesale customers;
- Telephone and on-line orders were not taken;
- Delivery was not offered;
- The four most expensive SNAP-eligible food items in stock were infant formula at \$19.99 per 12 ounces; Banquet fried chicken at \$9.79 per 29 ounces (5 units); Pedialyte at \$6.99 per 1.1 quart (4 units in stock); and Folgers coffee at \$5.99 per 10.3 ounces (2 units in stock);
- No fresh meats, poultry, or seafood;
- No frozen unprocessed meats, poultry, or seafood;
- Frozen food stock included such items as pizza, meals, pot pies, Hot Pockets, waffles, ice cream, and pancakes;
- Did not have a kitchen and hot foods were not sold;
- Did not have a deli area and deli meats and cheeses were not sold by the pound;
- Meat items included units of canned fish, eggs, sausage, bacon, packaged lunch meat, canned/potted meat, and meat jerky;
- Dairy included milk, butter, yogurt, sour cream/dip, and cheese;
- Fresh produce stock consisted of a few (each) onions, potatoes, and apples;
- Other staple foods available for purchase included such items as juice, pasta, rice, cereal, loaf bread, buns/rolls, corn meal, baking mix, flour, and canned goods;
- Much of the remaining food stock consisted of accessory foods such as candy, carbonated and non-carbonated drinks, vegetable oil, condiments, snack foods, and cakes/pastries; and

- Ineligible nonfood items included tobacco products, health and beauty aids, paper products, household cleaning supplies, lottery tickets, alcohol, automotive supplies, charcoal, and lighter fluid.

The available inventory of SNAP eligible food at the time of the store visit showed food stock that would be typical of a convenience store, where households normally purchase a limited number of items. The SNAP eligible food stocked by the store was generally of a low dollar value, consisting mainly of inexpensive canned and packaged goods, snack foods, single-serving food items and accessory food items. There was little indication that SNAP households would be inclined to regularly visit the store to purchase large quantities of groceries. 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 similar sized competitors.

### **Charge Letter Attachments**

On review, the investigative materials provided by the Retailer Operations Division, including computer printouts of transaction data available from Federal records, store visit observations, information regarding area competitor firms, and household shopping patterns, were analyzed.

Government analyses of stores caught in trafficking violations during on-site investigations have found that transactions involving trafficking consistently display particular characteristics or patterns. These patterns include, in part, those cited in the letter of charges. Based on this empirical data, and in the absence of any reasonable explanations for such transaction patterns, a conclusion can be drawn through a preponderance of evidence that the most likely explanation for "unusual, irregular, and inexplicable" transactions and patterns cited in the letter of charges is trafficking. Transactions having such characteristics sometimes do have valid explanations that support that they were the result of legitimate purchases of eligible food items. This is why opportunities are afforded to charged retailers to explain the questionable transactions cited. In this case, the Retailer Operations Division determined that the Appellant's contentions did not outweigh the evidence. The issue in this review is whether, through a preponderance of evidence, it is more likely true than not true that questionable transactions were the result of trafficking. As patterns of unusual transactions appear across multiple Attachments, the case of trafficking becomes more convincing.

#### **Repeat Transactions by the Same Household (Charge Letter Attachment 1)**

This charge letter Attachment documents 40 sets of transactions (98 total transactions) that total \$4,210.96 in SNAP benefits to meet the parameters of this scan. These transactions were conducted by 24 different SNAP households. Multiple transactions conducted by the same household account within a short period of time is a method which violating stores use to avoid single high dollar transactions that cannot be supported by a retailer's inventory and structure.

The Appellant contends that as noted by FNS in its *Benefit Redemption Patterns in the Supplemental Nutrition Assistance Program Final Report* (2011), a large portion of households redeem nearly all of their benefits within the first two weeks of the month. Purchases made

within the first seven days after receiving benefits is not unusual. The owner cannot control what SNAP customers do with their cards.

Although it is not uncommon for customers to have more than one transaction per day and there are no limits on the number of times EBT cards may be used or the amount of eligible foods that may be purchased, it is not common that such multiple transactions are for large dollar amounts. The SNAP transactions noted in the charge letter are questionable not because they exceed any limits for use, but rather because they display characteristics of use inconsistent with the nature and extent of the Appellant's stock and facilities and are therefore, indicative of trafficking.

Although many SNAP households do shop early in the month as opposed to later in the month, most households do not spend all or a majority of their monthly benefit allotment in just one or two days, especially from a convenience store like the Appellant firm that has a moderate food stock, no fresh meats, poultry, or seafood, no unprocessed frozen meats, poultry, or seafood, very little fresh produce stock, and lacks an abundant depth and breadth of staple foods. The February 2011 government report cited by the Appellant revealed that households most often redeemed their benefits at supermarkets and super stores with only 4% of all households never shopping in a supermarket or super store. Thus, when a supermarket or super store is available, it is highly unlikely that a SNAP recipient would conduct multiple transactions within a limited period of time or excessively large SNAP transactions at a convenience store like Union Market with a moderate selection of staple foods.

The Appellant contends that as was noted in the 2016 study conducted by the Convenience Store News, small grocery/convenience store customers are among some of the most loyal customers when it comes to their store selection.

FNS acknowledges the statement regarding small grocery/convenience store shoppers being some of the most loyal, based on the supplied 2016 study and that customers often pick-up needed items on their way to or from work or school. However, no evidence was submitted by the Appellant to support the statement that SNAP customers are more likely to shop regularly at a small grocery or convenience store than non-participants. The Appellant's claim that SNAP customers are more likely to shop regularly at a small grocery or convenience store than non-participants is located nowhere in the supplied study. This study appears to refer to all types of customers. The consumer research on convenience store core shoppers cited in the 2016 study did not address SNAP redemptions or SNAP customers.

The Appellant provided statistics pertaining to the general demographic of SNAP households. However, there is no indication as to how this explains the questionable transaction patterns addressed in the charge letter. Many households are comprised of a diverse family dynamic, yet this is not an indication that questionable transactions would be occurring at any given store. The subject store shows unusual transaction patterns that are not occurring in other similarly or even better stocked stores. If specific diverse family needs are causing these questionable transactions at the subject store, it would be expected that similar patterns would exist at other neighboring stores. However, this is not the case.

As to whether or not co-shopping actually affected the Appellant firm during the review period, this argument is little more than conjecture. The Appellant has provided no evidence to show that co-shopping is particularly common among SNAP recipients in Washington, D.C. If co-shopping truly impacted Union Market as the Appellant suggests, it would stand to reason that co-shopping would affect other nearby firms as well. This would manifest itself in comparable firms having similar transaction patterns – multiple transactions from the same household in a short period of time. But this is simply not the case.

The Appellant contends that it is aware that there are a number of SNAP households that come into the store multiple times a day because of convenience, often sending their children on separate shopping trips to pick up items. Some participants make purchases for friends, for large gatherings or to satisfy needs that are not obvious. It is much easier for the customer to get through the spaces of a store like the Appellant's than it is for them to go into a supermarket/super store. Accordingly, these customers are more likely to come back for supplemental and quick shopping trips than they otherwise would at an average convenience store with an inferior inventory and a further distance from their homes.

However, the second, third, and fourth transactions in each set are too large to consist of forgotten items. In addition, the report and photographs from the store visit as well as the stock photos submitted by the Appellant offer no explanation as to why SNAP customers would routinely shop at Union Market multiple times during a short period or purchase such a large volume of items, there being no great variety or advertisements of products, price advantage, profusion of large packages, or significant bulk items or food cases for sale. The majority of the Appellant's food stock consists of packaged food items, canned items, accessory food items, snacks, and beverages.

The Appellant contends that the store does not have an optical scanner, but the clerk has the ability to visually identify and enter items into the register. Item prices are usually consistent if not outright uniform, and are frequently memorized by the clerk through repetition over time. Furthermore, the store will tabulate transactions on a rolling basis, meaning that unlike a grocery store when you line up, set all of your items on the counter and then purchase them, this store permits participants to gather items, bring them to the register, and then return to gather more items. Also, as the store has two cash registers and only one EBT terminal, transactions could be split up (in the instance of co-shopping) between two registers, calculated separately, and processed sequentially in a lower amount of time.

While the store visit observations confirm that the store has two cash registers, they are both surrounded by a Plexiglas barrier. The firm had a small checkout area with limited check-out counter space, one EBT POS device, and no optical scanners or conveyor belts to expedite high dollar or rapid consecutive purchases. The customers have no place to put multiple purchases while shopping. As a customer this would be inconvenient at best and it would make it hard for the cashiers to keep a running total of items purchased as the Appellant suggests. As such, even if cashiers do know the price of goods by memory, these factors call into question that this is a reasonable explanation for the transactions.

No evidence was submitted to support the Appellant's contentions that these transactions are the result of unemployed local SNAP household members satiating their boredom by regularly shopping at stores to find something to do. If shopping due to boredom were a regular occurrence at the Appellant, this pattern would manifest itself in comparable firms having similar transaction patterns. But this is simply not the case. No evidence was submitted to support the Appellant's contention that area stores are stacked one upon another, causing a reduction in flow of SNAP participants. The Appellant's sales would also be impacted if its claim is true that the store is located in an area in which there is a reduction in flow due to more direct competition and a smaller portion of the overall business.

The Appellant contends that the store is located in an area where there are not immediate competitors around it. This means less competition and higher dollar volume. The surrounding SNAP retailers operate in slightly different business environment conditions, or with material differences in operation, location and inventory. There are 25 surrounding SNAP retailers with the nearest store located 0.48 miles away and no SNAP retailer to the northwest.

It is recognized that sometimes a firm may have unusual transaction patterns due to a recipient's lack of access to other SNAP authorized stores. However, during the review period there were 16 SNAP authorized retailers located within a 1.0 mile radius of Union Market, including 1 small grocery store and 15 other convenience stores, which could meet the nutritional needs of SNAP customers. There were 47 SNAP authorized retailers located within a 2.0 mile radius, including 3 supermarkets and 1 super store. Some of these area authorized stores offer a comparable or greater quantity and variety of food products at comparable or better prices as compared to the subject store.

The Appellant contends that transportation inconsistency is another reason for the transactions outlined in this Attachment. Participants do not have their own vehicles so trips to larger stores are dependent upon rides from friends or family. A household that cannot depend on those trips is forced to shop nearby.

The record indicates that SNAP customers who shopped at Union Market during the review period also shopped at other area grocery stores and, therefore, transportation to other stores is not an issue for these customers. Therefore, lack of access to other authorized stores or the availability of other food stores does not appear to be an explanation for the Appellant's abnormally high SNAP transaction amounts conducted within a short timeframe of each other.

No documentation was offered to support the Appellant's contention that trafficking was not occurring at the firm. The Appellant has the burden to provide relevant evidence to rebut the trafficking charges. Unfortunately, the Appellant has not provided any evidence to show that the transactions listed in this Attachment were legitimate purchases of eligible foods. The arguments presented by the Appellant hold little weight without some kind of evidence to substantiate its claims.

### **Excessively Large Purchase Transactions (Charge Letter Attachment 2)**

This charge letter Attachment documents 492 SNAP transactions, as large as \$116.70, that total \$20,324.98. These large transaction amounts are not consistent with the store's observed

characteristics and food inventory. The frequency of high dollar purchases in the review period calls into question the legitimacy of these transactions.

The Appellant contends that store sells a variety and quantity of staple food items and that it is sufficiently stocked in all four staple food categories. However, the store visit report and photos indicate that the store is approximately 1,400 square feet in size with no additional storage area out of public view. In addition, the store did not have any storage coolers or freezers. The food stock and facilities of the Appellant as reported in the store visit documentation do not appear sufficient to provide for all of one's food needs. People generally do not spend large sums at such stores. They usually stop at convenience stores to pick up a few staple food items, such as bread, milk, or a can or two of food that they may consider are not worth a trip to the supermarket to purchase. The Appellant contends that the large transactions are not the result of trafficking of SNAP benefits. However, it is rare for a convenience store such as Union Market to have purchases like those included in this Attachment to the charge letter.

A review of the store visit report and photos as well as the photos provided by the Appellant indicates that Union Market is a convenience store offering a moderate variety and amount of staple food items and does not offer any specialty or ethnic food items that are not available at other area authorized retail food stores. The stock of SNAP eligible foods is moderate with no fresh meats, poultry or seafood, no frozen unprocessed meats, poultry, or seafood, very little fresh produce stock, and lacks an abundant depth and breadth of staple foods.

The Appellant contends that visual identification on the part of the store clerk is easier than scanning items as they are aware of the prices because of experience so they need only to identify the items and enter the price on the register. The number of high priced items in the store does not require the store to have a huge amount of counter space to set all of the items. Given that a number of these items is roughly \$5.00 each, twelve of such items would not be difficult to carry and could be placed on the given space set out in the store visit report.

As noted previously, the firm had a small checkout area with limited check-out counter space, two cash registers which were surrounded by Plexiglas barriers, one EBT POS device, and no optical scanners or conveyor belts to expedite high dollar or rapid consecutive purchases. The customers have no place to put multiple purchases while shopping. As a customer this would be inconvenient at best and it would make it hard for the cashiers to keep a running total of items purchased as the Appellant suggests. As such, even if cashiers do know the price of goods by memory, these factors call into question that this is a reasonable explanation for the transactions.

The Appellant contends that FNS' on-site inspection of the store depicted the Appellant in this case, though not in as much detail as the Appellant would have preferred. Given the higher priced items in the store, it is not difficult to imagine \$60.00 worth of groceries being purchased in a single trip. However, the store visit report, which was signed by and completed in collaboration with the store owner, shows only a few high priced eligible foods in stock, the majority of which were in limited quantities, so the majority of the food items stocked at the store are low priced items. The Appellant submitted no evidence to substantiate its claim that the store visit observations did not include additional expensive SNAP-eligible foods that are normally stocked at the store.

While the Appellant firm may be located in a neighborhood with households that qualify for SNAP benefits and within walking distance of multiple schools and low-income housing developments, these factors are not an indication that questionable transactions would be occurring at any given store. The subject store shows unusual transaction patterns that are not displayed in other similarly stocked stores. If specific household needs are causing these questionable transactions at the subject store, it would be expected that similar patterns would also present themselves at nearby firms as well. But this is simply not the case.

The Appellant contends that according to USDA's research (*Foods Typically Purchased by SNAP Households*), sweetened beverages and salty snacks are within the top 10 expenditures for SNAP households, as are meats and a number of other items offered by the Appellant. It is therefore reasonable to expect SNAP customers to spend large amounts and/or the majority of their benefits at the Appellant store.

It is acknowledged that the subject store does offer items that SNAP households would purchase; however, many of these items are accessory items that a SNAP customer would not purchase all the time. However, the key findings of the noted study indicate that there were no major differences in the expenditure patterns of SNAP and non-SNAP households, no matter how the data was categorized. The study noted that similar to most American households: About 40 cents of every dollar of food expenditures by SNAP households was spent on basic items such as meat, fruits, vegetables, milk, eggs, and bread; another 20 cents out of every dollar was spent on sweetened beverages, desserts, salty snacks, candy and sugar; the remaining 40 cents was spent on a variety of items such as cereal, prepared foods, dairy products, rice, and beans; and the top 10 summary categories and the top 7 commodities by expenditure were the same for SNAP and non-SNAP households, although ranked in slightly different orders.

The Appellant provided statistics pertaining to the general demographic. However, there is no indication as to how this explains the questionable transaction patterns addressed in the charge letter. Many households are comprised of a diverse family dynamic, yet this is not an indication that questionable transactions would be occurring at any given store. The subject store shows unusual transaction patterns that are not occurring in other similarly or even better stocked stores. If specific diverse family needs are causing these questionable transactions at the subject store, it would be expected that similar patterns would exist at other neighboring stores. However, this is not the case.

#### 5 U.S.C. § 552 (b)(7)(E).

As to whether or not co-shopping actually affected the Appellant firm during the review period, this argument is little more than conjecture. The Appellant has provided no evidence to show that co-shopping is particularly common among SNAP recipients in Washington, D.C. If co-shopping truly impacted Union Market as the Appellant suggests, it would stand to reason that co-shopping would affect other nearby firms as well. This would manifest itself in comparable firms having similar transaction patterns – excessively large purchase transactions made from recipient accounts. But this is simply not the case.

The Appellant contends that the only stores that are nearby do not have the inventory and variety of the Appellant. Accordingly, this store is going to have larger transactions than the average convenience store. It is recognized that sometimes a firm may have unusual transaction patterns due to a recipient's lack of access to other SNAP authorized stores. However, as noted previously, during the review period there were 16 SNAP authorized retailers located within a 1.0 mile radius of Union Market, including 1 small grocery store and 15 other convenience stores, which could meet the nutritional needs of SNAP customers. There were 47 SNAP authorized retailers located within a 2.0 mile radius, including 3 supermarkets and 1 super store. Some of these area authorized stores offer a comparable or greater quantity and variety of food products at comparable or better prices as compared to the subject store.

The Appellant contends that according to the 2016 *U.S. Grocery Shopping Trends Annual Report*, FMI, limited assortment stores saw an increase of consumers who use them as a primary grocery by 3% over 2015; convenience stores likewise saw an increase of 3% in consumers who used their store as their primary grocer; ethnic food stores saw a rise of 1% in primary grocery usage. FNS does not question the data in the report and acknowledges that it could be possible that some people shop at the subject store regularly. However, the Appellant is using this average and or overall data to attempt to explain the questionable transactions in the charge letter. This data, however, is not specific to the subject store. This report does not mention the number of SNAP recipients, if any, included in the survey. In addition, the survey participants were located in Seattle, Washington, while the subject firm is located in Washington, D.C. As such, the referenced report does not substantiate that trafficking did not occur at the Appellant firm.

In support of the Appellant's contentions regarding SNAP households' shopping habits, the following studies were cited: *Benefit Redemption Patterns in the SNAP in Fiscal Year 2017 Final Report*, Insight Policy Research, September 2020; *Shopping Pattern and Food Purchase Difference Among SNAP Households and Non-SNAP Households in the United States*, Preventative Medicine Reports, June 20, 2017; and *What Does SNAP Benefit Usage Tell Us About Food Access in Low-Income Neighborhoods?*, Social Science & Medicine, 2014. While FNS does not dispute the findings of these studies, they do not provide any evidence that trafficking was not occurring at Union Market.

The Appellant contends that because the store is located much closer to the SNAP participants and its inventory contains such a wide variety of items, these transactions are more likely to occur as a matter of course. **5 U.S.C. § 552 (b)(7)(E).**

Based on the store layout, infrastructure, and available inventory, it is not credible that the Appellant would so frequently conduct large transactions closely resembling those typically found at a supermarket or super store. It is not plausible that the firm's customers would regularly carry very large amounts of merchandise around the store without the benefit of shopping carts, especially since larger, better-stocked stores are readily available and in the vicinity of the Appellant firm. The Appellant is not set up to process high-dollar transactions, as indicated by its lack of equipment to facilitate large transactions and limited counter space. There are no legitimate bases for SNAP customers' unusual attraction to the firm such as a superior selection of staple foods, price advantages, package specials, bulk or promotional items,

an extensive variety of otherwise unavailable ethnic food items, or special services rendered. The Appellant failed to provide convincing evidence to establish the legitimacy of these excessively large transactions, 5 U.S.C. § 552 (b)(7)(E). Based on all of these factors discussed in this section, the large volume of transactions for high-dollar amounts is unlikely to indicate a pattern of legitimate food purchases.

### **Evidence of Trafficking**

Regarding the Appellant's contentions with respect to the reliability of the ALERT system 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 local area, to render a determination as to whether or not the questionable transaction patterns were, more likely than not, the result of trafficking. The regulations at 7 CFR § 278.6(a) state that FNS may disqualify any authorized retail food store if the firm fails to comply with the Food and Nutrition Act of 2008, as amended, and that such disqualification shall result from a finding of a violation on the basis of evidence that may include facts established through, inconsistent redemption data, and evidence obtained through a transaction report under an electronic benefit transfer system.

The Appellant argues that USDA does not know the correlation coefficient between ALERT scans and trafficking. The Appellant asserts that it has calculated this based on results of undercover investigations and determined that it was a positive correlation, but the relationship between the values is weak. These contentions are pure conjecture on the part of the Appellant. The Appellant does not have the necessary data to perform a reliable correlation analysis.

### **Tax Records/Inventory Purchase Invoices**

The Appellant contends that the submitted tax returns and inventory purchase invoices substantiate the firm's inventory and demonstrate that there was adequate eligible food items to account for the transactions during the review period.

The submitted 2017 U.S. Individual Income Tax Return for store owner does not contain sufficient detail for FNS to evaluate the store's inventory. 5 U.S.C. § 552 (b)(7)(E). As such, this document does not offer additional insight as to what occurred during the charge letter transactions and do not validate that they were legitimate, bona-fide transactions.

The Retailer Operations Division conducted an analysis of the 153 inventory purchase invoices provided by the Appellant. 5 U.S.C. § 552 (b)(7)(E). In sum, the invoices do not explain the questionable transactions at the Appellant.

## Case Laws and Past Administrative Reviews

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

With regard to the prior Final Agency Decisions cited by the Appellant, this administrative review decision is based on the specific circumstances of this case as documented by the materials provided by the 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.

### CIVIL MONEY PENALTY

In the February 19, 2019 charge letter the Appellant was informed by the Retailer Operations Division that, under certain conditions, FNS may impose a civil money penalty (CMP) of up to \$59,000 in lieu of permanent disqualification of a firm for trafficking. Per Section 278.6(i) of the SNAP regulations, four criteria must be met in order to be considered for a trafficking civil money penalty. If requesting a trafficking CMP, an Appellant must meet each of the four criteria listed and provide the documentation as specified within ten days of the Appellant's receipt of their charge letter.

If the Appellant's request for a trafficking CMP and the required documentation are not submitted on time, it will lose its right for any further consideration for a trafficking CMP. The SNAP regulations are specific at 7 CFR §278.6(b)(2)(iii) that "if a firm fails to request consideration for a civil money penalty in lieu of a permanent disqualification for trafficking and submit documentation and evidence of its eligibility within the 10 days specified, the firm shall not be eligible for such a penalty". The regulations do not provide the agency discretion to extend the time within which documentation and evidence in support of a trafficking civil money penalty may be submitted.

In the reply to the charge letter of February 19, 2021, (i.e., after the required 10 days of receipt of the February 19, 2019 charge letter), the Appellant, through counsel, requested consideration for a civil money penalty in lieu of permanent disqualification pursuant to 7 CFR § 278.6(i). However, the record supports that the Appellant did not submit timely substantial evidence, as required by the regulations, to meet the criteria for a trafficking CMP in lieu of permanent disqualification. Therefore, the Retailer Operations Division's decision not to impose a civil money penalty in lieu of disqualification is sustained as appropriate pursuant to 7 CFR § 278.6(i).

## **CONCLUSION**

The Retailer Operations Division's analysis of the Appellant's EBT transaction record, upon which charges of violations are based, together with observations made during the store visit and an analysis of customer shopping behaviors, provide substantial evidence that questionable transactions during the focus period have characteristics and display patterns that are not consistent with legitimate sales of eligible food to SNAP benefit customers at a store of this type, size and makeup. Rather, the characteristics are indicative of illegal trafficking in program benefits. The Appellant's contentions do not outweigh this evidence.

The record has yielded no indication of error or discrepancy in the reported findings by the Retailer Operations Division that program benefits were accepted in exchange for cash or consideration other than eligible food. Therefore, based on a review of the evidence in this case, it is more likely true than not true that program violations did, in fact, occur as charged. Therefore, the decision to impose a permanent disqualification from participation in the SNAP against Union Market is sustained.

## **RIGHTS AND REMEDIES**

Your attention is called to Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. 2023) and to Section 279.7 of the Regulations (7 CFR § 279.7) with respect to your right to a judicial review of this determination. Please note that if a judicial review is desired, the Complaint, naming the United States as the defendant, must be filed in the U.S. District Court for the district in which you reside or are engaged in business, or in any court of record of the State having competent jurisdiction. If any Complaint is filed, it must be filed within thirty (30) days of receipt of this Decision.

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

LORIE L. CONNEEN  
ADMINISTRATIVE REVIEW OFFICER

January 18, 2022