

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

A1 Food and Liquor,

Appellant,

v.

**Office of Retailer Operations and
Compliance,**

Respondent.

Case Number: C0216343

FINAL AGENCY DECISION

The U.S. Department of Agriculture, Food and Nutrition Service (FNS), finds that there is sufficient evidence to support the determination by the Office of Retailer Operations and Compliance to impose a permanent disqualification against A1 Food and Liquor (hereinafter Appellant) from participating as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

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

AUTHORITY

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

CASE CHRONOLOGY

By letter dated May 30, 2019, the Office of Retailer Operations and Compliance charged Appellant with trafficking based on a series of irregular SNAP transaction patterns that occurred in July 2018 through December 2018. The letter noted that the penalty for trafficking is permanent disqualification as provided by 7 CFR § 278.6(e)(1). The letter also noted that the

Appellant could request a trafficking civil money penalty (CMP) in lieu of a permanent disqualification within ten days of receipt under the conditions specified in 7 CFR § 278.6(i). Appellant, through its original counsel, responded to the charges in letters dated June 10, June 19, and June 20, 2019. None of these replies requested a CMP or provided any documentation in support of one. After giving consideration to the evidence, the Office of Retailer Operations and Compliance notified Appellant by letter dated September 30, 2019, that the firm was permanently disqualified from participation as a SNAP retailer in SNAP in accordance with 7 CFR § 278.6(c) and 278.6(e)(1) for trafficking violations. This letter also stated that Appellant was not eligible for the CMP because insufficient evidence was submitted to demonstrate that it had established and implemented an effective compliance policy and program to prevent SNAP violations.

By letter dated October 8, 2019, Appellant, through its current counsel, appealed the Office of Retailer Operations and Compliance's assessment and requested administrative review. The appeal was granted. This request also included a request for information under the Freedom of Information Act (FOIA). The agency responded to the FOIA request by correspondence dated November 1, 2019. On December 10, 2019, counsel requested and was approved for an extension of time until December 23, 2019, to submit additional information. Subsequent correspondence was received.

STANDARD OF REVIEW

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

CONTROLLING LAW

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

7 CFR § 278.6(a) states: "FNS may disqualify any authorized retail food store if the firm fails to comply with the Food and Nutrition Act of 2008, as amended, or this part. Such disqualifications shall result from a finding of a violation on the basis of evidence that may include facts established through on-site investigations, inconsistent redemption data, evidence obtained through a transaction report under an electronic benefit transfer system."

7 CFR § 278.6(e)(1)(i) states: "FNS shall disqualify a firm permanently if personnel of the firm have trafficked as defined in § 271.2." Trafficking is defined in part as, "The buying, selling,

stealing, or otherwise effecting an exchange of SNAP benefits for cash or consideration other than eligible food”. Trafficking includes “Intentionally purchasing products originally purchased with SNAP benefits in exchange for cash or consideration other than eligible food”.

7 CFR §278.6(i) states: “FNS may impose a civil money penalty in lieu of a permanent disqualification for trafficking . . . if the firm timely submits to FNS substantial evidence which demonstrates that the firm had established and implemented an effective compliance policy and program to prevent violations of the Program.”

7 CFR §278.6(b)(2)(ii) states: “Firms that request consideration of a civil money penalty in lieu of a permanent disqualification for trafficking shall have the opportunity to submit to FNS information and evidence that establishes the firm’s eligibility for a civil money penalty in lieu of a permanent disqualification in accordance with the criteria included in §278.6(i). This information and evidence shall be submitted within 10 days, as specified in §278.6(b)(1).” Part 278.6(b)(2)(ii) further states that if a firm fails to request a civil money penalty in lieu of a permanent disqualification for trafficking and submit documentation and evidence of its eligibility within the specified 10 days, the firm shall not be eligible for such a penalty.

SUMMARY OF THE CHARGES

The issue in this review is whether, through a preponderance of evidence, it is more likely true than not true that the questionable transactions were the result of trafficking. The charges on review were based on an analysis of SNAP EBT transaction data during the six month period of July 2018 through December 2018. This involved three patterns of EBT transaction characteristics indicative of trafficking:

1. There were an unusual number of transactions ending in a same cents value.
2. Multiple transactions were made from individual benefit accounts in unusually short timeframes.
3. Excessively large purchase transactions were made from recipient accounts.

APPELLANT’S CONTENTIONS

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

- Appellant, through a prior law firm, answered the charge letter as follows:
 - A large number of items are priced in whole numbers, such as \$1.00, \$1.50, \$2.00, or numbers ending in .x9 cents;
 - Customers will purchase something to see their SNAP balance and will then make additional purchases within a very short period of time. Family members come into together, i.e. children with parents, and they each make individual purchases;

- The store is well stocked with approximately 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in SNAP eligible food and grocery items;
- A nearby competitor had its SNAP authorization terminated thus resulting in increased sales during the investigation;
- There are no big stores (5 U.S.C. § 552 (b)(6) & (b)(7)(C)) nearby;
- 5 U.S.C. § 552 (b)(6) & (b)(7)(C) of inventory purchases were made from 19 vendors between the months of October through December of 2018;
- The firm's inventory is well documented as USDA representatives took pictures of a well-stocked store;
- Photographs were provided showing an overview of the store, SNAP food items, including infant formula priced at \$22.99, and item pricing;
- The store visit photos show many grocery items that are pre-priced with an even dollar amount as well as 27 SNAP items with prices ending in .99 cents. Twelve examples are provided of possible purchase combinations that add-up to some of the prices in Attachment 1 of the charge letter. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Given that many items are pre-priced in even dollar amounts and many items end in .99 and .98 cents, it is not inconceivable that an average of three transactions per day would end in either .00, .99, or .98 cents;
- Appellant summarized the FOIA responses to the various requests and states that FNS is withholding responsive documents that are a violation of the Appellant's due process rights. If FNS cannot provide a response to these questions that are directly related to the charge letter accusations that the Appellant's store characteristics did not correlate with the large based EBT transactions, how can any EBT vendor know what his store characteristics are and what sales limit he/she can impose on EBT customers which he would not impose on credit card or cash paying customers. Again, the Regulations clearly show that an EBT vendor must treat every customer regardless of the method of payment (i.e. cash, credit or EBT card);
- The documentation for the firm's inventory purchases for the review period as well as its Illinois sale tax and use reports are attached showing that the average gross income for the period in question is 42 percent that is in line with the profit margins of small mom and pop grocery stores; and,
- The firm is a well-stocked business that has enough volume to sustain transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C). On December 13, 14, and 15, 2016, the Appellant firm had a negative undercover investigation by FNS showing that the firm was not trafficking. The firm had an unblemished record since first authorized as a SNAP retailer until receiving the charge letter. The Appellant has met its burden of proof by a preponderance of evidence that the administrative action should be reversed.

Appellant submitted a negative FNS investigative report, copies of prior correspondence to/from FNS, the FNS FOIA response, FNS store visit photos, a .99 cent price listing, a listing of possible item price combinations for Attachment 1, invoices/receipts for inventory purchases, state sales tax and use reports, and monthly Z reports in support of these contentions.

ANALYSIS AND FINDINGS

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

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

Store Background and FNS Store Visit

FNS authorized the firm on April 2, 2015. The record indicates that in reaching a disqualification determination, the Office of Retailer Operations and Compliance considered information obtained during a March 10, 2019, store visit conducted by an FNS contractor to observe the nature and scope of the firm's operation, stock, and facilities. This information was then used to ascertain if there were justifiable explanations for the firm's suspicious SNAP transactions. The store visit documented the following store size, description, and characteristics:

- The firm was a small liquor and convenience store offering a very limited quantity and variety of staple foods and carrying no other unique items or offering any distinctive services.
- The store stocked traditional American brands and had no ethnic or specialty food items.
- Exterior signage advertised a large variety of alcohol and tobacco products.
- The store visit report and photos showed no shopping carts or handheld baskets for customer use thus severely limiting the amounts of food that could be moved to the checkout.
- No food packages, bundles, case sales, bulk items, or other sales were evident that would explain the unusual transactions and no SNAP eligible cased items were available for purchase other than approximately three cases of bottled water.
- The store visit report specifically noted that the firm was not a specialty store and that there were no meat packages, fish specials, or fruit and vegetable boxes for sale.
- The checkout area consisted of a very small night window set into a glass security wall with a small shelf in front. The night window opening was approximately eight inches wide and eight inches high and the shelf space in front of the night window was approximately 1.5 feet wide and 1.0 feet deep with many snack food displays on both

sides leaving a very limited area for customers to place their purchases. The very small checkout area would make it problematic to process large orders. The checkout area had one cash register, one POS terminal, and no optical scanner as confirmed by the store cashier.

- There was a small electric food warmer behind the security wall with hot cheese and nachos for purchase.
- The firm had a very limited stock of staple foods that also included single serving and pre-packaged items with a significant portion of inventory in soda, candy, snacks, other drinks, and ineligible items.
- The firm had no fresh or frozen unprocessed meat or seafood, a moderate quantity and variety of processed meats and seafood (canned meat and fish, hot dogs, sausages, packaged lunch meats, bacon, soups, baked ham, and jerky), no deli meats, no canned poultry, several frozen entrees, no frozen dinners, three cartons of eggs, no fresh fruits or vegetables, no frozen fruits or vegetables, dried beans, single serving packaged nuts, no single serving apple sauce, no single serving fruit cocktails, 100 percent fruit juices, no 100 percent vegetable juices, a limited stock of canned soups, single serving Ramen style noodle soups, a very limited quantity and variety of canned and packaged staple food items, no deli cheese, packaged cheese (shredded and sliced), no cream cheese, no large yogurt, no single serving yogurt, no single serving yogurt drinks, four margarine, no butter, seven sour cream, fresh milk, single serving containers of fresh milk, single serving milk drinks, canned milk, no coconut milk, no shelf stable milk, no powdered milk, no half & half, no whipped cream, nine bread, four rolls, three tortillas, no tostadas, no pitas, no taco shells, corn meal, flour, no Maseca flour, sugar, rice, cold cereal, no single serving cold cereal, no hot cereal, canned pasta, no single serving pasta, dry pasta, dry noodles, three pancake mixes, no mac&cheese, no single serving size mac&cheese, several baking mixes, many frozen heat & eat foods (Hot Pockets, pizza rolls, small pizzas, burritos, burgers, chicken sandwiches, etc.), frozen French fries, cooking oil, coffee, no tea, no cocoa, no baby foods, no baby cereal, no infant formula, no baby juices, and very few expensive staple food items.
- Ineligible items included: tobacco, lottery, alcohol, hot food, household products, paper products, pet products, auto products, ATM, health and beauty items, incense, clothing, hats, and jewelry while accessory foods included: candy, condiments, snacks, baked goods, sugar, spices, cooking oil, baking mixes, single serving ice cream, coffee, and un/carbonated drinks.
- The firm's hours of operation were open 9 AM-12 AM Monday-Thursday, 9 AM-2 AM Friday-Saturday, and 9 AM-12 AM Sunday per the store cashier.
- Signage was in English and there were no SNAP posters (anti-fraud, eligible items, reporting trafficking, etc.) visible in the store.
- Although most food items were not individually priced, there were several food items, primarily snack foods, that had manufacturer pricing. Comments on the store visit report by the contract reviewer specifically stated that most of the food prices ended in .x9 cents. A price ending in .x9 cents is a common pricing structure for stores of this type. The store visit report listed the four most expensive food items costing more than \$5.00 for sale in the store as being: three 48 ounce packages of Magnolia Smoked Sausage priced at \$13.99, five 29 ounce packages of Banquet frozen processed chicken priced at \$13.99, eight 25.5 ounce packages of TGI Fridays wings priced at \$11.99, and more

thant 24.8 ounce packages of Tostitos Pizza Rolls priced at \$6.99 each. This listing of the most expensive items was provided by the store cashier during the store visit.

- The firm was not a WIC vendor and did not stock any infant formula and other baby foods, cereals, juices, etc.

Unusual numbers of transactions ending in a same cents value

This Attachment listed 538 transactions with 147 transactions ending in the same cents value of .98 cents, 223 transactions ending in the same cents value of .99 cents, and 168 transactions ending in the same cents value of .00. 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

After reviewing the new arguments offered by Appellant during the administrative review process, the Office of Retailer Operations and Compliance has concluded that the evidence in this Attachment does not support this trafficking charge. Accordingly, it is the determination of this review that the trafficking charge in Attachment 1 is dismissed.

Multiple transactions in unusually short time frames

This Attachment documents 61 individual transactions in 24 sets of two or more transactions conducted by 17 different households in a short period of time.

5 U.S.C. § 552 (b)(6) & (b)(7)(C). This Attachment also includes an unusually high number of transactions ending in the same cents amount of .96 cents. Specifically, 22 of the 61 individual transactions, representing more than 36 percent, end in .96 cents. Many of these same transactions are for the exact same dollar amount such as: 5 U.S.C. § 552 (b)(6) & (b)(7)(C). 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The dollar amounts of subsequent transactions in each set are substantial and nearly equal or exceed the dollar amount of the initial transaction in 23 of the 24 sets. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). There are 15 sets for amounts 5 U.S.C. § 552 (b)(6) & (b)(7)(C) as several pairs of transactions in those sets of three or more individual transactions that occur in as little time 5 U.S.C. § 552 (b)(6) & (b)(7)(C). One set is comprised of five transactions, one of four transactions, and eight of three transactions while the remaining 14 sets are comprised of two individual transactions. It is not a usual shopping pattern to see so many purchases, in a short period of time, by the same recipients as documented in this Attachment. Multiple transactions conducted by the same household within a short period of time is a method which violating stores use to avoid single high dollar transactions that cannot be supported by store inventory and structure. These sets of transactions appear to be in amounts which are indicative of trafficking.

Appellant contends the multiple transactions in unusually short time frames were all legitimate transactions by customers who purchase something to see their SNAP balance and will then make additional purchases within a very short period of time. Family members also come in together, i.e. children with parents, and they each make individual purchases.

SNAP households have no limits on the number of times they may use their benefits or the dollar amount of eligible food they may purchase. The SNAP transactions in this Attachment are questionable not because they exceed any limits for use, but rather because they display

characteristics of use inconsistent with the nature and extent of a convenience store's stock and facilities and are thus indicative of trafficking. These transaction sets do not contain the characteristics associated with a household purchasing a forgotten item right after checking-out, of household members/friends shopping together and making separate purchases, of a household dividing its purchases, or of households making a separate purchase to check their balance followed by another transaction as seven of the 24 transaction sets **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** and 15 other sets occur too quickly to have been legitimate transactions. The transaction sets also do not contain the characteristics of a household returning later in the day to purchase a forgotten item or two as all of the sets have subsequent transactions in amounts **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**, far more than the cost of a forgotten item or two. Appellant offers no explanation as to why households would conduct multiple sizeable transactions at a store with a very limited stock of staple foods within a short period of time when they are also shopping at the many comparably sized or larger food stores located nearby that includes a supermarket, a small grocery store, and 10 convenience stores within 0.96 miles of Appellant's location with two additional super stores located within 1.96 miles. The nearest small grocery store is approximately six blocks away while the supermarket is approximately 11 blocks away and the nearest convenience store is just over one block away. The availability of many larger SNAP stores nearby combined with the firm's very limited staple food stock makes it unlikely that any household would consider the Appellant firm as their primary source for groceries. It should also be noted that SNAP regulations require EBT card holders to be able to check their account balance using a retailer's POS terminal without making any purchases or standing in a checkout line, and they can telephone a toll-free number for that information as well. Additionally, regulations require that EBT card holders receive a POS terminal receipt showing the dollar amount of remaining benefits so, contrary to Appellant's contention, it would be unusual for this many households to not know their SNAP balance.

Based on the very limited number of expensive items for sale at the Appellant firm, it is likely that transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** would consist of a significant number of individual items. SNAP benefit transactions involving legitimate food purchases require many steps: 1) the customer waiting for the previous customer to pick-up their purchases and leave the checkout area; 2) the customer making multiple trips bringing items to the checkout counter for large purchases since the firm has no shopping carts; 3) the cashier separating eligible from ineligible items; 4) the cashier handling individual items to determine the price, which in this case involves manual keying of amounts since there is no scanner; 5) the cashier weighing individual items if sold by weight; 6) the cashier entering prices into a register or adding machine, once for eligible foods and once for ineligible items, which is typical for larger purchases; 7) the cashier handling manufacturers cents-off coupons, if applicable; 8) the cashier bagging the items for carry-out; 9) the cashier informing the customer of the totals (one for eligible foods and one for non-eligible items, if applicable, which for large purchases includes most transactions); 10) the cashier pressing the "SNAP transaction key" on the POS device/card reader; 11) the customer swiping their EBT card; 12) the customer entering their required PIN; 13) the cashier entry of the purchase amount; 14) the cashier confirming the customer has a sufficient benefit balance; 15) the transaction being processed by the system and receiving approval; 16) the cashier printing the EBT and cash register receipts; 17) the cashier accepting an alternate form of payment for nonfoods and possibly handling cash change; and

18) the customer removing products from the checkout area so the next customer in line can begin the next transaction. All or most of these steps are inherent in legitimate large SNAP purchases. One can readily surmise that while such transactions may be completed in succession, performing these processes on large transactions is not done rapidly. The amount of time required is generally proportional to the dollar amount of the transaction; typically, the larger the dollar amount the longer the time period between transactions. The very limited counter space as well as having no shopping carts or hand baskets plus having to manually key-enter lengthy EBT card numbers adds additional time to transactions.

The Appellant firm processed large numbers of transactions, 5 U.S.C. § 552 (b)(6) & (b)(7)(C), markedly faster than supermarkets typically process purchases, yet the Appellant firm does not have an optical scanner or any of the logistical tools such as conveyor belts, rotating bagging platforms, or order separators that are routinely used in rapid throughput operations. It is therefore improbable that large dollar value transactions for the purchase of legitimate food items which would consist of a substantial number of lower priced items based on Appellant's stock could be processed in the times listed in this Attachment given the facilities at the firm. The large transaction dollar amounts and the short interval between transactions in this Attachment demonstrate the improbability of these being legitimate eligible food purchases and suggest trafficking as the most likely explanation.

It is certainly not unusual for a small number of SNAP households to conduct multiple transactions in a short period of time. However, it is unusual that subsequent transaction dollar amounts are substantial in these transaction sets and that all of the sets in this Attachment 5 U.S.C. § 552 (b)(6) & (b)(7)(C) when the comparable average convenience store SNAP transaction amount in Macon County during the review period was \$5.62. FNS transaction data shows that this same pattern of multiple transactions in unusually short time frames is not evident at other nearby like-type grocery stores further supporting that trafficking was occurring at the Appellant firm during the review period.

The Office of Retailer Operations and Compliance's analysis of shopping patterns for Attachment households shows they have ready access to transportation as evidenced by their shopping at a variety of comparably sized or larger food stores located nearby and at a distance from Appellant's location, including super stores and supermarkets. The analysis also shows these households shopped at the Appellant firm and a super store and/or supermarket 5 U.S.C. § 552 (b)(6) & (b)(7)(C) and inexplicably often spent more at the Appellant firm than at the super stores and/or supermarkets. Appellant failed to offer any explanation or rationale as to why households who are regularly shopping and spending large dollar amounts at many larger and better stocked stores would conduct multiple purchases often totaling to comparable or higher dollar amounts at a store with a very limited stock of staple foods. There is no legitimate reason why households would spend so much of their SNAP allotment at the Appellant firm when they clearly had access to and frequently shopped at super stores and supermarkets. Common sense dictates that it is improbable that households would choose to spend large dollar amounts at the Appellant firm if their purchases consisted solely of eligible food items that could be purchased at any of the super stores and/or supermarkets they were already regularly shopping at and therefore the more plausible explanation is that these households were trafficking SNAP benefits at the Appellant firm.

5 U.S.C. § 552 (b)(6) & (b)(7)(C). Conducting multiple transactions totaling to large dollar amounts at a convenience store with a very limited stock of staple foods while spending significantly less at a much larger store offering a far better selection of foods at better prices is a suspicious shopping pattern that is indicative of trafficking. It is also unusual that this household stopped shopping at the Appellant firm after October 5, 2018, yet remained in the area based on its purchases at other nearby stores during the remainder of the review period.

5 U.S.C. § 552 (b)(6) & (b)(7)(C). Conducting multiple transactions totaling to large dollar amounts at a convenience store with a very limited stock of staple foods while spending significantly less at a much larger store offering a far better selection of foods at better prices is a suspicious shopping pattern that is indicative of trafficking. This household only shopped at the Appellant firm on three dates (September 9, December 9, and December 18, 2018) during the review period conducting multiple transactions each time while primarily shopping at eight super stores and a supermarket. This household's December 9, 2018, shopping pattern was nearly identical to its earlier pattern making four purchases (5 U.S.C. § 552 (b)(6) & (b)(7)(C)) 5 U.S.C. § 552 (b)(6) & (b)(7)(C) at the Appellant firm 5 U.S.C. § 552 (b)(6) & (b)(7)(C). 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Additionally, the Illinois SNAP database shows that this household's reported residence is located 3.6 driving miles from Appellant's location. This household's pattern of regularly shopping at super stores and supermarkets located more than 1.96 miles from Appellant's location supports it living at a distance from the firm.

Conducting multiple transactions totaling to large dollar amounts at a convenience store with a very limited stock of staple foods while spending comparable or often significantly less at much larger stores offering a far better selection of foods at better prices is a suspicious shopping pattern that is indicative of trafficking. The households in the two examples above and the others listed in this Attachment displayed suspicious and irregular patterns of conducting multiple transactions totaling to large dollar amounts at a convenience store with a very limited stock of staple foods while spending comparable or lesser amounts at much larger stores offering a far better selection of foods at better prices continued throughout the review period.

It is highly unlikely that the Appellant firm stocked any eligible food items that would not be available at the super stores, supermarkets, and the other larger grocery stores these households were regularly shopping at and these stores would also likely have significantly lower food prices yet these households continued to spend large dollar amounts at a convenience store with a very limited stock of staple foods. Other households analyzed exhibited similar shopping patterns indicative of trafficking. There is no legitimate reason why these households would spend so much of their SNAP allotments at the Appellant firm when they clearly had access to and frequently shopped at nearby and distant supermarkets and super stores. Appellant also offered no explanation as to why a household residing at a significant distance would use their limited cash resources to travel up to 7.2 miles round trip from their normal shopping areas past numerous comparably sized or larger SNAP retail stores to shop at Appellant's very minimally stocked convenience store.

There may be legitimate reasons why a SNAP household might return to a store during a short

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

High Dollar Value Transactions

This Attachment lists 203 transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. The substantial number of high dollar transactions is uncharacteristic for a store offering a very limited stock of staple foods and calls into question the legitimacy of these transactions. The transactions are substantially higher than the average SNAP transaction amount of \$5.62 for this store type in Macon County. This is unusual and indicative of trafficking as previously discussed.

The evidence under review shows that SNAP households shopping at the Appellant firm are also shopping at many full-line supermarkets and super stores, located nearby as well as at a distance from Appellant's location, that offer a greater quantity and variety of SNAP eligible foods items for better prices than customers can find at the Appellant firm. These high dollar value transactions remain questionable when considering the proximity of the other stores that would be better shopping options for consumers. Based on their shopping patterns, transportation does not appear to be an issue for these households. Yet, they continue to shop and spend suspicious high dollar amounts at the Appellant firm, where the eligible food stock is limited, **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** of their purchases at larger food stores. Specifically, 79 of the 101 households in this Attachment visited a supermarket, super store, or large grocery store within a day of completing transactions at the subject firm. Accordingly, access to larger, better stocked stores does not appear to be an issue for most households in this Attachment.

While households residing in areas with extremely limited grocery store options may conduct high dollar transactions at convenience stores out of necessity, this is not the case when they have better alternatives. FNS records show there are 12 comparably sized or larger SNAP retailers located within a 0.96 mile radius of the Appellant firm that includes a supermarket, a small grocery store, and 10 convenience stores with two additional super stores located within 1.96 miles. The nearest small grocery store is approximately six blocks away while the supermarket is approximately 11 blocks away and the nearest convenience store is just over one block away. There are additional supermarkets and super stores located further away. These many larger stores would offer greater quantities and varieties of staple food items at lower prices than would be found at a convenience store with a very limited stock of staple foods.

The difference in the average SNAP transaction amount, the total SNAP transaction dollar volume, and the total SNAP transaction count for Macon County convenience stores during the review months and at the Appellant firm is significant. Appellant's average SNAP transaction dollar volume is **5 U.S.C. § 552 (b)(7)(E)** larger than that of Macon County convenience stores while its total SNAP transaction count is 71.97 percent larger and its average SNAP transaction amount is 23.49 percent larger than the County average. The very high number of SNAP

transactions and the extremely high dollar volume combined with the relatively low average transaction amount is an indication the firm may be dividing larger transactions into multiple smaller transactions in an effort to circumvent detection as previously discussed. A comparison of Appellant's SNAP redemptions to that of nearby like type stores having redemptions for the review period shows that none exhibit the same suspicious transaction patterns listed in the charge letter for the Appellant firm even though all are located in proximity to Appellant's location and would therefore be expected to share the same SNAP customer base and shopping patterns. This is further indication that the transactions in this Attachment and the previous do not represent legitimate food purchases. The Office of Retailer Operations and Compliance considered all of these to be indicators of unusual and suspicious activity.

The firm also had irregular SNAP transaction data compared to like type stores in Macon County. A comparison of Appellant's redemption data to the average for County convenience stores using ten dollar increments shows that Appellant's transaction count and dollar volume was significantly higher than that of like type stores in all ranges

5 U.S.C. § 552 (b)(6) & (b)(7)(C) at which point transactions stop. It is unusual that like type Macon County convenience stores begin averaging less than one transaction in each range 5 U.S.C. § 552 (b)(6) & (b)(7)(C), significantly less than that of the Appellant firm. This transaction pattern does not appear in the transaction patterns or in the transaction count and dollar volume averages for other like type stores. These large dollar transactions are considered to be irregular and suspicious based on the firm's food inventory. The Office of Retailer Operations and Compliance determined there was no credible reason for the firm to have transactions at these dollar levels given the very limited stock of staple foods and the lack of any specialty, bulk, or ethnic foods that might sell for large dollar amounts and also considered this to be a strong indication of trafficking. None of Appellant's contentions explain these unusual and suspicious differences.

Appellant contends the excessively large transactions are legitimate charges for eligible items as the store is well stocked with approximately 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in SNAP eligible food and grocery items, including infant formula and fresh meats. Additionally, a nearby competitor had its SNAP authorization terminated thus resulting in increased sales during the investigation. There are no big stores (5 U.S.C. § 552 (b)(6) & (b)(7)(C)) nearby. A negative undercover investigation by FNS in 2016 also showed that the firm was not trafficking. Appellant submitted documentation for inventory purchases, a listing of vendors with amounts spent at each, and photos of the firm's layout and stock.

Contrary to Appellant's claims of the firm well stocked, a review of the March 10, 2019, store visit inventory report and numerous photos shows that the firm stocked no fresh or frozen unprocessed meats or seafood with the only meats or seafood in stock being canned or highly processed products such as packaged lunch meats, bacon, sausages, frozen packaged chicken varieties, frozen packaged BBQ ribs, jerky, etc. The photos and inventory show no fresh meats or infant formula for sale at the Appellant firm. The firm stocked no baby foods of any kind and it was not a WIC vendor. Most SNAP households with infants or small children are WIC participants and therefore would be purchasing baby foods, formula, and other WIC products using WIC vouchers at a WIC vendor, not SNAP EBT at the Appellant firm. Additionally, the firm has no shopping carts that would be needed to transport the large numbers of food items

required to make up the numerous high dollar value transactions listed in this Attachment. The firm also stocked no fresh or frozen fruits or vegetables. The firm's extremely limited quantity and variety of staple foods combined with the lack of specialty foods or bulk items makes it highly unlikely that any SNAP recipient would consider the firm to be their primary grocery store. It is also noted that, contrary to Appellant's claim, there is a 5 U.S.C. § 552 (b)(6) & (b)(7)(C) supermarket located approximately 11 blocks from the firm's location thus making it even less likely that SNAP recipients would spend significant amounts of their limited SNAP food benefits at the firm. FNS records do show that a nearby store was permanently disqualified; however, this action happened more than one year before the start of the review period and would therefore have no impact of the unusual patterns of transactions occurring during the period under review.

The SNAP transactions noted in this Attachment are not presumed to be trafficking because they exceed a set dollar amount; they are questionable because they are inconsistent for this type of store and store stock. A shopping pattern analysis by the Office of Retailer Operations and Compliance shows that Attachment households are regularly shopping at much larger stores, and conducting high dollar transactions, yet are conducting comparable or higher dollar transactions at the Appellant firm. It makes no sense for a household that regularly shops at larger stores and apparently has no transportation limitations to spend large dollar amounts at the Appellant firm since its cost of goods is higher than that of larger stores such as supermarkets or super stores.

The FNS store visit shows that the firm offers a very limited stock of staple foods that also includes single serving and pre-packaged items with a significant portion of inventory in drinks, candy, and snacks as well as many ineligible items. The fact that tobacco, lottery, alcohol, hot food, household products, paper products, pet products, auto products, ATM, health and beauty items, incense, clothing, hats, and jewelry are not eligible for purchase with SNAP benefits also provides no justification for the high transaction amounts.

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

A detailed analysis of the invoices and receipts for inventory purchases provided by Appellant was conducted by the Office of Retailer Operations and Compliance in order to compare the potential dollar amount of eligible food purchases plus markup to the firm's SNAP redemptions

for the review period. It is noted that Appellant's invoices and receipts corroborate the store visit report that shows a convenience store with primarily convenience food items, snacks, candy, and beverages in addition to many ineligible items. The evidence and Appellant's listing of firms where inventory was purchased shows that some of the firm's food stock is purchased from big brand retailers such as Walmart, Kroger's, Save-A-Lot, Aldi, and Family Dollar with the Appellant firm applying a markup for resale. Appellant offered no explanation as to why SNAP households would buy eligible food items from the Appellant firm when they could buy the same items directly from these and other larger SNAP retailers that the households were already shopping at and for substantially less money. The results of the analysis shows that the firm's SNAP redemptions for the period were less than the potential sales based on inventory purchases. Accordingly, the invoice analysis determined the firm did have sufficient stock to support SNAP redemptions during the review period. However, while the firm's inventory appeared sufficient, inventory alone is not adequate to explain the suspicious transaction patterns in the charge letter or why households living at a distance from the Appellant firm were travelling past larger grocery stores to shop at Appellant's poorly stocked convenience store.

The photos submitted by Appellant appear to be comparable to those taken during the FNS store visit and show a convenience store that is primarily stocked with convenience items, candy, snacks, beverages, and ineligible items with a very limited stocked of staple foods. Appellant also included a hypothetical scenario to explain transaction number 69 **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** in this Attachment. Appellant theorized that the purchase of a case of 32 ounce cans of Mr. Pure Orange Juice priced at \$32.99 plus a case of 24 cans of Arizona fruit punch priced at \$22.99 would total \$55.98. While the firm may now offer stock priced at \$32.99 and \$22.99. At the time of the March 2019 store visit, the firm's highest priced item was \$13.99 for frozen Banquet Chicken or Magnolia Smoke Sausage as stated by the firm's cashier during the visit. The items hypothetically proposed by the Appellant were not offered at the time of the SVC. The same also applies to Appellant's statement of the firm offering infant formula priced at \$22.99.

It is further noted that SNAP redemptions at the Appellant firm fluctuated unusually following receipt of the charge letter on May 31, 2019. The volume of SNAP redemptions at the Appellant firm decreased 25.3 percent from May 2019 to June 2019 while the average dollar amount of SNAP transactions decreased 14.95 percent and the number of SNAP transactions decreased 12.25 percent during the same period. A pronounced fluctuation in SNAP redemptions following receipt of the charge letter is a clear indication of trafficking since, if trafficking were not occurring, there would be no abnormal fluctuations in redemption amounts.

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

Other Contentions

Regarding Appellant's denial of trafficking, the purpose of this review is to either validate or to invalidate the earlier decision of the Office of Retailer Operations and Compliance and is limited to what circumstances were at the basis of the action at the time such action was made.

In an appeal of an adverse action, the Appellant bears the burden of proving by a preponderance of evidence that the administrative action should be reversed. That means the Appellant has the burden of providing relevant evidence that a reasonable mind, considering the record as a whole, would accept as sufficient to support a conclusion that the argument asserted is more likely to be true than untrue. Assertions that the firm has not violated program rules, by themselves and without supporting evidence and rationale, do not constitute valid grounds for dismissal of the current charges of violations or for mitigating their impact. When store ownership signed the certification page of the SNAP retailer authorization application to become a SNAP retailer, it confirmed it understood and agreed to abide by program rules and regulatory provisions. It also agreed to accept responsibility on behalf of the firm for SNAP violations including those committed by any of the firm's employees, paid or unpaid, new, full-time or part-time. The certification is clear that store ownership understood by signing the document that violations of program rules can result in administrative actions such as fines, sanctions, withdrawal, or disqualification from the SNAP. Additionally, a record of participation in SNAP with no previously documented instance of violations does not constitute valid grounds for dismissal of the current charges of violations or for mitigating the impact of those charges.

Regarding Appellant's many contentions regarding the FOIA response, FOIA responses are governed by current FOIA rules and regulations and fall outside of the purview of this administrative review and so are not addressed further.

With regards to Appellant's contention that its due process rights were violated, section 278.6(b)(1) of the SNAP regulations provides that upon charging a firm with SNAP violations, the letter informing the firm of the charges "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." This section further states that, "Any firm considered for disqualification, shall have full opportunity to submit to FNS information, explanation, or evidence concerning any instances of noncompliance before FNS makes a final administrative determination." A review of the Office of Retailer Operations and Compliance administrative actions regarding this matter indicates full compliance with all applicable SNAP regulations, policies, and procedures therefore there is no basis for Appellant's claim of due process rights being violated. This disqualification is an administrative action and SNAP regulations provide for an administrative review of the action. The Act, as amended, and regulations provide that any firm aggrieved by an administrative review determination may seek judicial review of the determination in Federal court or a State court of record having competent jurisdiction. In such event, trial de novo proceedings ensure the firm of a full evidentiary hearing on the agency action at issue.

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

The issue under review involves a charge of trafficking SNAP benefits based on EBT transaction data. EBT transaction data is covered in SNAP regulations at 7 CFR § 278.6(a) and is addressed below. Trafficking is always considered to be the most serious violation even if it is a first offense therefore a temporary suspension or lesser penalty would not be applicable. SNAP regulations at 278.6(e)(1) clearly state that, “FNS shall disqualify a firm permanently if personnel of the firm have trafficked as defined in § 271.2.” SNAP regulations at 7 CFR § 271.2, define trafficking as, “The buying, selling, stealing, or otherwise effecting an exchange of SNAP benefits for cash or consideration other than eligible food”. SNAP regulations at 7 CFR § 278.6(a) clearly state that “FNS may disqualify any authorized retail food store if the firm fails to comply with the Food and Nutrition Act of 2008, as amended, or this part. Such disqualification shall result from a finding of a violation on the basis of evidence that may include facts established through on-site investigations, inconsistent redemption data, evidence obtained through a transaction report under an electronic benefit transfer system”. In the present case, the data presented in the Attachments is solely based on the SNAP EBT transactions conducted at the Appellant firm during the review period. This firm was selected as a result of a series of complex algorithms that make numerous data comparisons with other like type firms during the review period. All of the transactions were then reviewed and analyzed by the Office of Retailer Operations and Compliance staff before the decision was made to issue a charge letter. This investigative process included a detailed examination of information obtained from various sources, including, but not limited to the inventory report and photos from the FNS store visit, a transaction comparison and analysis of like type and larger stores, and analysis of shopping patterns for recipient households conducting transactions at the Appellant firm during the review period. This analysis also included a review of the firm to ensure its store classification was correct and the data comparisons with like type firms valid. Additionally, there are nearby like type stores whose transaction data does not form these suspicious patterns and are therefore not at risk of disqualification for trafficking. There is also no regulatory requirement that trafficking disqualifications be based solely on on-site undercover operations.

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

The Food and Nutrition Act of 2008, as amended, and the regulations issued pursuant thereto do not cite any minimum dollar amount of cash or SNAP benefits, or number of occurrences, for such exchanges to be defined as trafficking. Nor do they cite any degrees of seriousness pertaining to trafficking of SNAP benefits. Trafficking is always considered to be the most serious violation, even when the exchange of SNAP benefits for cash is dollar-for-dollar or is conducted by a non-managerial store clerk. This is reflected in the Food and Nutrition Act, which reads, in part, that disqualification “shall be permanent upon the first occasion of a

disqualification based on trafficking by a retail food store." In keeping with this legislative mandate, Section 278.6(e)(1)(i) of the SNAP regulations states that FNS shall disqualify a firm permanently if personnel of the firm have trafficked. There is no agency discretion in the matter of what sanction is to be imposed when trafficking is involved and second chances are not an authorized option under existing regulations.

CIVIL MONEY PENALTY

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

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

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

CONCLUSION

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

The retailer has not provided sufficient evidence to rebut the case that Appellant most likely trafficked in SNAP benefits. Therefore, based on a review of all of the evidence in this case, it is more likely true than not true that program violations did, in fact, occur as charged. Based on the discussion above, the determination to impose a permanent disqualification against

Appellant is sustained. Furthermore, the Office of Retailer Operations and Compliance properly determined that Appellant was not eligible for a trafficking CMP according to Section 278.6(i) of the SNAP regulations.

RIGHTS AND REMEDIES

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

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

ROBERT T. DEEGAN
ADMINISTRATIVE REVIEW OFFICER

February 1, 2021