

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

**Appletown Market,**

**Appellant,**

**v.**

**Case Number: C0201976**

**Retailer Operations Division,**

**Respondent.**

**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 Retailer Operations Division to impose a permanent disqualification against Appletown Market (hereinafter Appellant) from participating as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP).

**ISSUE**

The issue accepted for review is whether the Retailer Operations Division 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 on January 19, 2018.

**AUTHORITY**

According to 7 U.S.C. § 2023 and its 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**

In a letter dated December 19, 2017, the Retailer Operations Division charged the Appellant with trafficking, as defined in Section 271.2 of the SNAP regulations, based on a series of irregular SNAP transaction patterns that occurred during the

months of March 2017 through August 2017. 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 counsel, responded to the charges in a letter dated January 2, 2018, that included a request for a trafficking CMP, but provided no evidence in support of the CMP. The Retailer Operations Division notified Appellant in a letter dated January 19, 2018, that the firm was permanently disqualified from participation as an authorized retailer in SNAP in accordance with Section 278.6(c) and 278.6(e)(1) for trafficking violations. This determination letter also stated that Appellant's eligibility for a trafficking CMP according to the terms of Section 278.6(i) of the SNAP regulations was considered. However, the letter stated “. . . you are not eligible for the CMP because you failed to submit sufficient evidence to demonstrate that your firm had established and implemented an effective compliance policy and program to prevent violations of the Supplemental Nutrition Assistance Program.”

By letter dated February 2, 2018, Appellant, through counsel, appealed the Retailer Operations Division's assessment and requested an administrative review of this action. The appeal was granted. Subsequent correspondence dated March 6, 2018, was received from Appellant.

### **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 of SNAP benefits.

7 U. S. Code § 2021(a)(2) states, “Regulations promulgated under this chapter shall provide criteria for the finding of a violation of, the suspension or disqualification of and the assessment of a civil penalty against a retail food store or wholesale food

concern on the basis of evidence that may include facts established through on-site investigations, inconsistent redemption data, or evidence obtained through a transaction report under an electronic benefit transfer system.”

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

7 CFR § 278.6(e)(1)(i) reads, in part, “FNS shall . . . [d]isqualify a firm permanently if . . . personnel of the firm have trafficked as defined in § 271.2. ” Trafficking is defined, in part, in

7 CFR § 271.2, as, “The buying, selling, stealing, or otherwise effecting an exchange of SNAP benefits . . . for cash or consideration other than eligible food, either directly, indirectly, in complicity or collusion with others, or acting alone . . . .” Trafficking is further defined, in 7 CFR § 271.2, to include “(5) Intentionally purchasing products originally purchased with SNAP benefits in exchange for cash or consideration other than eligible food.”

7 CFR § 278.2(f) states, inter alia: “Coupons [SNAP benefits] shall not be accepted by an authorized retail food store in payment for items sold to a household on credit.”

7 CFR §278.6(i) states, inter alia: “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, inter alia: “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 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 Part 278.6(b)(1), 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 March 2017 through August 2017. This involved three patterns of EBT transaction characteristics indicative of trafficking:

1. Multiple transactions were made from individual benefit accounts in unusually short time frames.
2. The majority or all of individual recipient benefits were exhausted in unusually short periods of time.
3. Excessively large purchase transactions were made from recipient accounts.

## **APPELLANT'S CONTENTIONS**

In the response to the letter of charges, in the request for administrative review, and in the subsequent response, Appellant has stated as its position in the matter the following:

- Store ownership claims that the trafficking charges are incorrect as a matter of fact and inadequately supported. He also claims that even if there was a rogue employee, he was unaware of it and should be relieved of any consequences. The firm has been a SNAP retailer for approximately three years with no prior warnings or violations. There was no intent by the firm to commit trafficking;
- There is no witness or firsthand evidence of trafficking. There is simply supposition and speculation based on a review of alleged records that are between nine and four months old and completely inaccessible to the owner except for a superficial printout provided. While the store has a video surveillance system it does not save tapes past 1.5 months and the cash register does not keep records of transactions, especially old transactions. Because SNAP waited so long before charging, the owner has lost the only evidence that would have vindicated him. Because of this intentional delay where SNAP knew or should have known of the usual and ordinary limited retention of video surveillance tapes and the lack of any warning letter as compelled under SNAP regulations, the charges should be dismissed. The full-time clerk has worked at the store for about six years and has been a faithful and honest employee who steadfastly denies any wrongdoings. The only explanation is that each transaction was innocent, legitimate, and lawful, or that the records are inaccurate or incomplete;
- The multiple purchases are readily explained by buyers who occasionally engage in two transactions one after the other. Possibly for ease of use of the

EBT card. A purchaser will purchase certain items to see the balance on the card and then will use up the balance buying multiple or bulk items. Often this could be for family or household group that live together and share payments for food that is eaten by all of them. Families often will buy multiple items close together in time to stock up for a time when they will not be able to or do not have time to shop. Often purchasers may forget to buy an item and will return shortly afterwards to purchase it. Frequently a purchaser will purchase certain and take them out to his or her car and return to purchase more items. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The government has the luxury of culling out a few selected sales over a required six month period of time based on some unknown and undisclosed calculation or criteria and this proof is grossly deficient to prove what it must prove. There is also nothing that prohibits multiple transactions;

- The same grounds above would also apply to the transactions where the majority or all of an individual's benefits were exhausted in unusually short periods of time. Many customers purchase multiple items at or near the same time every month to last them through several days or weeks which is not illegal. There is nothing in SNAP regulations that prohibits a customer from spending their card balance in a short period of time. SNAP vendors are also not able to reject a sale because the customer has little or no credit left on their EBT card or because they recently used a large portion of the benefits. It is inappropriate to hold the vendor responsible for a customer spending their card balance early in the month when the individual card holder or family should be punished if this practice is in fact illegal;
- The large purchases are often made by family purchasers who buy bigger volumes or bigger ticket items. The store has a wide variety of highly sought after food items. Moreover, many purchasers buy multiple items so they can stock up without having to repeatedly return to the store. For example, many purchasers buy cases of Red Bull, Rockstar, and Amp energy drinks with 24 cans per case at a price of \$2.49, \$2.59, or \$2.60 per drink and approximately \$60.00 per case that will last through the month or for several weeks. There is no evidence of the firm's intent to violate the regulations;
- The government deprived the owner of due process by waiting approximately nine months before charging the firm thus preventing him from having a fair opportunity to evaluate the transactions while the firm's records were available and relevant parties' memories fresh. Because the government waiting so long, it deprived the owner of the opportunity to present a defense, to evaluate the evidence and cross examine its accusers, or to rebut the charges depriving the owner of due process;
- The investigative report is defective as it lacks detail and simply states conclusions about the evidence. There is no analysis or explanation as to why the transactions cited are believed to be illegal and the report omits key evidence. There is no discussion of how or why the government reaches the conclusions it does from the evidence provided in its bald, conclusory report. There is no analysis of the types of items purchased or even a review

of the prices of items sold. The report appears to have been compiled by a computer program and the December 19, 2017, letter is a form letter exactly like dozens of other trafficking letters. There is no human decision, no exercise of the necessary intellectual inquiry and discretionary function of a human being in this case. This is a machine-made prosecution based on automated likelihoods and groundless speculation and should be summarily dismissed because the proof of trafficking is inadequate;

- If the charges are not dismissed, the owner should be given a warning letter for its first alleged trafficking offense. The owner has had no prior offenses or violations of licensing regulations or the law and will suffer irreparable if forced to give up SNAP. SNAP regulations at Section 278.6(e)(7) state that a warning letter should be sent to firms when the violations are too limited to warrant a disqualification. In this case a warning letter is mandated because the government's proof is extremely limited. It is based solely on the most superficial of circumstantial evidence and is bereft of any firsthand observations, videos, controlled purchases, or other corroboration or indicia of reliability; and,
- If found responsible for trafficking, the owner should be given a CMP as he meets the four criteria. The owner developed an effective compliance policy as specified in regulations and regularly trains his employees approximately every six months based on SNAP materials and YouTube videos found on line. The firm's management also regularly sits down with employees and goes over SNAP rules. The firm's compliance policy and program were in operation for three-four years since the firm became a SNAP vendor so were in place prior to the alleged violations. An effective training program has been developed and instituted as specified in Section 278.6(i)(2). Lastly, the firm's ownership was not aware of, did not approve of, did not benefit from in any way, and was not involved in the alleged trafficking. Even if knowledge is attributed to ownership, this is only the first occasion in which a member of management was aware of, approved, benefitted from, or was involved in the conduct of any trafficking. As noted above, if the store clerk was involved any violations, it was totally unknown to the owner before the charge letter was received. The owner should qualify as an "innocent owner" and be given the benefit of the option to pay a CMP in order to preserve the firm's SNAP retailer status.

Appellant submitted a signed affidavit by the store owner attesting to the accuracy of all statements in this response in support of these contentions.

The preceding 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.

## **ANALYSIS AND FINDINGS**

The Retailer Operations Division presented a case that Appellant trafficked SNAP benefits. Each Attachment furnished with the letter of charges represents the questionable and unusual patterns of SNAP transactions indicative of trafficking which were conducted at the Appellant business 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**

The FNS most recently reauthorized the business on June 20, 2017, and the business is classified as a convenience store. The file indicates that in reaching a disqualification determination, the Retailer Operations Division considered information obtained during a June 10, 2017, store visit conducted by a 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 EBT transactions at Appellant's store that formed patterns indicative of trafficking. The store review summary documented the following store size, description, and characteristics:

- The business was a moderately sized store offering a limited quantity and variety of staple foods and carrying no ethnic foods, unique items, or offering any distinctive services.
- Exterior signage included advertisements for wine, beer, iced coffee, lottery, tobacco, and propane.
- The business had an extensive selection of beer, wine, and other alcoholic beverages.
- There were no shopping carts or handheld baskets for customer use seen during the visit making it difficult for customers to carry large amounts of food to the checkout area.
- The checkout area was approximately 2.0 feet wide by 2.0 feet deep with displays on both sides as well as the PIN pad that limited the available area upon which to place purchases. The small size of the checkout area would make it problematic to process large orders.
- The checkout counter had one cash register, one POS terminal, and an optical scanner as evidenced by the store visit report and photographs.
- No food packages, bundles, case sales, bulk products, or other sales were evident that would explain the unusual transactions and no cased items were available for purchase except for cases of water, Snapple, beer, and wine.
- The store visit report specifically notes that the business was not a specialty store and that there were no meat bundles or fruit and vegetable boxes for sale.

- The business had a limited stock of staple foods that also included many single serving and pre-packaged items with a large portion of inventory in accessory foods (primarily soda, candy, and other drinks), snacks, and many ineligible items.
- The business had no fresh unprocessed meats, no fresh unprocessed seafood, no frozen unprocessed meats, no frozen unprocessed seafood, a very limited quantity and variety of processed meats and seafood (canned meat/poultry/fish, six packs of hot dogs, one pack of bacon, and jerky), no deli meats, no packaged lunch meats, no sausages, a moderate selection of frozen entrees, a very limited selection of frozen dinners, an extremely limited selection of fresh fruit (six lemons and several limes), no fresh vegetables, no frozen fruits, a limited selection of frozen vegetables, a limited selection of single serving nuts, a moderate stock of soups, a very marginal quantity and variety of canned and packaged staple food items, no deli cheeses, no yogurt, only one sour cream, no baby foods, no infant formula, no corn meal, no flour, and very few expensive eligible food items.
- Ineligible items included: tobacco, tobacco accessories, alcohol, ATM, household products, paper products, auto products, pet products, health and beauty items, cell phones/phone cards, newspapers, diapers, sunglasses, firewood, greeting cards, live bait, lighter fluid, and charcoal while accessory foods included: candy, spices, condiments, coffee, tea, cocoa, sugar, and carbonated/ uncarbonated drinks.
- Signage was in English and there were no SNAP posters (anti-fraud, eligible items, reporting trafficking, etc.) visible in the store.
- The business's hours of operation were 6:00 AM-10:00 daily as confirmed by a store employee during the store visit.
- Most food items were priced with all visible staple food prices ending in .x9 cents except for a very limited number of items priced differently such as drinks priced at two for \$5.00. Comments on the FNS 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 the most common pricing structure for stores of this type.
- The FNS store visit report listed the four most expensive items costing more than \$5.00 for sale in the store as being an 11 ounce container of coffee priced at \$8.99, another 11 ounce container of coffee priced at \$5.99, a 15 ounce frozen chicken alfredo entrée priced at \$6.49, and a 15 ounce frozen pulled pork enchilada entrée priced at \$6.49. This listing of the most expensive items was provided by a store employee during the store visit.
- The store was not a WIC vendor and did not stock baby foods and infant formula.
- The store visit report photographs showed some empty and marginally stocked shelves.
- The quantity and variety of the store's staple food inventory was significantly less than that seen during the previous FNS store visit on December 7, 2011.



## Multiple transactions in unusually short time frames

This Attachment documents 62 individual transactions in 27 sets of two or more transactions conducted by 16 different households in a short period of time. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Three transaction sets are comprised of four individual transactions, two sets are comprised of three individual transactions, and the remaining 22 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. 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

Appellant contends the multiple purchases are readily explained by buyers who occasionally engage in two transactions one after the other. Possibly for ease of use of the EBT card. A purchaser will purchase certain items to see the balance on the card and then will use up the balance buying multiple or bulk items. Often this could be for family or household group that live together and share payments for food that is eaten by all of them. Families often will buy multiple items close together in time to stock up for a time when they will not be able to or do not have time to shop. Often purchasers may forget to buy an item and will return shortly afterwards to purchase it. Frequently a purchaser will purchase certain [sic] and take them out to his or her car and return to purchase more items.

5 U.S.C. § 552 (b)(6) & (b)(7)(C). The government has the luxury of culling out a few selected sales over a required six month period of time based on some unknown and undisclosed calculation or criteria and this proof is grossly deficient to prove what it must prove. There is also nothing that prohibits multiple transactions.

SNAP households have no limit on the number of times they may use their benefits or the dollar value of eligible food they may purchase. The SNAP transactions listed in this Attachment are questionable not because they exceed any limits for use, but rather because they display characteristics of use inconsistent with the nature and extent of a convenience store's limited stock and facilities and are thus indicative of trafficking. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). It also does not make sense that other family members or friends would be spending SNAP benefits in these amounts given the limited staple food stock in the store. One might plausibly expect one transaction to carry the household over until a trip to a larger store would be made, but not multiple transactions.

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 the subsequent transaction dollar amount is for a substantial amount in all of these transaction sets and that they nearly equal or exceed the dollar amount of the first transaction in 18 of the 27 sets. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). These multiple transactions indicate that the amounts were contrived in an attempt to avoid suspiciously high transactions that would be indicative of trafficking by breaking them into multiple, smaller amounts. FNS transaction data shows that this same

pattern of multiple transactions in unusually short time frames is not evident at other nearby like type convenience stores further supporting that trafficking was occurring at the Appellant business during the period under review.

Additionally, since the Appellant business has only low priced food items with almost all food items priced at less than \$5.00, the purchase of the many items with prices ending in .x9 cents needed for the large transactions in this Attachment would most likely not result in a total ending in a same dollar amount 5 U.S.C. § 552 (b)(6) & (b)(7)(C). When there are a disproportional amount of transactions ending in a same cent value, it appears that these transaction amounts are contrived and therefore, in the absence of any compelling rationale to the contrary, are indicative of trafficking.

An analysis of the shopping patterns for all of the households listed in the letter of charges conducted by the Retailer Operations Division shows that they have ready access to transportation as evidenced by their shopping at a variety of other larger food stores located at a significant distance from Appellant's location. While Appellant alleges that the business stocks "a wide variety of highly sought after food items", no such items other than energy drinks were listed as examples as to why SNAP households would travel long distances to conduct multiple transactions totaling to high dollar amounts at a minimally stocked convenience store. Cases of energy drinks were not in evidence on the day of the FNS store visit and Appellant's claim that households would pay approximately \$60.00 for a case of energy drinks makes no sense when these same households are regularly shopping at a variety of super stores and/or supermarkets that would offer these same drinks for significantly lower amounts. Additionally, the Retailer Operations Division analyzed the households themselves and determined that none live in or near Appellant's location in Sterling, Massachusetts with the closest household living approximately five miles away in Clinton, Massachusetts. The remaining households all live at least 10 miles from Appellant's location with the majority living in the City of Worcester and would have to drive past many super stores and supermarkets all of which offer a greater quantity and variety of staple foods at lower prices in order to reach Appellant's location. This analysis brings-up the question of why would households who are regularly shopping at numerous larger and better stocked stores located at a significant distance elect to conduct multiple purchases at a minimally stocked convenience store that carries no unique foods or offers any special services. Appellant's contentions fail to offer any explanation or rationale for these unusual and suspicious shopping patterns. Common sense dictates that it is unbelievable that households with limited cash resources would choose to travel these great distances if their purchases consisted solely of eligible food items that could be purchased at any of the super stores, supermarkets, or other larger stores they were already regularly shopping at and therefore more likely than not that these households were trafficking SNAP benefits at the Appellant business and the multiple transactions were attempts to obscure trafficking by dividing a large dollar transaction into a series of smaller dollar transactions. This is a method used by stores to avoid high dollar transactions that

cannot be supported. This is further supported by household data analyzed over the review period that shows 15 households traveled to at least 32 full-line large grocery stores, supermarkets, and/or super stores in and around Worcester County and made what would appear to be normal food purchases at these stores on the same day, day prior, or day after making transactions at the Appellant business. These households clearly have access to transportation as they are travelling approximately 22.64 miles and beyond to shop at full-line large grocery stores, supermarkets, and/or super stores. It is apparent that the Appellant business is not the only store these households are shopping at; however, the unusual and suspicious transaction patterns cited in this Attachment only occur at the Appellant business. This transaction activity is an indication that trafficking is occurring.

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.

### **Near Depletions of SNAP Benefit Accounts**

This Attachment lists a total of 28 EBT transactions in 12 sets of one or more transactions involving nine households during which the majority, if not all, of the household's monthly SNAP benefits were depleted in a short period of time. There are two sets comprised of four individual transactions, one set comprised of three transactions, eight sets comprised of two transactions, and one set comprised of a single transaction. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Depleting a household's entire SNAP allotment in one or a few transactions, or within one day, leaving little or no benefits for the rest of the month, is inconsistent with the normal shopping behavior of SNAP benefit households.

SNAP benefits are intended to supplement the food budget for recipient households whose net income is at or below the Federal Poverty Level. A government report on SNAP shopping patterns indicates that after the first day of benefit issuance, on average, 79.1 percent of a household's allotment remains unspent. Even after seven days, 42 percent of benefits still remain unspent. It typically takes two weeks to deplete 78.1 percent of one's benefits. This report further revealed that households most often redeemed their benefits at supermarkets and super stores with only four percent of households never shopping in a supermarket. Participating households typically made several (just over nine on average) relatively small purchases (5 U.S.C. § 552 (b)(6) & (b)(7)(C)) with SNAP benefits each month. Making single or multiple transactions of large dollar amounts or cumulatively large dollar amounts, and/or depleting substantial amounts of one's allotment in a period of hours, leaving a marginal amount or no benefits for the rest

of the month, is inconsistent with typical shopping behavior of SNAP benefit households. Rather, transactions over a short period of time of large value, or large cumulative value, in which SNAP benefits are exhausted are an indicator of trafficking.

Appellant states that the same contentions offered for the previous Attachment would also apply to the transactions where the majority or all of an individual's benefits were exhausted in unusually short periods of time. Many customers purchase multiple items at or near the same time every month to last them through several days or weeks which is not illegal. There is nothing in SNAP regulations that prohibits a customer from spending their card balance in a short period of time. SNAP vendors are also not able to reject a sale because the customer has little or no credit left on their EBT card or because they recently used a large portion of the benefits. It is inappropriate to hold the vendor responsible for a customer spending their card balance early in the month when the individual card holder or family should be punished if this practice is in fact illegal.

The FNS store visit shows this is a small store offering a limited quantity and variety of staple foods items as well as a large variety of the accessory foods and ineligible items typically found in convenience stores. Specifically, the business offers no fresh unprocessed meat or seafood items, no frozen unprocessed meat or seafood items, and stocks an extremely limited selection of fresh fruit (six lemons and limes), no fresh vegetables, no frozen fruits, and a limited selection of frozen vegetables. This hardly qualifies as a large selection, particularly for households that are also shopping at larger stores that would offer a greater variety of these products at lower prices. It is unlikely that most SNAP households would choose this store as a destination for making large household food purchases if they had the ability to shop at larger stores.

Appellant is correct in that a business has no control over the spending habits of its customers as it may not refuse a SNAP sale and it also may not limit the dollar amount or number of SNAP transactions. The Retailer Operations Division's analysis of the transactions and households listed in this Attachment shows that these households live at least five miles, if not 10 miles or further, away from Appellant's location and shop at a variety of larger stores located at a significant distance. It is unlikely that multiple households with very limited food dollars would be purchasing large quantities of eligible food products that would exhaust the majority or all of their monthly SNAP benefits at a minimally stocked store located miles away from the areas where they normally shop. The multiple transactions and high dollar amounts make it unlikely that the transactions listed in this Attachment are for eligible food items. With regards to Appellant's contention that FNS should be looking into the SNAP recipients conducting the transactions listed in the Attachments, no ruling will be rendered as the scope of this review is limited solely to the factors pertaining to the permanent disqualification of the Appellant business. Therefore, Appellant's contention regarding recipient

households cannot be used to reverse or mitigate the decision of the Retailer Operations Division.

Appellant has failed to provide any cogent explanations for the irregular shopping patterns exhibited by the households listed in this Attachment, the majority of whom are not regular customers of the Appellant business as shown in the data compiled by the Retailer Operations Division, or why these households would deplete or exhaust their SNAP benefits in a short period of time conducting multiple consecutive transactions to do so. While SNAP households do tend to make larger purchases in the days immediately following receipt of their monthly allotment, the behavior by households in this Attachment is contrary to the documented shopping patterns of SNAP households, as previously discussed, who typically make just over nine transactions each month consisting of relatively small dollar amounts. Also, no explanation or rationale has been offered by Appellant as to why households that are regularly shopping at larger stores offering a greater variety and quantity of SNAP eligible food stock at lower prices and who apparently have no transportation limitations would be conducting high dollar value transactions at a convenience store that offers a limited selection of staple food items and has no shopping carts that would be needed for the large transactions in this Attachment. Based on this discussion, trafficking is the only feasible explanation for these irregular shopping patterns.

It should be noted that this Attachment is not targeting excessively large transactions per se. It represents a pattern whereby nine households within the review months, almost depleted, or did deplete their entire monthly SNAP benefit allotments, in a single or a few transactions, during the course of some hours, all on the same day. As previously noted, this is not typical shopping behavior exhibited among SNAP recipients.

### **High Dollar Value Transactions**

This Attachment lists 122 individual EBT transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. The substantial number of high dollar transactions is uncharacteristic for a convenience store of this size offering a minimal stock of staple foods and calls into question the legitimacy of these transactions. The SNAP transactions listed in this Attachment are all substantially higher than the average SNAP transaction amount of \$7.01 for this store type in Worcester County. The 122 excessively large SNAP EBT transactions at Appellant's business for the review months represents more than 38 percent of all SNAP redemptions at Appellant's business during the period under review. This is unusual and indicative of trafficking.

The evidence under review shows that SNAP households shopping at the Appellant business are also shopping at many full-line supermarkets and super stores located 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 business. The large dollar transactions remain questionable when considering the proximity of these other SNAP authorized stores that would be better shopping options for consumers. Based on these shopping patterns, transportation does not appear to be an issue for these households. Yet, these recipients continue to shop and spend suspicious high dollar amounts at the Appellant business, where the eligible food stock is limited, 5 U.S.C. § 552 (b)(6) & (b)(7)(C) of their purchases at larger food stores.

Evidence shows that the difference in the average SNAP transaction dollar amount, the total SNAP transaction dollar volume, and the SNAP transaction count for Worcester County convenience stores during the review months and at the Appellant business is significant. 5 U.S.C. § 552 (b)(7)(E). The unusually high number of SNAP transactions is an indication that the business 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 convenience stores that had redemptions for the review period shows similar differences. Additionally, none of these nearby stores exhibit the same suspicious transaction patterns listed in the charge letter for the Appellant business even though all are located in proximity to Appellant's location and would therefore be expected to share the same SNAP customer base and shopping patterns. This is a further indication that the SNAP transactions in this Attachment and the others do not represent legitimate food purchases. The Retailer Operations Division considered all of these to be indicators of unusual and suspicious activity.

This store also had irregular SNAP transaction data as compared to like type convenience stores in Worcester County. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). These unusual spikes in both transaction numbers and dollar volume do not appear in the transaction count and dollar volume averages for other Worcester County convenience stores. These high dollar transactions are considered to be irregular and suspicious based on the Appellant store's food inventory. The Retailer Operations Division determined there was no credible reason for the Appellant business to have transactions at those high dollar levels given the minimal stock of staple foods and the lack of any specialty, bulk, or ethnic foods that might sell for large dollar amounts and therefore also considered this to be a strong indication of trafficking. None of Appellant's contentions explain these unusual and suspicious differences.

Appellant contends the large purchases are often made by family purchasers who buy bigger volumes or bigger ticket items. The store has a wide variety of highly sought after food items. Moreover, many purchasers buy multiple items so they can stock up without having to repeatedly return to the store. For example, many purchasers buy cases of Red Bull, Rockstar, and Amp energy drinks with 24 cans per case at a price of \$2.49, \$2.59, or \$2.60 per drink and approximately \$60.00

per case that will last through the month or for several weeks. There is no evidence of the firm's intent to violate the regulations.

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 the store's stock. An analysis of shopping patterns by the Retailer Operations Division shows that households in this Attachment are regularly shopping at much larger stores, and conducting transactions of large dollar amounts, yet are conducting comparable or higher dollar value transactions at the Appellant business. It would make 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 business since its cost of goods would be higher than that of larger stores such as supermarkets or super stores. The matter of energy drinks has been discussed previously in this decision and will not be repeated.

Information obtained during the FNS store visit on June 10, 2017, shows that the Appellant business offers a minimal quantity and variety of SNAP eligible staple food items, many accessory foods, and many ineligible items. Much of the inventory for sale consists of inexpensive snacks, beverages, and single serving foods as well as many ineligible items. Since the Appellant business offers no fresh unprocessed meats, no fresh unprocessed seafood, no frozen unprocessed meats, no frozen unprocessed seafood, a very limited quantity and variety of processed meats and seafood (canned meat/poultry/fish, six packs of hot dogs, one pack of bacon, and jerky), no deli meats, no packaged lunch meats, no sausages, a moderate selection of frozen entrees, a very limited selection of frozen dinners, an extremely limited selection of fresh fruit (six lemons and limes), no fresh vegetables, no frozen fruits, a limited selection of frozen vegetables, a limited selection of single serving nuts, a moderate stock of soups, a very marginal quantity and variety of canned and packaged staple food items, no deli cheeses, no yogurt, only one sour cream, no baby foods, no infant formula, no corn meal, no flour, and has very few expensive eligible food items, these patterns are deemed to be suspicious. The fact that tobacco, tobacco accessories, alcohol, ATM, household products, paper products, auto products, pet products, health and beauty items, cell phones/phone cards, newspapers, diapers, sunglasses, firewood, greeting cards, live bait, lighter fluid, and charcoal are not eligible for purchase with SNAP benefits also provides no justification for the high transaction amounts. The business carries no special foods or offers any unique services that are not also available at other nearby grocery stores making it unlikely that SNAP recipients with available transportation would make this business their grocery store of choice.

5 U.S.C. § 552 (b)(6) & (b)(7)(C).

Increasing food prices make it even more unlikely that SNAP recipients, with limited food benefits, would want to spend a considerable part of their benefits in a convenience store that does not address all of their food shopping 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 would also offer store brand products at lower prices, offer weekly specials, and have shopping carts and checkouts with scanners and conveyor belts to facilitate processing purchases quickly. Additionally, Appellant furnished no itemized cash register and EBT receipts for the period under review to document the legitimacy of these excessively large transactions and no evidence was provided of SNAP eligible store stock via receipts of products taken into inventory for the relevant review months. The Appellant business has a very small checkout area and does not have shopping carts or hand baskets thereby making it difficult to facilitate the great quantities of eligible food items required to make up these large dollar transactions. Therefore, it is improbable that the food items purchased in these high dollar amounts could be carried to the register without the use of carts and more likely that the amounts were contrived.

It is further noted that SNAP redemptions at the Appellant business fluctuated unusually following receipt of the charge letter on December 22, 2017. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). A pronounced decrease in SNAP transactions 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**

It is important to state that this review encompasses and documents the examination of the primary and relevant information in this case, the purpose of which is to determine whether Appellant demonstrates, by a preponderance of the evidence, that the disqualification should be reversed. In this case, therefore, if Appellant demonstrates by a preponderance of the evidence that it did not engage in trafficking with SNAP benefits, then such transactions will be considered legitimate and the disqualification reversed. If this is not demonstrated, the case is to be sustained. 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. Regardless of whom the ownership of a store may utilize to handle store business or their degree of involvement in store operations, ownership is accountable for the proper training of staff and the monitoring and handling of SNAP benefit transactions. The ownership remains liable for all violative transactions handled by store personnel, whether paid or unpaid, new, full-time or part-time. 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.



Both the FNS SNAP retailer application and retailer reauthorization application contain a certification page whereby applicants must confirm their understanding of and agreement with SNAP retailer requirements in order to complete the application/reauthorization process. Store ownership did certify its understanding and agreement to abide by program rules and regulatory provisions when it initially applied to become a SNAP retailer in 2011 and again when it applied for reauthorization in 2017. The owner agreed to accept responsibility on behalf of the firm for violations of the SNAP including those committed by any of the firm's employees, paid or unpaid, new, full-time or part-time. All SNAP retailers also receive a standard authorization/ reauthorization package from FNS that includes the "SNAP Training Guide for Retailers" and other training materials to be used in training both store employees and store ownership that includes a short video. The certification page and the "SNAP Training Guide for Retailers" both clearly state that store owners or operators are legally responsible for their own actions as well as the actions of everyone working in their store and that violations may include being disqualified from SNAP. The FNS retailer web site also directs applicants and retailers to links to an electronic version of the SNAP Retailer Training Guide and to a streaming video thereby precluding the need for retailers to have a DVD player. All training materials are available on the FNS retailer web site in both English and Spanish versions.

FNS strives to issue charge letters as soon as possible after the period under review; however, it does take a significant amount of time to collect and fully analyze the information in order to determine if the issuance of a charge letter is warranted. To issue a charge letter without fully analyzing this information would be capricious and arbitrary. Any allegations that an intentional delay in order for the firm's surveillance tapes and cash register data to expire are baseless as the Retailer Operations Division staff would have no knowledge of the capabilities or limitations of a firm's surveillance system or cash register(s) as this information is not collected by FNS and therefore would not be available to them. As far as the length of the review period, it is necessary to collect sufficient transaction data to ensure that any observed patterns are valid over the long term and not a minor aberration in data that could result from using a review period of a couple of weeks or one month as Appellant's contentions infer. A review of the Retailer Operations Division's administrative actions regarding this matter indicates full compliance with applicable SNAP regulations, policies, and procedures. In summary, no violations of due process were noted in this administrative action.

Regarding a warning letter, the FNS policy citation referenced applies only to those situations where the SNAP violations are of a limited nature that would not warrant a disqualification. The issue under review involves a charge of trafficking SNAP benefits based on EBT transaction data. Trafficking is always considered to be the most serious violation therefore this provision would not be applicable.

The owner and the business were charged with trafficking based on a computer analysis of the store's transactions for the months of March 2017 through August

2017. 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.

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 . . . [d]isqualify 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, either directly, indirectly, in complicity or collusion with others, or acting alone . . . .” SNAP regulations at 7 CFR § 278.6(a) clearly state, in part, 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 . . . .**” (Emphasis added). In the present case, the data presented in the Attachments is solely based on the SNAP electronic benefit transfer transactions conducted at the Appellant business during the period under review. 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 period under review. All of the transactions were then reviewed and analyzed by the Retailer Operations Division 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 photographs from the FNS store visit on June 10, 2017, a transaction comparison and analysis of like type and larger stores, and analysis of shopping patterns for recipient households conducting transactions at the Appellant business during the review period. This analysis also included a review of the business 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 in the charge letter Attachments. 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 evidence under review shows SNAP activity indicative of trafficking. Neither the Food and Nutrition Act of 2008, as amended, nor the regulations issued pursuant thereto 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 Retailer Operations Division 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 submit any 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 Retailer Operations Division determined that Appellant was not eligible for a trafficking CMP in lieu of permanent disqualification.

SNAP regulations are explicit in what constitutes substantial evidence. Specifically, 7 CFR § 278.6(i)(2) states in relevant part, "As specified in Criterion 3 above, in determining whether a firm has established an effective policy to prevent violations, FNS shall consider written and dated statements of firm policy which reflect a commitment to ensure that the firm is operated in a manner consistent with part 278 of current FNS regulations and current FSP policy on the proper acceptance and

handling of food coupons.” This section goes on to state, “As required by Criterion 2, such policy statements shall be considered only if documentation is supplied which establishes that the policy statements were provided to the violating employee(s) prior to the commission of the violation.” This section further states, “A firm which seeks a civil money penalty in lieu of permanent disqualification shall document its training activity by submitting to FNS its **dated training curricula and records of dates training sessions were conducted . . .**” (Emphasis added).

Appellant provided no documentation of how the business met any of the four criteria in either its response to the charge letter or in the request for administrative review and no documentation or other evidence of any kind, including written statements, was subsequently received from Appellant in support of a trafficking CMP. Therefore, Appellant failed to meet the regulatory standard for a trafficking CMP as it did not provide substantial evidence that it met all four criteria required by 7 CFR §278.6(i). Based on the above, the Retailer Operations Division’s decision not to impose a CMP in lieu of disqualification is sustained as appropriate pursuant to 7 CFR §278.6(i).

## CONCLUSION

The Retailer Operations Division has presented a case that Appellant has likely trafficked in SNAP benefits. The Retailer Operations Division’s 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 that are consistent with trafficking violations in SNAP benefits. This is evidenced by: the suspicious patterns in three 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 by the Retailer Operations Division. Based on the discussion above, the determination to impose a permanent disqualification against Appellant is sustained. Furthermore, Retailer Operations properly determined that Appellant was not eligible for a trafficking CMP according to the terms of Section 278.6(i) of the SNAP regulations.

## **RIGHTS AND REMEDIES**

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

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

ROBERT T. DEEGAN  
Administrative Review Officer

May 2, 2018