

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

**Broadway Convenience Deli,**

**Appellant,**

**v.**

**Case Number: C0200063**

**Retailer Operations Division,**

**Respondent.**

**FINAL AGENCY DECISION**

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

**ISSUE**

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR § 278.6(e)(1)(i) in its administration of the SNAP, when it imposed a Permanent Disqualification against Broadway Convenience on August 17, 2017.

**AUTHORITY**

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

**CASE CHRONOLOGY**

In a letter dated June 22, 2017, the Retailer Operations Division informed the Appellant that Broadway Convenience was in violation of the terms and conditions of the SNAP regulations,

7 CFR § 270 – 282, based on EBT SNAP benefit transactions that "establish clear and repetitive patterns of unusual, irregular, and inexplicable SNAP activity for your type of firm."

In a letter received by the Retailer Operations Division on July 3, 2017, the Appellant denied the trafficking allegations and provided various explanations for the questionable SNAP transactions that were outlined in the June 22, 2017 Charge Letter.

After considering the Appellant's reply and the evidence in the case, the Retailer Operations Division issued a Determination Letter dated August 17, 2017, informing the Appellant that Broadway Convenience was being permanently disqualified from participation in the SNAP in accordance with 7 CFR § 278.6(e)(1) for trafficking violations.

In a letter postmarked September 9, 2017, the Appellant requested an administrative review of the Retailer Operations Division's decision to permanently disqualify the firm from participation in the SNAP. FNS granted the Appellant's request for administrative review by letter dated September 18, 2017.

### **STANDARD OF REVIEW**

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

### **CONTROLLING LAW**

The controlling statute in this matter is contained in the Food and Nutrition Act of 2008, amended, 7 U.S.C. § 2021 and 278 of Title 7 of the Code of Federal Regulations (CFR). 7 U.S.C. § 2021, Part 278.6(a) and Part 278.6(e)(1)(i) of the Regulations establish the authority upon which a permanent disqualification may be imposed upon a retail food store or wholesale food concern. There also exist FNS policy memoranda and clarification letters which further explain the conditions necessary in order to permanently disqualify retail stores.

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

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

7 CFR § 278.6(a) states, inter alia:

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

7 CFR § 278.6(e)(1)(i) states:

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

7 CFR § 271.2 states, inter alia:

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

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

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

7 CFR § 278.6(i) states, inter alia:

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

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

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

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

eligible for such penalty. [Emphasis added].

### SUMMARY OF CHARGES

The Appellant was charged and determined to be trafficking based on an analysis of EBT transaction data from November 2016 through April 2017. This involved the following SNAP transactions patterns which are indicative of trafficking:

- There were an unusual number of transactions ending in a same cents value;
- There were multiple purchase transactions made from individual benefit accounts in unusually short timeframes; and
- There were excessively large purchase transactions made from recipient accounts.

### APPELLANT'S CONTENTIONS

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

In the reply to the Charge Letter and in the review request postmarked September 9, 2017, the Appellant stated the following summarized contentions, in relevant part:

- The Appellant denies that trafficking of SNAP benefits took place at Broadway Convenience.
- This is the first time that Broadway Convenience has been cited for any SNAP violations by USDA.
- With regard to the unusual number of transactions that ended in a same cents value, Broadway Convenience stocks many foods that when purchased together, 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The Appellant estimates that Broadway Convenience's SNAP transactions are approximately 1,000 per month. This means that approximately 6,000 SNAP transactions were conducted during the six month review period. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). It is unfair that the Appellant was cited for SNAP trafficking based on such a weak statistical amount of overall SNAP transactions.
- With regard to the multiple transactions made from individual benefit accounts in unusually short timeframes, none of these transactions were made in a single day—they were conducted over the span of two days. All of the questionable transactions listed in Charge Letter Attachment 2 were made within the first 15 days of the month when SNAP customers customarily make major food purchases. The Appellant cannot predict the shopping behaviors of SNAP customers.
- The excessively large purchase transactions are the result Broadway Convenience's convenient location and proper stocking of eligible staple foods. Also, 86% of the questionable SNAP transactions listed in Charge Letter Attachment 3 occurred during

the first 15 days of the month when SNAP customers customarily make major food purchases.

- A permanent disqualification from the SNAP is unreasonable and severe as the allegations of trafficking are based solely upon a computer generated analysis and not the result of trafficking violations found by USDA during an on-site investigation.
- A permanent SNAP disqualification will impose a hardship on SNAP customers.
- A permanent SNAP disqualification will impose a financial hardship on Broadway Convenience.

In support of the Appellant's contentions, the following documents were submitted to FNS:

- 27 pictures depicting Broadway Convenience's food inventory;
- 10 examples of large food purchases consisting of a list of various food items with a picture of the staged food items which would represent eligible food items that could make up large transactions;
- 6 examples of unusual and same cent purchases consisting of a list of various food items with a picture of the staged food items which would represent eligible food items that could make up large transactions; and
- Vendor invoices/receipts for products that were purchased for Broadway Convenient in December 2016.

## **ANALYSIS AND FINDINGS**

### **Store Characteristics**

FNS authorized Broadway Convenience as a convenience store on September 28, 2015. The case file indicates that in reaching a disqualification determination, the Retailer Operations Division considered information obtained during a May 13, 2017 store visit conducted by a FNS contractor to observe the nature and scope of the firm's operation, stock, and facilities. This information obtained from the store visit was also used to ascertain if there were justifiable explanations for the firm's irregular SNAP transactions. The store visit report and photographs documented the following store size, description, and characteristics:

- Approximately 2,500 square feet in size and it does not have a storage area/room outside of public view; however, the store has a storage cooler that stocks mostly alcohol and drinks;
- No shopping carts or hand-held baskets available for customer use;
- Two cash registers; however, only one cash register was used to ring-up the SNAP transactions that were outlined in the Charge Letter;
- Only one EBT point-of-sale (POS) device for use in ringing-up SNAP transactions;
- No optical scanner;
- Typical convenience store layout and inventory with predominantly snack foods, cakes/pastries, candy, and beverages;

- No meat/seafood specials or bundles that might sell for high prices;
- Not a WIC Program vendor; however, the store sells a very minimal variety and amount of infant formula, infant fruits/vegetables, and infant meats;
- The most expensive staple foods in stock are Enfamil® infant formula at \$16.99 per 12.05 oz. can, frozen chicken wings at \$9.99 per 4 pound bag, frozen boxed fried chicken at \$7.99 per 29 oz. box, and frozen pizza at \$5.99 per 2 pound 13 oz. box;
- It does not appear from the store visit observations that the store extends credit to customers;
- No signs posted or flyers available advertising the availability of bulk foods offered at a discounted rate to include grocery package deals;
- Very limited checkout counter areas with miscellaneous items stocked there. As such, the checkout counters do not provide adequate space for the large amounts of individual food items necessary to make up many of the large transactions cited in the Charge Letter Attachments;
- Frozen food items include boxed breaded fried chicken, chicken wings, breaded chicken strips, corn, green beans, ice cream, pizza, and single-serving size cheeseburgers and other sandwiches;
- No fresh unprocessed meats, poultry, or seafood;
- Only two varieties of frozen unprocessed meat, poultry, and seafood in minimal quantities including chicken wings and shrimp;
- No deli case/section in which deli meats and cheeses are sold by the pound;
- Other meat items include packaged lunch meat, bacon, canned/potted meat, canned fish, hot dogs, sausage, and eggs;
- No kitchen in which hot and cold prepared, ready-to-eat foods that are intended for immediate consumption and require no additional preparation are prepared and sold;
- Only one variety of canned fruits in minimal quantities;
- A minimal variety and amount of canned vegetables;
- A minimal variety and amount of fresh produce which includes lettuce, tomatoes, cucumbers, strawberries, green peppers, onions, potatoes, and lemons;
- Other staple foods available for purchase include such items as 100% juice, milk, cheese, margarine, pasta, cereal, flour, corn meal, cakes/pastries, snack foods, etc.;
- Much of the remaining food stock consists of accessory foods such as candy and gum, carbonated and non-carbonated drinks, condiments, coffee, tea, and vegetable oil; and
- A good supply of ineligible nonfood items such as alcohol, tobacco products, health and beauty items, paper products, household items, household cleaning supplies, over-the-counter medications, laundry detergent, jewelry and watches, rock salt, hair extensions, pet food, etc.

This documentation reflects that the firm was a typically stocked convenience store in all relevant respects. It is worth noting that the average SNAP purchase in a convenience store in Erie County, New York (the county in which Broadway Convenience is located) during

the analysis period was \$7.67, reflecting that large purchases are not routinely made in such stores.

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

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

### **Denial of Trafficking Charges**

Regarding the Appellant’s contention that she denies the trafficking allegations, this review encompasses and documents the examination of the primary and relevant information in this case, the purpose of which is, as noted above, to determine whether the Appellant demonstrates by a preponderance of the evidence that the permanent disqualification should be reversed. In this case, therefore, if the Appellant demonstrates by a preponderance of the evidence that trafficking did not occur in the Appellant’s firm, then trafficking will be considered not to have occurred 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.

### **First Time Violator**

The Appellant contends that this is the first time that Broadway Convenience has been cited for any SNAP violations by USDA. However, a record of participation in the 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. Trafficking in SNAP benefits is an extremely serious violation and both 7 U.S.C. § 2021(b)(3)(B) and 7 CFR § 278.6(e)(1)(i) state that a first time violation warrants a permanent disqualification.

## Same Cents Transactions

Charge Letter Attachment 1 lists 78 transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. Broadway Convenience is a convenience store with a limited staple food stock. Based on the store visit, Broadway Convenience's inventory contains almost exclusively inexpensive, typical convenience type food items. As such, it is implausible that several of these relatively inexpensive items purchased together would routinely total to purchase amounts **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. Consequently, when there are a disproportional amount of transactions that end 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.

The Appellant contends that with regard to the unusual number of transactions that ended in a same cents value, **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. The Appellant estimates that Broadway Convenience's SNAP transactions are approximately 1,000 per month. This means that approximately 6,000 SNAP transactions were conducted during the six month review period. Based on the number of questionable SNAP transactions listed in Attachment 1 of the Charge Letter, **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. It is unfair that the Appellant was cited for SNAP trafficking based on such a weak statistical amount of overall SNAP transactions. In support of this contention, the Appellant provided FNS with six examples of unusual and same cent purchases consisting of a list of various food items with a picture of the staged food items which would represent eligible food items that could make up large transactions. However, the Appellant's contention is not supported by available evidence.

The Appellant estimates that Broadway Convenience conducted 1,000 SNAP transactions each month of the six month review period. However, ALERT data indicates that the store conducted approximately 470 SNAP transactions per month **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**.

**5 U.S.C. § 552 (b)(7)(E)**

In support of the Appellant's contention, she provided FNS with six examples of unusual and same cent purchases consisting of a list of various food items with a picture of the staged food items which would represent eligible food items that could make up large transactions.

However, as was indicated by the Appellant, the examples were "staged" and not actual purchases of staple foods made by customers with SNAP benefits. **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**.

A review of the photographs from the FNS store visit of May 13, 2017 show that the majority of food items in the store have prices that do not end in any particular price variation or value. The store visit observations indicate that Broadway Convenience's food inventory consists of almost exclusively inexpensive, typical convenience store type foods. As such, it is



implausible that several of these relatively inexpensive food items purchased together would routinely total to purchase amounts 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

Due to Broadway Convenience's mostly low cost foods, the larger dollar transactions cited in the Charge Letter would normally consist of multiple food products being purchased in one transaction. It is implausible that several of these relatively inexpensive items purchased together would disproportionately result in a total purchase price 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Instead, when SNAP customers buy multiple food items, resulting in higher dollar amounts, the total transaction amount is more likely to result in a more dispersed statistical spread 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Consequently, when there are a disproportional amount of transactions that end in a same cents value, it appears that these transaction amounts are contrived and therefore, in the absence of any compelling rationale to the contrary, are a strong indicator that the firm is trafficking in SNAP benefits. A preponderance of the evidence indicates that the irregular transaction purchases 5 U.S.C. § 552 (b)(6) & (b)(7)(C) cited in Charge Letter Attachment 1 are more likely than not a result of the store trafficking in SNAP benefits.

### **Repeat Transactions by the Same Household**

Charge Letter Attachment 2 lists 13 transaction sets (27 total transactions) 5 U.S.C. § 552 (b)(6) & (b)(7)(C). 5 U.S.C. § 552 (b)(6) & (b)(7)(C) It is not credible that the subject store would have so many suspicious SNAP transactions greatly exceeding the average SNAP transaction for convenience stores in Erie County during the review period. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Violating stores often conduct multiple transactions from the same household account to avoid detection of single high dollar transactions that cannot be supported by the firm's food inventory and infrastructure.

The Appellant contends that with regard to the multiple transactions made from individual benefit accounts in unusually short timeframes, none of these transactions were made in a single day—they were conducted over the span of two days. All of the questionable transactions listed in Charge Letter Attachment 2 were made within the first 15 days of the month when SNAP customers customarily make major food purchases. The Appellant cannot predict the shopping behaviors of SNAP customers. However, the Appellant's contentions are unsubstantiated.

While the Appellant's statement is accurate in that the majority of SNAP recipients spend a good portion of their SNAP benefits in the first two weeks of the month, this shopping behavior does not explain or substantiate the questionable SNAP transactions listed in Charge Letter Attachment 2. The Appellant also contends that all of the multiple transactions made from individual benefit accounts in unusually short timeframes occurred over the span of two days. However, all of these questionable SNAP transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

While there are no limits on the number of times EBT cards may be used or the amount of eligible foods that may be purchased, the SNAP transactions noted in this Charge Letter Attachment are questionable because they display characteristics of use inconsistent with the

nature and extent of the store's stock and facilities and are indicative of trafficking. Although it is not uncommon for customers to conduct more than one transaction per day, it is not common that such multiple transactions are for large dollar amounts. Broadway Convenience is not set up to provide for all of one's food needs with no fresh unprocessed meats, poultry, or seafood, only two varieties of frozen unprocessed poultry and seafood in minimal quantities, no frozen fruits and only two varieties of frozen vegetables in minimal quantities, a minimal variety and amount of fresh produce, a minimal variety and amount of canned fruits and canned vegetables, and lacks an abundant depth and breadth of staple foods. Also, the store visit observations indicate that there is no evidence of a price advantage or custom or special services rendered at the subject store that are not offered at other authorized SNAP stores in the area. It is irregular for convenience stores to have purchases such as those cited, especially when Broadway Convenience stocks only a few high priced food items so the majority of food items stocked at the store are low priced items.

A review of client shopping data for the review period shows that clients shopping at Broadway Convenience are also shopping at other area grocery stores, as well as full-line supermarkets and super stores that most likely offer customers a much larger quantity and variety of eligible food items for better prices. Based on these shopping patterns, transportation to other stores is not an issue for these SNAP customers. Yet, these customers continue to shop and spend suspicious high dollar amounts in short timeframes at Broadway Convenience, where the eligible food stock is limited, **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** of their purchases at better stocked stores. This is a strong indicator of trafficking.

Sometimes a firm may have unusual transaction patterns due to a recipient's lack of access to other SNAP authorized stores. However, there are 38 SNAP authorized retailers located within a 1.0 mile radius of Broadway Convenience that can meet the nutritional needs of SNAP customers. These authorized stores include 20 convenience stores, 2 bakeries, 2 fruit/vegetable specialty stores, 3 meat/poultry specialty stores, 1 seafood specialty store, 6 small grocery stores, 1 medium grocery store, 2 supermarkets, and 1 super store. Several of these authorized SNAP stores are larger than Broadway Convenience and offer a greater quantity and variety of food products at comparable or better prices as compared to the subject store. As mentioned previously, SNAP customers who shopped at Broadway Convenience during the six month review period also shopped at other area grocery stores and, therefore, transportation to other stores is not an issue for these customers. Therefore, lack of access to other authorized stores does not appear to be an explanation for Broadway Convenience's abnormally high SNAP transaction amounts conducted within a short timeframe of each other.

The Appellant did not provide any compelling justification as to why SNAP households are conducting multiple transactions at Broadway Convenience or evidence that all of the irregular transactions cited in the Charge Letter were for eligible food items only. Based on the analysis above and in the absence of any other reasonable explanation, the irregular transaction patterns are more likely than not to be a result of trafficking in SNAP benefits.

### **Excessively Large Purchase Transactions**

Charge Letter Attachment 3 lists 287 SNAP transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. As noted previously, there is no indication from the store visit report that Broadway Convenience would be likely to have SNAP redemption patterns significantly different from similar-sized competitors offering similar food items.

The Appellant contends that the excessively large purchase transactions are the result of Broadway Convenience's convenient location and proper stocking of eligible staple foods. Also, 86% of the questionable SNAP transactions listed in Charge Letter Attachment 3 occurred during the first 15 days of the month when SNAP customers customarily make major food purchases. In support of these contentions, the Appellant provided FNS with: (1) 27 pictures depicting Broadway Convenience's food inventory; and (2) 10 examples of large food purchases consisting of a list of various food items with a picture of the staged food items which would represent eligible food items that could make up large transactions. However, the Appellant's contentions are not supported by available evidence.

While the Appellant's statement is accurate in that the majority of SNAP recipients spend a good portion of their SNAP benefits in the first two weeks of the month, this shopping behavior does not explain or substantiate the questionable SNAP transactions listed in Charge Letter Attachment 3. Regarding the Appellant's contention that Broadway Convenience has a proper stock of eligible foods, FNS compared the pictures of food stock taken during the May 13, 2017 store visit of Broadway Convenience to the pictures provided by the Appellant. FNS noted that the firm's food inventory was basically the same during the store visit when compared to the Appellant's photos of the firm's food inventory. However, there was one notable difference. As is indicated in the below photos, during the May 13, 2017 store visit, the horizontal cooler case was empty; however, the Appellant's photo indicates that the horizontal cooler case was completely stocked with eggs, packaged lunch meats, hot dogs, sausages, etc. The Appellant's photo appears to be contrived in an effort to support her contention that the excessively purchase transactions were for eligible staple foods by SNAP customers.



**Figure 2: FNS Store Visit Photo of Deli Case.**



**Figure 3: Appellant's Photo of Deli Case.**

The Appellant also provided 10 examples of large food purchases consisting of a list of various food items with a picture of the staged food items which would represent eligible food items that could make up large transactions. The Appellant indicated that these examples indicate different food items that could be purchased at Broadway Convenience that would total some of the excessively large purchase transaction listed in Charge Letter Attachment 3. However, there are a total of 287 excessively large purchase transactions listed in Attachment 3. The Appellant provided only 10 examples of large food purchases. In addition, as the Appellant indicated to FNS, the 10 food purchase examples were “staged” purchases and provide no actual evidence that they were not the result of trafficking in SNAP benefits.

It is also important to note that none of the 10 example food purchases provided by the Appellant match any of the excessively large purchase transactions listed in Attachment 3 of the Charge Letter. The Appellant provided a photo of each of the example food purchases with a list of the purchased foods with their prices. An example of the Appellant’s documentation is included below.



**Figure 4: Photo provided by Appellant of foods purchased that represent one of the excessively large purchases listed in Attachment 3.**

**5 U.S.C. § 552 (b)(7)(E)**

5 U.S.C. § 552 (b)(6) & (b)(7)(C). As previously stated, none of the Appellant's food purchase lists and accompanying photos add up to any of the excessively large purchase transactions listed in Charge Letter Attachment 3.

The store visit report and photos show that Broadway Convenience was stocked with a limited quantity and variety of staple foods as it stocked no fresh unprocessed meats, poultry, or seafood, only two varieties of frozen unprocessed poultry and seafood in minimal quantities, no frozen fruits and only two varieties of frozen vegetables in minimal quantities, a minimal variety and amount of fresh produce, a minimal variety and amount of canned fruits and canned vegetables, and lacks an abundant depth and breadth of staple foods. The inventory report and photos also show only a few expensive eligible foods in stock that would account for these large amounts as well as showing the store has limited checkout counter space, no optical scanners, and no shopping carts or hand-held baskets in which to transport the large number of items required to make up these large transaction amounts. Without these, it is unlikely that such large dollar value transactions could be for actual food purchases and more likely they are trafficking.

The record shows that there are 38 SNAP authorized retailers located within a 1.0 mile radius of Broadway Convenience. Several of these authorized stores are larger than Broadway Convenience and offer a greater quantity and variety of food products at comparable or better prices as compared to the subject store. An analysis of the shopping patterns for all of the SNAP households listed in this Attachment shows that the majority of the households shopping at Broadway Convenience have access to transportation and that all are regularly shopping at a variety of larger stores, including super stores and/or supermarkets, located a few miles distance from the Appellant's location. While Broadway Convenience does offer some staple food items, SNAP recipients are already shopping at other larger SNAP retailers located within a few miles of the Appellant's business offering a greater quantity and variety of products, including fresh meats/seafood and produce, at lower prices. Therefore, the store has nothing to attract SNAP customers as there are no special or custom services offered.

FNS compared the average SNAP transaction dollar amount of Broadway Convenience during the six month review period to the average SNAP transaction dollar amount (during the same timeframe) of six area comparable authorized convenience stores located within 0.72 miles of the subject store. FNS' comparison indicates that Broadway Convenience's average SNAP transaction amount was higher than any of the area comparable convenience stores. This is questionable activity especially when taking into consideration that Broadway Convenience is not set up to provide for all of one's food needs with no fresh unprocessed meats, poultry, or seafood, only two varieties of frozen unprocessed poultry and seafood in minimal quantities, no frozen fruits and only two varieties of frozen vegetables in minimal quantities, a minimal variety and amount of fresh produce, a minimal variety and amount of canned fruits and canned vegetables, and lacks an abundant depth and breadth of staple foods. Also, the store visit observations indicate that there is no evidence of a price advantage or custom or special services rendered at the subject store that are not offered at other authorized SNAP stores in the area.

The Appellant provided FNS with vendor invoices for products purchased for Broadway Convenience in December 2016 in order to help substantiate that enough staple foods had been purchased to cover/explain the SNAP transactions that occurred at Broadway Convenience during the review period. FNS' analysis of these vendor invoices indicates that the majority of the food purchases were for candy, snack foods, cakes/pastries, and beverages.

The below table summarizes the vendor invoices provided by the Appellant. Please note that SNAP redemptions represent 72% of Broadway Convenience's total inventory purchases. This includes a 40% markup which is commonly used by authorized retailers (Note: The Retailer Operations Division was unsuccessful in verifying the firm's markup percentage when they attempted to contact Broadway Convenience). Broadway Convenience's SNAP redemptions exceeded its available food stock for December 2016. The invoices do not explain or substantiated the suspicious SNAP transactions that occurred at the firm during the review period.

#### 5 U.S.C. § 552 (b)(7)(E)

It is important to note that even if the Appellant had provided FNS with all of Broadway Convenience's vendor invoices for the entire six month review period and the vendor invoices showed that sufficient food inventory had been purchased to account for the firm's SNAP redemption volume, sufficient inventory alone does not explain the suspicious patterns of SNAP transactions such as unusual numbers of transactions ending in a same cents value and rapid and consecutive transactions by individuals during the same store visit or in a single day. Even the large dollar transactions would remain questionable if there were sufficient food inventory to support such transactions when consideration is made of there being only a limited variety of stock in the store, no fresh meats, poultry, or seafood, only two varieties of frozen unprocessed poultry and seafood in minimal quantities, no frozen fruits and only two varieties of frozen vegetables in minimal quantities, limited fresh produce, a greater variety of foods at comparable or lower prices at other stores, no shopping carts or hand-held baskets available for customer use, and little counter space to place food for purchase at the checkout counter. Even if there were sufficient food stock at Broadway Convenience to mathematically support high dollar transactions, there does not appear to be anything that would reasonably attract SNAP households to shop there, a convenience store, in some cases traveling a few miles to do so, and spend substantial amounts of their SNAP benefits.

Lastly, the case record documents that the Retailer Operations Division conducted a detailed analysis of three SNAP households identified in the Charge Letter to analyze their shopping patterns at Broadway Convenience compared to their shopping patterns at other SNAP authorized stores. Each of these households had access to, and shopped at larger stores including super stores and/or supermarkets. It is obvious that these SNAP households had transportation available to them to reach these other authorized stores. However, despite this access to better stocked stores, these sampled households conducted excessively large transactions at Broadway Convenience often 5 U.S.C. § 552 (b)(6) & (b)(7)(C) of shopping at the larger stores where they conducted much smaller SNAP purchases. It is highly unlikely

that a convenience store with minimal staple foods would have legitimate SNAP transactions greater than these larger and better stocked stores.

In summary, the store's layout, infrastructure, and food inventory do not support a high percentage of transactions markedly exceeding those of similar type stores. In addition to the statistical irregularity of such high dollar transactions, the limited availability of counter space for checking out and the lack of shopping carts and hand-held baskets support the Retailer Operations Division's determination. It is not plausible that the store's customers are carrying large amounts of food around the store without the benefit of shopping carts and/or hand-held baskets. Customers purchasing such large quantities of food items would have to hold them in their arms, or enlist the help of others while shopping. Based on the preponderance of the evidence, the irregular transaction patterns cited in Charge Letter Attachment 3 are more likely than not the result of trafficking in SNAP benefits.

### **Computer Generated Analysis**

The Appellant contends that a permanent disqualification from the SNAP is unreasonable and severe as the allegations of trafficking are based solely upon a computer generated analysis and not the result of trafficking violations found by USDA during an on-site investigation. Firms are chosen for analytical investigation based upon numerous detailed and rigorous mathematical algorithms. This data presents the Retailer Operations Division with a statistically valid prima facie indication of highly unusual transaction activity; the activity therein identified is not marginally aberrant, but markedly so. Properly analyzed and interpreted, the Retailer Operations Division does not contend that EBT transactions are overtly suspicious when they occur on an occasional or intermittent basis, but when such transactions form repetitive patterns, on a comparative basis, over a period of time that ensures such activity is not simply intermittent, such activity is identified for further analysis.

Once such firms have been identified as potential compliance cases, from approximately 263,105 authorized firms nationwide, the Retailer Operations Division undertakes a detailed examination of the available transaction data and obtains further relevant information regarding the firm's business operations such as the level and condition of staple food stock maintained by the firm, the presence or absence of the firm's logistical retail wherewithal and numerous other factors pertinent to the firm's ability to legitimately process the transaction activity for which the firm has been flagged. Agency policy and procedures direct that only after a careful, comprehensive and complete analysis, from which appropriate conclusions are logically derived, will the firm be issued a Charge Letter. The firm is then given the opportunity to reply to those charges and provide any information it deems appropriate in justifying as legitimate the transaction activity detailed in the Charge Letter. In the present case, these policies and procedures are shown by the record to have been duly performed in all relevant and pertinent detail. Moreover, 7 CFR § 278.6(a), noted above, established the authority upon which FNS may disqualify any authorized retail food store on the basis of evidence obtained through a transaction report under an electronic benefit transfer system. The Retailer Operations Division's use of transaction data and other reports, in addition to store visit observations and an analysis of household shopping behavior and other relevant data and

information, in rendering a finding that trafficking is the most likely explanation of the transaction activity, is as valid a means of establishing evidence as that obtained through an on-site investigation and the eye witnessing of trafficking. Accordingly, the Appellant's contention that the charges are unreasonable and based solely upon a computer generated analysis is not compelling.

### **Imposed Hardship on SNAP Customers**

The Appellant contends that a permanent SNAP disqualification will impose a hardship on SNAP customers. 7 CFR § 278.6(f) of the SNAP regulations provides for civil money penalty assessments in cases where disqualification would cause "hardship" to SNAP households because of the unavailability of a comparable participating food store in the area to meet their needs. However, this regulation also sets forth the following specific exception to such assessments there under: "A civil money penalty for hardship to SNAP households may not be imposed in lieu of a permanent disqualification". Therefore, since this case involves a permanent disqualification action, the civil money penalty provision is not applicable to the present case.

### **Imposed Financial Hardship**

The Appellant contends that a permanent SNAP disqualification will impose a financial hardship on Broadway Convenience. However, there is no provision in the SNAP regulations or internal agency policy directives for waiver or reduction of an administrative penalty assessment on the basis of possible economic hardship to the firm resulting from imposition of such penalty. To allow store ownership from being excused from assessed administrative penalties based on purported economic hardship to the firm would render virtually meaningless the enforcement provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of the USDA.

Moreover, giving special consideration to economic hardship to the firm would forsake fairness and equity, not only to competing stores and other participating retailers who are complying fully with program regulations, but also to those retailers who have been disqualified from the program in the past for similar violations. Therefore, the Appellant's contention that the firm may incur economic hardship based on the assessment of an administrative penalty does not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

### **CIVIL MONEY PENALTY**

As previously indicated, the August 17, 2017 Determination Letter advised the Appellant of the ineligibility for consideration for a trafficking civil money penalty (CMP) according to the terms of Section 278.6(i) of the SNAP regulations. The letter of charges dated June 22, 2017 advised the Appellant that documentation of eligibility for that alternative sanction was to be



provided within 10 days. The regulations specify that such documentation must, in part, establish that there was an effective compliance policy and training program and that both were in effect and implemented prior to the occurrence of violations. The letter indicates that no information was provided by the Appellant for consideration; therefore, on review the Retailer Operations Division's determination that the Appellant firm is ineligible for the imposition of civil money penalties in lieu of disqualification is affirmed.

## **CONCLUSION**

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

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

## **RIGHTS AND REMEDIES**

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

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

LORIE L. CONNEEN  
Administrative Review Officer

May 7, 2018