

**U.S. Department of Agriculture  
Food and Nutrition Service  
Administrative Review  
Alexandria, VA 22302**

**Cowboy Supermarket,**

**Appellant,**

**v.**

**Retailer Operations Division,**

**Respondent.**

**Case Number: C0204558**

**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<sup>1</sup> was properly imposed against Cowboy Supermarket (hereinafter “Cowboy Supermarket” and/or “Appellant”) and its owner of record, by the Retailer Operations Division of the FNS.

**ISSUE**

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR § 278.6(e)(1) in its administration of the Supplemental Nutrition Assistance Program (SNAP) when it imposed a Permanent Disqualification against Cowboy Supermarket in a letter dated February 27, 2018.

**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.

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<sup>1</sup> Section 4001(b) of the Food, Conservation, and Energy Act of 2008 (P.L. 110-234; 122 Stat. 1092) amended the Food and Nutrition Act of 2008 by striking “food stamp program” and inserting “supplemental nutrition assistance program” effective October 1, 2008

## **CASE CHRONOLOGY**

In a letter dated January 8, 2018, the Retailer Operations Division informed Appellant that it was being charged with violation of the terms and conditions of the SNAP regulations, 7 CFR §§ 270- 282, based on Electronic Benefit Transaction (EBT) SNAP benefit transactions considered to “establish clear and repetitive patterns of unusual, irregular, and inexplicable SNAP activity for your type of firm.”

The Retailer Operations Division record indicates Appellant responded both telephonically, and in writing, through counsel. Following documented consideration of Appellant’s responses the Retailer Operations Division advised Appellant of a final determination of permanent disqualification from participation in the SNAP in accordance with 7 CFR § 278.6(c) and § 278.6(e)(1) for trafficking violations, in a letter dated February 27, 2018, documented to have been delivered to Appellant on February 28, 2018.

The determination letter also advised that the Retailer Operations Division considered Appellant’s eligibility for a trafficking civil money penalty (CMP) according to the terms of Section § 278.6(i) of the SNAP regulations. The Retailer Operations Division determined that the Appellant was not eligible for the trafficking CMP because the Appellant did not timely submit sufficient evidence to demonstrate the firm had established and implemented an effective compliance policy and program to prevent violations of the SNAP.

In a letter dated March 2, 2018, received in the offices of the Administrative Review Branch on March 5, 2018, Appellant, through counsel, submitted an appeal of the Retailer Operations Division’s determination, requesting an administrative review of the action. The appeal was granted and although Appellant, through counsel, requested a stay of the permanent disqualification during pendency of the review the action was implemented in accordance with 7 CFR § 279.4(a), which states in relevant part “...the permanent disqualification for trafficking shall not be held in abeyance and shall be effective immediately as specified in 278.6(b)(2) of this chapter.”

Appellant, through counsel, further provided additional materials dated March 29, 2018, received in the offices of the Administrative Review Branch on April 5, 2018. These materials were made available to the Retailer Operations Division for consideration, and in materials dated May 1, 2018, the Retailer Operations Division further affirmed their initial decision to impose a permanent disqualification for trafficking on Appellant.

## **STANDARD OF REVIEW**

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

## CONTROLLING LAW AND REGULATIONS

The controlling law in this matter is contained in the Food and Nutrition Act of 2008, as amended (the “Act”)<sup>2</sup>, 7 U.S.C. § 2021 and promulgated through regulation under Title 7 of the Code of Federal Regulations (CFR),<sup>3</sup> part 278. In particular CFR § 278.6(a) and (e)(1)(i) establish the authority upon which a permanent disqualification may be imposed against a retail food store or wholesale food concern.

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

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

7 CFR § 278.6(e)(1)(i) states, in relevant part:

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

7 CFR § 271.2(1) defines trafficking, in relevant part:

“ ... 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:...”

7 CFR § 271.2 states, in relevant part:

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

7 CFR § 278.6(a) states, in relevant part:

“FNS may disqualify any authorized retail food store ... if the firm fails to comply with the Food & 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.)

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<sup>2</sup> Effective October 1, 2008, the *Food Stamp Act of 1977* was superseded by the *Food and Nutrition Act of 2008*, as amended through P.L. 110-246.

<sup>3</sup> Title 7 of the Code of Federal Regulations may be accessed in its entirety via the Internet at [https://www.ecfr.gov/cgi-bin/text-idx?tpl=/ecfrbrowse/Title07/7tab\\_02.tpl](https://www.ecfr.gov/cgi-bin/text-idx?tpl=/ecfrbrowse/Title07/7tab_02.tpl)

7 CFR § 278.6(c) states, in relevant part:

“Review of evidence. The letter of charges, the response, and any other information available to FNS shall be reviewed and considered by the appropriate FNS regional office, which shall then issue the determination...”

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

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

7 CFR § 278.6(e)(7), states, in relevant part:

“Send the firm a warning letter if violations are too limited to warrant a disqualification.”

7 CFR § 278.6(i), states, in relevant part:

“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 of the Program.” [Emphasis added]

## SUMMARY OF THE CHARGES

The Retailer Operations Division materials and the charge letter dated January 8, 2018, reveal that charges were based on an analysis of EBT SNAP benefit transaction data during the six (6) month period of April 2017 through September 2017 and involved two (2) patterns of EBT transaction characteristics indicative of trafficking as follow:

- Attachment 1 lists an unusual number of SNAP EBT transactions ending in the same cents value.
- Attachment 2 lists excessively large purchase transactions made from the accounts of SNAP recipients.

## APPELLANT’S CONTENTIONS

In the letter dated March 2, 2018, counsel, on behalf of Appellant, contends that:

- The standard applied to impose the permanent disqualification was vague and ambiguous because it included no definition of what an unusual, irregular, or

inexplicable activity for the type of firm is; and, there was no context for the transactions presented.

- No trafficking has occurred at Appellant, asserting that the transactions identified in Attachments 1 and 2 [Exhibits 1 and 2] to the letter of charges [Exhibit 3] were completed in accordance with the applicable regulations.
- Appellant conducts bulk sales which total to lump sums ending in “00”.
- No further action should be taken to disqualify Appellant as a SNAP authorized retailer.

In a letter dated March 29, 2018, received in the offices of the Administrative Review Branch on April 5, 2018, Appellant, through counsel provides a “Memorandum for Support for Request for Administrative Review” offering further explanation and evidentiary materials consisting of Exhibits 1 through 12, for consideration stating, in summary that:

- No wrongdoing has occurred at Appellant.
- Respondent has not met its burden of a preponderance of the evidence in proving that any violations occurred at Appellant by not doing a thorough or complete investigation of the matter; as first asserted by Appellant in the written response to the Retailer Operations Division dated February 15, 2018 [Exhibit 4].
- Cowboy Supermarket is a local corner store/grocer dealing mostly in dry goods, snacks, small amounts of produce, and bulk packages of meat; also selling alcohol, tobacco products, and other beverages; evidenced by 19 photographs [Exhibits 10 and 11] provided for consideration.
- A substantial portion of Cowboy Supermarket’s day to day business transactions involve catering to the low income community surrounding it; with 8,000 SNAP/EBT transactions conducted in one-year; for a total value of nearly 5 U.S.C. § 552 (b)(6) & (b)(7)(C); consisting of an average SNAP/EBT monthly deposit 5 U.S.C. § 552 (b)(6) & (b)(7)(C); representing approximately one-quarter of Appellant’s total monthly deposits<sup>4</sup>. [Exhibits 5, 6 and 7]
- Appellant is the only supermarket of this type in a several block area [Exhibit 10, Google Earth map]; is located in a low income, economically depressed area; and includes services to include meat from a meat case measuring 12 foot long, a seven (7) door walk-in freezer, a 16 door walk-in cooler featuring dairy and produce, and several rows of shelves containing household items as seen in Exhibit 11.

Appellant, through counsel, also provided explanations regarding each of the attachments to the letter of charges which are summarized below:

- **Attachment 1** [Exhibit 1] materials are reported to represent “an unusual number of transactions ending in a same cents value” without context. The 267 total transactions ending in 00, 98, and 99 are reported by Appellant to represent less than five (5)

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<sup>4</sup> Evidence of the amounts presented include Exhibit 5, a printout listing all EBT purchase transactions conducted at Appellant between March 25, 2017 and February 28, 2018; Exhibit 6 consisting of monthly “Merchant Statements” for the period including February 1, 2017 through February 28, 2018 detailing debit, credit, and SNAP transactions at Appellant; and, Exhibit 7, a single page summary of the total deposits by card type.

percent of the calculated transactions in the six-month period as gleaned from Merchant Statements provided as Exhibits 5, 6 and 7. Appellant contends that Respondent has not provided evidence that products at Appellant are not priced in those amounts; and, stepping into any convenience store would reveal a number of items that are offered either at a .98 or 99 value. A random sampling of cash, debit and credit receipts from a time period between October 15, 2017 and January 20, 2018 [Exhibit 12] reveals that transactions at Cowboy Supermarket regularly result in totals ending in .00, .50, .98 and .99 thereby affirming that the types of transactions are not exclusive to SNAP EBT transactions and are not unusual at Appellant.

- **Attachment 2** [Exhibit 2] materials are reported to represent some transactions that have already been included in Attachment 1; and, again are indicated to represent less than five (5) percent of the overall transactions conducted at Appellant in a six-month period. Information regarding the individual accounts has not been provided for consideration thereby resulting in a lack of context to support evaluation.

An “Affidavit of **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**” [Exhibit 9] recounts the materials and contentions provided for consideration in the matter at hand; and, further reference Illinois Department of Revenue reports for periods encompassing July 1, 2016 through February 28, 2018 [Exhibit 8]<sup>5</sup>.

The preceding represents only a brief 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

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.

With regards to Appellant’s contentions in explanation of questionable transactions, the issue in review is whether there is sufficient evidence, through a preponderance of that evidence, that it is more likely true than not true that the questionable transactions were the result of trafficking.

### **Appellant Operations:**

The record reveals that in reaching a disqualification determination, the Retailer Operations Division considered information obtained during a store visit conducted by FNS contracted

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<sup>5</sup> It is noted that the IL tax filing documents are annotated as timely filed for the periods July 1, 2016 through September 30, 2017. The reports for October 1, 2017 through December 31, 2017 are annotated to have been filed on March 6, 2018; and the January 1, 2018 through February 28, 2018 documents are annotated as filed on March 7, 2018.

personnel on September 26, 2017. The record also includes a store visit report, also conducted by FNS contracted personnel on May 22, 2016.

The September 26, 2017 visit was authorized by the self-declared cashier and resulted in materials reflecting observations made, and responses received, from the cashier during the store visit which describes the nature and scope of Appellant's operation, as well as the stock and facilities.

The record indicates that Appellant was authorized as a SNAP retailer effective April 4, 2012 as a convenience store, in accordance with FNS definitions. During the September 26, 2017 store visit Appellant reports operating from 8AM until 6PM, Monday through Saturday, and from 8AM until 8PM on Sunday.

Appellant is reported to operate out of a retail space of approximately 2,300<sup>6</sup> square feet at street level of what appears to be a two-story building, with a storage area of approximately 80 square feet and the presence of storage coolers and freezers. The store visit materials indicate that "The store no longer sells meat bundles. The coolers with the cardboard boxes, all the product is for kitchen use only. Prepared sandwiches and salads are made to order. Clothing was a non food item."

The store visit report identifies at least three (3) varieties in each of the four (4) staple food categories with the only fresh produce identified as onions. No fresh meat beyond pork (ham, bacon sausage), deli meats, and eggs were identified in the store visit of September 26, 2017. A sketch of store resulting from the September 26, 2017 store visit is provided for reference below.

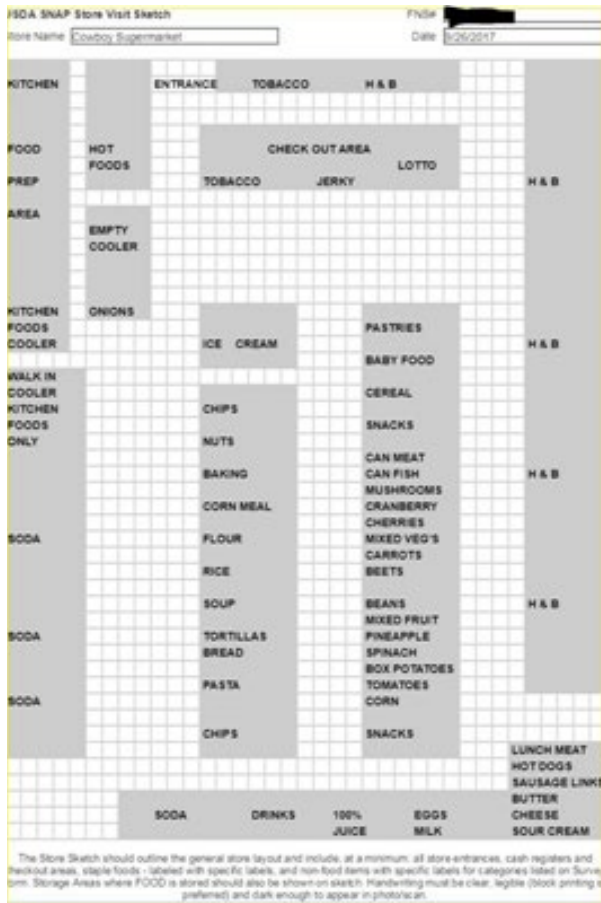
The store visit materials describe Cowboy Supermarket to be operating with one (1) general use cash register that is not equipped with scanning technology; and, one (1) point-of-sale (POS) terminal. The checkout operation is seen in the September 26, 2017 certified store visit photographs to include a limited counter space approximated at 1.5 feet by 1.5 feet by the Retailer Operations Division.

Health and beauty aid merchandise and tobacco products are identified as shelved behind and surrounding the limited checkout area.

The store visit materials document that there are no hand-held shopping baskets or shopping carts available to support the delivery of purchases to the counter/checkout area for the completion of merchandise price totaling and payment.

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<sup>6</sup> The store visit report dated May 22, 2016 indicates the approximated square footage as 1,250. No explanation of the discrepancy was found documented in the record.



## Store Sketch – Photo #7

Certified photographs from the September 26, 2017, contracted store visit are presented below:







**Photo #11 – Store Overview**



**Photo #32 – Store Overview**



**Photo #34– Infant Formula Stock**



**Photo #39- Empty Refrigeration Units**



**Photo #9 – Empty Meat Case**



**Photo #5 – Deli Prep Area**



Photo #17 – Prepared Food Menu



Photo #42 – Prepared Food Menu

The inventory checklist completed at the time of the September 26, 2017 store visit identifies food varieties available in each of the four (4) staple food groups as follows:

- Five (5) varieties of dairy products including more than 20 units of infant formula, milk and cheese; and, between six (6) and 20 units of butter/margarine; and sour cream/yogurts/dips.
- Thirteen (13) varieties of fruits and vegetables with more than 20 units available in 100 percent fruit juices, and nine (9) of the varieties of canned fruits and vegetables; potatoes are noted as available in dry (instant) form with between six (6) to 20 units; and, three (3) varieties of fruits and vegetables are available in less than six (6) units each. The only fresh produce identified is onion.
- Eight (8) varieties of breads and cereals with loaf bread in quantities of between six (6) and 20 units; the remaining seven (7) varieties include packaged items such as pasta, snacks, baking mixes, and breakfast cereals in more than 20 units.
- Seven, (7) varieties of meat/poultry/fish staple foods are identified with less than six (6) units in two (2) of those varieties (infant meats and pork (ham, bacon or sausage)); one (1) variety (packaged deli meats) of between six (6) and 20 units; and four (4) varieties (canned meats, canned fish, and jerky) with more than 20 units.

The materials indicate that the owner reported the four (4) highest priced SNAP/EBT items (over \$5) including Similac Infant Formula priced at \$24.99 for a one (1) pint 472 ml; Enfagrow Infant Formula priced at \$24.99 for 24 ounces; Enfamil Infant Formula priced at \$16.99 for a 20.5 ounce container; and two (2) pounds of packaged Kielbasa smoked sausage priced at \$5.99. The record indicates that Appellant is an authorized Women Infants and Children (WIC) retailer. As such much of the infant foods, infant formula, and many of items such as cheese, milk, eggs, breakfast cereal, and 100 percent juices would be purchased with WIC benefits as opposed to SNAP benefits. The administrative record indicates that Appellant was reported to have redeemed WIC benefits **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** in calendar year 2017.

Non-SNAP products and services offered at Appellant include tobacco products, lottery tickets, automobile products, health and beauty aids, paper goods, and cleaning products. The certified

store visit photographs also show clothing (t-shirts, belts, hats); advertisement of the availability of utility bill paying and money transfer service; and an ATM.

### **Redemption Changes:**

The administrative record documents SNAP redemptions at Appellant in December 2017 **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**, which is in line with Appellant provided estimates of monthly SNAP redemptions. It is notable that the SNAP redemptions reduced **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** in January 2018, accounting for a 20 percent reduction. SNAP redemptions further declined in February 2018 **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** netting a total percentage change of almost 37 percent in the two (2) monthly following delivery of the January 8, 2018 letter of charges.

### **Comparison/Competitor Store Information:**

Retailer Operations Division documents that Appellant is located in an area that is served by at least 20 alternative SNAP authorized retailers within a two-mile radius including three (3) superstores, two (2) supermarkets, one (1) large grocery store; one (1) small grocery store, and 13 competitor convenience stores. This is in contradiction to Appellant's contention that it is the only type supermarket within several blocks.

An analysis of the SNAP redemptions, transaction count, average transactions, and incidence of occurrence of suspicious transactions in the same categories as those identified for Appellant was completed for four (4) nearby convenience stores.

The results are demonstrated in the following table:

**5 U.S.C. § 552 (b)(7)(E)**

Appellant is seen to have had more than double the SNAP redemptions of both the state and the county and significantly more redemptions than any of the nearby convenience stores reviewed by the Retailer Operations Division.

Similarly Appellant had more transactions, a higher average transaction; and significantly higher incidence of suspicious transactions in each of the patterns identified at Appellant. Retailer Operations Division notes that there is nothing in the administrative record that indicates shopping patterns should be distinct from similar sized competitors carrying similar stock.

### **Charge Letter Attachment Analysis:**

The data reflected in the letter of charges dated January 8, 2018 is the result of information gained primarily from the Anti-Fraud Locator using Electronic Benefits Transfer (EBT) Retailer Transactions (ALERT) system which is a fraud detection, decision support system designed to

monitor and track electronically conducted retail transactions completed by SNAP recipients in authorized meal program and food retailer locations.

The ALERT System facilitates management of the program by providing transaction-level information to Federal personnel charged with the responsibility of SNAP retailer management and compliance. The system uses pre-defined criteria or patterns for potential fraud detection. Pre-formatted reports provide information on those stores and transactions meeting the criteria. ALERT supports both online analysis and online queries and reports for use by FNS. The system does not make the final determination instead it is used by Retailer Operations Division to develop information and evidence for consideration in support of their development of an ultimate decision.

**Attachment 1:** Represents **an unusual number of transactions ending in the same cents value** with 267 transactions identified as suspicious including:

- 126 transactions ending in .00, 5 U.S.C. § 552 (b)(6) & (b)(7)(C), representing focus period SNAP redemptions 5 U.S.C. § 552 (b)(6) & (b)(7)(C);
- 74 transactions ending in .98, 5 U.S.C. § 552 (b)(6) & (b)(7)(C), representing focus period SNAP redemptions 5 U.S.C. § 552 (b)(6) & (b)(7)(C); and,
- 67 transactions ending in .99, 5 U.S.C. § 552 (b)(6) & (b)(7)(C), representing focus period SNAP redemptions 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

In total the 267 suspicious transactions represent 5.40 percent of the total SNAP transactions of the period; and, 5 U.S.C. § 552 (b)(6) & (b)(7)(C) which is 8.46 percent of the total SNAP redemptions recorded in the focus period.

The Retailer Operations Division documents that when there are a disproportional number 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. Notably 55 transactions in the exact amount 5 U.S.C. § 552 (b)(6) & (b)(7)(C) are included in the Attachment 1 materials.

Appellant contends that without context the cited transactions cannot be considered because they represent less than five (5) percent of the calculated transactions in the six-month period; the Respondent has not provided evidence that products at Appellant are not priced in those amounts; and, stepping into any convenience store would reveal a number of items that are offered either at a .98 or .99 value. Appellant further contends that blk sales total to .00 amounts however, no evidence or examples of merchandise meeting the conditions was provided for consideration.

Evidence was provided that cash, credit and debit transactions, at Appellant routinely ended in .00, .50, .98, and .99 during the period between October 15, 2017 and January 20, 2018.

On review it is noted that none of the four (4) comparator stores recorded regular SNAP transactions in the focus period that ended in .00. Further, the September 26, 2017 store visit materials do not identify items ending in .00, .98, or .99 beyond the highest priced SNAP items

at \$24.99, \$16.99, and \$5.99. No SNAP eligible items priced at \$10.00 were reported among the highest priced SNAP items. The incidence of the repetition of \$24.99 was twice and \$16.99 only appeared once.

In sum, the explanations provided by Appellant have not served to evidence that the transactions identified as suspicious in Attachment 1 are, in fact, legitimate. Therefore, the determination of the Retailer Operations Division that the transactions listed in Attachment 1 are more likely than not evidence of trafficking is affirmed.

**Attachment 2:** Represents **excessively large purchase transactions made from the accounts of SNAP recipients** with 237 transactions in amounts **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** conducted by 146 households at Cowboy Supermarket in the focus period. The transactions represent 4.80 percent of the total SNAP transactions in the focus period and **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** more than 21 percent of the total SNAP redemptions recorded in the focus period.

The Retailer Operations Division indicates that the average convenience store transaction in the State of Illinois in the focus period was \$6.15; the average convenience store transaction in the county of Madison was \$5.88; **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. The Retailer Operations Division documents that there were 35 transactions in amounts higher **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** during the focus period which are suspicious in consideration of the inventory and layout; the minimal staple foods; no fresh meat or produce; no shopping carts or baskets; and, limited counter space.

Appellant responds that a review of the Attachment 2 materials reveals many of the transactions were already identified in Attachment 1; and, that again the total transactions in six (6) months represent less than five (5) percent of the total transactions; and, only one-fifth of the nearly **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** SNAP redemptions in the period. Appellant also indicates that Appellant is the only “supermarket” of its type in a several block area offering access to a meat case measuring 12 food long, a seven (7) door walk in freezer, a 16 door cooler and several rows of shelved household items.

It is noted that the evidentiary photographs and Google Earth map materials are affirmed as accurate depictions of Cowboy Supermarket in the affidavit signed by its owner of record. However, Appellant provided materials are distinctly different from either the May 22, 2016, or the September 26, 2017, store visit materials. In the May 22, 2016 store visit signage of fresh meat package offerings were photographed, although there was no fresh or frozen meat seen in the photographs, either in the reported meat case or otherwise. In the September 26, 2017 store visit materials it is noted that Appellant no longer sells meat in bulk. The photographs show an empty meat case, and several freezer/cooler doors are noted to be either empty or stocking boxes of food which Appellant reported during the visit were bulk foods used in kitchen food preparation.

In sum, the explanations provided by Appellant have not served to evidence that the transactions identified as suspicious in Attachment 2 are, in fact, legitimate. Therefore, the determination of

the Retailer Operations Division that the transactions listed in Attachment 2 are more likely than not evidence of trafficking is affirmed.

### **Household Analysis:**

The Retailer Operations Division documents analyzing the transactions of four (4) of the households identified in the charge letter attachments as responsible for suspicious transactions finding that each of the households analyzed had access to, and shopped at, supermarkets and super stores.

- The first household was noted to have conducted SNAP transactions at a superstore and supermarket on both April 4, 2017 and May 4, 2017, followed by excessively large transactions at Appellant 5 U.S.C. § 552 (b)(6) & (b)(7)(C) later. The transactions at both the superstores and supermarkets were for amounts smaller than the transactions at Appellant.
- The second household recorded a transaction 5 U.S.C. § 552 (b)(6) & (b)(7)(C) at a large grocery store followed by four (4) transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C) over the next two (2) days at Appellant. The same pattern occurred on September 9, 2017 with a transaction 5 U.S.C. § 552 (b)(6) & (b)(7)(C) at a supermarket followed by seven (7) transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C) at Appellant over the next six (6) days.
- The third household recorded a SNAP transaction 5 U.S.C. § 552 (b)(6) & (b)(7)(C) at a supermarket on April 20, 2017 followed with a transaction 5 U.S.C. § 552 (b)(6) & (b)(7)(C) later at Appellant. From May 2 through 10, 2017 this household shopped at an area supermarket while also conducting several transactions at Appellant 5 U.S.C. § 552 (b)(6) & (b)(7)(C).
- The fourth household conducted a series of transactions in both April and September at an area supermarket supplemented with repeated transaction at Appellant.

The Retailer Operations Division documents that the identified households conducted SNAP transactions at Appellant where a limited inventory is identified, in amounts sometimes exceeding the amounts transacted at larger more robustly stocked large grocery stores, supermarkets, or superstores which is identified as a suspicious behavior.

The Appellant provided explanations for the suspicious transactions did not serve to sway the decision of the Retailer Operations Division that the charge letter attachment materials were more likely than not representative of trafficking transactions.

### **Only area supermarket type store:**

Although Appellant reports that it is a local corner grocer dealing mostly in dry goods, snacks, small amounts of produce, and bulk packages of meat; and, the only supermarket type store for blocks around the area where it is located, a review of the USDA-FNS automated Retailer Locator, located at <https://www.fns.usda.gov/snap/retailerlocator> , verifies that there are at least

10 authorized SNAP authorized retailers within a 0.88 mile radius; and, at least 25 SNAP authorized retailers within a two (2) mile radius. Although Appellant declares the sale of bulk meat packages the store visits of May 22, 2016 and September 26, 2017 do not show the availability of fresh or frozen meats beyond the limited pre-packaged deli meats and cheese identified on the store inventory report. The September 26, 2017 store visit specifically indicates that bulk meats are no longer being sold.

Given the availability of strictly convenience type foods at Appellant there are no notable distinctions between Appellant and any area SNAP authorized store in the area. It is noted that Appellant does advertise a robust prepared food menu and the boxes of merchandise identified in the freezer/coolers that were otherwise empty supports that sales of prepared foods could account for some of Appellant's revenue. It is noted, however, that prepared foods, ready for consumption, hot or cold, are not eligible for purchase using SNAP benefits.

A full review of the administrative record, including the store visit reports as identified and the Appellant provided materials reveal obvious differences. It is noted that the affidavit, sworn by Appellant's owner on March 29, 2018, states that the materials provided "represent how Cowboy Supermarket looks today" which is understood to infer that changes in stocking and overall operation may have taken place between the assessment of information used to determine that a permanent disqualification was warranted by the Retailer Operations Division and the swearing of the affidavit. Changes to inventory or operation made subsequent to the Retailer Operations Division determination on review are not considered.

The evidence provided by Appellant affirms that a portion of Cowboy Supermarket's day to day business transactions involve catering to what is characterized as a low income community surrounding it; with 8,000 SNAP/EBT transactions conducted in one-year; for a total value of nearly 5 U.S.C. § 552 (b)(6) & (b)(7)(C); representing monthly average SNAP/EBT of approximately 5 U.S.C. § 552 (b)(6) & (b)(7)(C). However, that the transactions identified in the analysis by the Retailer Operations Division can be affirmed with additional evidence does not evidence that the transactions were legitimate sales of only eligible food items in accordance with the SNAP regulations.

**No wrongdoing has occurred:**

Appellant, through counsel, asserts that no wrongdoing as charged has occurred as evidenced by the information provided coupled with the owner's sworn affidavit; and indicates that no further action should be taken.

This review encompasses and documents the examination of the primary and relevant information in this case, the purpose of which is to determine whether **the Appellant demonstrates** by a preponderance of the evidence that the permanent disqualification should be reversed. The Respondent's determination of the appropriate sanction, in the instant case permanent disqualification is presented in extensive research and analysis documented in various materials included as part of the Agency record. As referenced above 7 CFR § 278.6(a) states, in relevant part that "FNS may disqualify any authorized retail food store ... if the firm fails to

comply with the Food & 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 instant case Appellant has not provided explanations or evidence to indicate that the transactions identified as suspicious in Attachments 1 and 2 of the letter of charges represent legitimate SNAP purchases.

While it cannot be definitively concluded that the transactions cited in the charge letter attachments were the result of trafficking, the evidence offered by the Retailer Operations Division weighs towards the materials likely represent trafficking transactions. Personal sworn or unsworn declarations, without evidence to support conclusions contrary to those drawn by the Retailer Operations Division do not, in and of themselves, eliminate the consideration of the transactions listed in the charge letter attachments.

#### **Civil Money Penalty:**

Part 278.6(f)(1) 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. Although it is reasonable to consider that the disqualification of Appellant may impact the shopping patterns of area households; and will certainly impact Appellant’s revenue source, the regulation sets forth the following specific exception to assessments thereunder: “A civil money penalty for hardship to Food Stamp [SNAP] households may not be imposed in lieu of a permanent disqualification.” Therefore, this civil money penalty provision is not applicable in the present case.

As previously indicated the February 27, 2018 determination letter advised 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 January 8, 2018 advised Appellant that documentation of eligibility for that alternative sanction was to be provided within 10 days.

The record documents that Appellant did not make a request for the imposition of a CMP in lieu of permanent disqualification and provided no evidence of the existence of a comprehensive training program and compliance policy for consideration.

7 CFR §278.6(i) specifies that “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 of the Program.” The criteria listed therein are, as a whole, specifically identified as a *minimum* standard that firms must meet in order to be eligible for such a penalty. The statute and the regulation allow no flexibility below the level of



this stated standard. Appellant provided no evidence of the existence of any compliance policy and program to prevent violations of the SNAP.

Therefore the Retailer Operations Division could not consider the imposition of a CMP in lieu of disqualification. On review the Retailer Operations Division's determination that Appellant firm is ineligible for the imposition of a civil money penalty in lieu of disqualification is affirmed.

### **CONCLUSION**

The Retailer Operations Division analysis of Appellant's EBT transaction records, upon which charges of violations are based, together with observations made during the contracted store visit provide substantial evidence that questionable transactions during the focus period have characteristics that are not consistent with legitimate sales of eligible food to SNAP customers at a store of the nature and scope as described in the preceding materials in Attachments 1 and 2 to the letter of charges. Rather, the characteristics are indicative of illegal trafficking in program benefits.

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.

Based on the discussion above, the decision to impose a permanent disqualification from participation in the SNAP against Cowboy Supermarket is sustained.

### **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.

NANCY BACA-STEPAN  
ADMINISTRATIVE REVIEW OFFICER

July 12, 2018