

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

C & S Market,

Appellant,

v.

Case Number: C0203437

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 C & S 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 November 15, 2017.

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 October 24, 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 May 2017 through September 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 responded to the charges in a letter dated October 27, 2017, but the response neither requested nor contained any evidence to be considered in support of the CMP. The Retailer Operations Division notified Appellant in a letter dated November 15, 2017, 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 November 17, 2017, Appellant appealed the Retailer Operations Division's assessment and requested an administrative review of this action. The appeal was granted. No subsequent correspondence 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 §278.6(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 May 2017 through September 2017. This involved two patterns of EBT transaction characteristics indicative of trafficking:

1. Multiple transactions were made from individual benefit accounts in unusually short time frames.
2. Excessively large purchase transactions were made from recipient accounts.

APPELLANT’S CONTENTIONS

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

- There’s unfounded evidence that C&S Market violated the regulations based on two compiled records. Legal counsel is not warranted because the business has not violated the rules and regulations. The business is a full grocery store operating 11 hours a day except Sunday from 12:30-7:00 PM. It is an established business in operation since 2012 and fulfills the needs of its small 2.5 square mile neighborhood. The majority of clients are non-EBT that want more local produce and want to support local business versus chain stores. SNAP income supplements the business and is not the lifeline of it. The business would lose some income and might have to let go a few employees, but will

remain in operation without EBT;

- The owner is one of those people who would not be so lucky in life in getting away with anything and has no additional information to submit other than what was previously submitted. If USDA needs a line by line explanation, the owner does not have the manpower or the memories to recount each transaction. These would be best verified by the EBT clients as well as the bank statement and receipts already provided;
- For the multiple transactions in short time frames the owner selected 9/11/2017 as an example since September was the best sales month. The short time frames would be best answered by the client themselves as the owner has no control over how many times each customer can use their card at her store. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). They might purchase three boxes of quail meat at \$35.00/box and turn around and purchase a bottle of water at \$1.99 in separate transactions seconds from each other;
- The excessively large transactions are supported and justified by the EFT transactions from Costco and Sam's Club highlighted on the attached bank statement. The business sells a substantial variety of staple food items and includes a large quantity of meats, poultry, seafood, and seasonal locally grown vegetables. On this date the combined Costco and Sam's Club purchases totaled 5 U.S.C. § 552 (b)(6) & (b)(7)(C) with the majority of purchases being high priced cases of meats, seafood, and water. The Costco is a specialty store for businesses and is only six minutes away. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). It is not unusual for a 16 pound pack of beef priced at \$5.59/pound 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The owner's competitive pricing allows SNAP patrons to have higher purchasing power and provides more nutritious food to their households. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). If the business has to have a single transaction by a customer in an amount deemed appropriate by USDA, then the owner would not want to do such business. There are monthly non-EBT customers that purchased seven to 15 boxes of quail meat at \$35.00 per box 5 U.S.C. § 552 (b)(6) & (b)(7)(C) and their phone numbers and names are available upon request;
- 5 U.S.C. § 552 (b)(6) & (b)(7)(C),
- The business does not take its EBT authorization lightly and EBT investigators are welcome to shop in the store and verify the owner's statements with the regular EBT customers. The owner has strived to meet all qualifications and regulations and can assure that to the best of her knowledge no trafficking or violations have been committed. The charges are unwarranted and reconsideration is requested. The decision will have a major impact on the growing small rural community looking to stretch their means while striving to feed their families healthier options.

Appellant submitted maps/directions for Costco Business Centers, a banking statement showing transactions for April-October 2017, invoices/receipts for inventory purchases, and photographs of store stock 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 April 17, 2017, following a six month disqualification for accepting SNAP benefits for the sale of ineligible items 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 an April 12, 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 minimal quantity and variety of staple foods and carrying no unique eligible food items.
- The business stocked a limited quantity and variety of Hispanic foods (e.g. Goya, etc.) typically found in stores as well as many American brands.
- Exterior signage advertised notary, fax/copy, and phone cards in addition to cigarettes and energy drinks. A store employee stated that the business did not allow telephone or online orders and did not have delivery service.
- There was only one shopping cart and three small handheld baskets for customer use seen during the visit making it difficult for customers to carry large amounts of food to the checkout.
- The checkout area consisted of a long counter with a plastic security barrier on top that contained two sliding windows that when opened would leave an area approximately one foot deep by 1.5 feet wide for purchases to be placed. This area also contained the PIN pad and food displays that would take-up available counter space. The small size of the checkout areas limits the amount of counter space available to place purchases upon and would make it problematic to process large orders.
- The checkout counter had two cash registers, one POS terminal, and no optical scanner as evidenced by the store visit report and photographs.
- No food packages, bundles, bulk products, case sales, or other sales were evident that would explain the unusual transactions and no SNAP eligible cased items were available for purchase except for beverages.
- The store visit report specifically notes that the business is not a specialty store and that there are no meat bundles or fruit and vegetable boxes for sale.
- The store had a minimal 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 ineligible items.

- The store had no fresh unprocessed meats or seafood, no frozen unprocessed meats or seafood, an extremely limited quantity and variety of processed meats and seafood (canned meat/fish/poultry, jerky, five packages of hot dogs, and four sausages), no bacon, no packaged lunch meats, no deli meats, no frozen entrees, no frozen dinners, a moderate quantity and variety of fresh fruit and vegetables, no frozen fruits or vegetables, no nuts, no soups other than single serving noodle soups, no dried beans, a limited quantity and variety of canned and packaged staple food items, no sour cream, no yogurt, no margarine, no deli cheeses, limited packaged cheese, no baby foods, no baby cereals, a limited variety of infant formula, no tea, and very few expensive eligible food items.
- Ineligible items included: tobacco, alcohol, household products, paper products, auto products, health and beauty items, clothing, diapers, toys, piñatas, charcoal, lighter fluid, grills, notary, fax/copy, phone cards, and video gambling machines while accessory foods included: candy, spices, condiments, cocoa, coffee, cooking oil, 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 10:00 AM-9:00 PM M-Saturday and 12:30-7:00 PM Sunday 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 snacks priced at 35 cents, 75 cents, and two for \$1.00; limes priced at 25 cents each; and eggs priced at \$1.00. 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 a 51 ounce bottle of olive oil priced at \$14.99, a 12.4 ounce container of Gerber infant formula priced at \$14.99, a seven ounce jar of instant coffee priced at \$6.99, and a case of 40 bottles of water priced at \$5.99. The listing of the most expensive items was provided by a store employee during the store visit. The listing of the most expensive items was provided by a store employee during the store visit.
- The store was not a WIC vendor. While the business did stock a limited quantity of infant formula, most SNAP households with infants or small children are WIC participants and therefore would be purchasing these products using WIC vouchers at WIC vendors, not SNAP EBT.
- The store visit report and photographs showed that several shelves, coolers, and display racks were marginally stocked or empty.

Multiple transactions in unusually short time frames

This Attachment documents 67 individual transactions in 32 sets of two or more transactions conducted by 21 different households in a short period of time.

5 U.S.C. § 552 (b)(6) & (b)(7)(C). The dollar amounts of the subsequent transactions in each set are all substantial and they nearly equal or exceed the dollar amount of the initial transaction in 17 of the 32 sets. **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. 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). These sets of transactions appear to be in amounts which are indicative of trafficking.

Appellant contends the short time frames would be best answered by the client themselves as the owner has no control over how many times each customer can use their card at her store. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). They might purchase three boxes of quail meat at \$35.00/box and turn around and purchase a bottle of water at \$1.99 in separate transactions seconds from each other.

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 stock and facilities and are thus indicative of trafficking. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). 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. Appellant's example involving non-EBT customers purchasing multiple boxes of quail meat immediately followed by a bottle of water is without merit as the FNS store visit shows no expensive items such as boxes of meat available for sale and also because the second transaction in her example was for a small dollar amount (5 U.S.C. § 552 (b)(6) & (b)(7)(C)) that would be characteristic of a customer forgetting an item and conducting a second purchase of a small dollar amount. 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

An analysis of the shopping patterns for households listed in this Attachment shows that they have ready access to transportation as evidenced by their shopping at a variety of other larger food stores located nearby and at a distance from Appellant's location with all of the households shopping at a large number of super stores and supermarkets. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). This analysis also identified nine households that only shopped at other stores located 1.16 miles or further away with one household only shopping at other stores located more than 4.3 miles from Appellant's location. There were also 11 other households where the vast majority of their SNAP transactions were conducted at other stores located more than 1.04 miles away from Appellant's location. This is an indication that as many as 20 of the 21 households in this Attachment may reside at a distance from the Appellant business and brings-up the question of why would these households elect to travel a sizeable distance, often several miles round trip from their regular shopping areas, past numerous larger and better stocked stores 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 improbable that households with limited cash resources would choose to travel these distances if their purchases consisted solely of eligible food items that could be purchased at any of the super stores and/or supermarkets they were already regularly shopping at and therefore more likely than not that these households were trafficking SNAP benefits at the Appellant business and the multiple transactions were attempts by to obscure trafficking by dividing a large dollar value transaction into a series of smaller dollar value transactions. This is a method used by stores to avoid high dollar transactions that cannot be supported.

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. 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

High Dollar Value Transactions

This Attachment lists 355 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 \$6.07 for this store type in Clayton County. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). This is unusual and indicative of trafficking.

The record shows there are two super stores located within a one mile radius of Appellant's location at 0.4 and 0.86 miles as well as one medium grocery store clearly within easy walking distance at 0.11 miles away. There are also an additional three super stores and two supermarkets located 1.16-1.99 miles away. The evidence under review shows that SNAP households shopping at the Appellant business are also shopping at other nearby stores, as well as at many full-line supermarkets and super stores, located nearby as well as at a significant 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. Specifically, 114 of the 117 households listed in this Attachment shopped at a super store, supermarket, or large grocery store 5 U.S.C. § 552 (b)(6) & (b)(7)(C) of shopping at the Appellant business.

Evidence shows that the difference in the average SNAP transaction dollar amount, the total SNAP transaction dollar volume, and the SNAP transaction count for Clayton County convenience stores during the review months and at the Appellant business is significant. 5 U.S.C. § 552 (b)(7)(E). 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.

Appellant contends the excessively large transactions are supported and justified by the EFT transactions from Costco and Sam's Club highlighted on the attached bank statement. The business sells a substantial variety of staple food items and includes a large quantity of meats,

poultry, seafood, and seasonal locally grown vegetables. On September 11, 2017, the combined Costco and Sam's Club purchases 5 U.S.C. § 552 (b)(6) & (b)(7)(C) with the majority of purchases being high priced cases of meats, seafood, and water. The Costco is a specialty store for businesses and is only six minutes away. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). If the business has to have a single transaction by a customer in an amount deemed appropriate by USDA, then the owner would not want to do such business. There are monthly non-EBT customers that purchased seven to 15 boxes of quail meat at \$35.00 per box 5 U.S.C. § 552 (b)(6) & (b)(7)(C) and their phone numbers and names are available upon request.

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.

Information obtained during the FNS store visit on April 12, 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 or seafood, no frozen unprocessed meats or seafood, an extremely limited quantity and variety of processed meats and seafood (canned meat/fish/poultry, jerky, five packages of hot dogs, and four packages of sausage), no bacon, no packaged lunch meats, no deli meats, no frozen entrees, no frozen dinners, a moderate quantity and variety of fresh fruit and vegetables, no frozen fruits or vegetables, no nuts, no soups other than single serving noodle soups, no dried beans, a limited quantity and variety of canned and packaged staple food items, no sour cream, no yogurt, no margarine, no deli cheeses, limited packaged cheese, no baby foods, no baby cereals, a limited variety of infant formula, no tea, and very few expensive eligible food items, these patterns are deemed to be suspicious. The fact that tobacco, alcohol, household products, paper products, auto products, health and beauty items, clothing, diapers, toys, piñatas, charcoal, lighter fluid, grills, notary services, fax/copy services, phone cards, and video gambling machines 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.

Appellant furnished no itemized cash register and EBT receipts for the period under review to document the legitimacy of these excessively large transactions. While the banking statements show some large dollar value transactions occurring at Costco and Sam's Club, they are not itemized and therefore no determination can be made as to whether they were only for SNAP eligible food items or if they included large amounts of ineligible items. An examination of the photographs provided by Appellant shows signage and labeling that appears to be from a Costco or similar store and therefore have no evidentiary value as they do not provide evidence of large amounts of meat, poultry, seafood, and seasonal locally grown vegetables for sale at the Appellant business during the period under review.

An analysis of the 16 pages of invoices and receipts for inventory purchases submitted by Appellant was conducted by the Retailer Operations Division. The invoices and receipts provided were from Sam's Club, Coca Cola Bottling, and Market Grocery and show many purchases of snack items and drinks. Even though Appellant submitted maps showing the Costco specialty stores for businesses and what appear to be photographs of store stock at Costco, no actual receipts from Costco were provided. It is unusual that although Appellant selected the four inventory purchases occurring on September 11, 2017, in her contentions claiming that the one transaction at Sam's Club and the three at Costco represented the purchase of high priced cases of meats, seafood, and water that no actual receipts were provided for any of the four transactions. It is also noted that 12 of the 33 invoices and receipts provided were dated outside of the period under review and therefore were excluded from the analysis. The months of May and September 2017 had the most invoices and receipts so these two months were used for the analysis. No markup percentage was provided by Appellant so a 200 percent markup was applied to the total dollar amount of invoices for these two months in order to produce a figure representing potential eligible food sales. For comparison purposes, data provided by the National Association of Convenience Stores (NACS) for 2016 shows the average markup of SNAP eligible food items was 64 percent. The potential eligible food sales figures were then compared to SNAP redemptions at the Appellant business for the same two months showing that redemptions significantly exceeded potential sales thereby demonstrating that the invoices and receipts provided do not support Appellant's claim of selling large amounts of meat, poultry, and seafood. Additionally, the Appellant business has an extremely small checkout area with no scanner and only one shopping cart 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.

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.

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, 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 letter of charges evidence trafficking as the most likely explanation for the questionable transactions listed in the charge letter Attachments. It is herein determined that Appellant has not provided 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 was 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.

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 request a trafficking CMP or to submit sufficient evidence to demonstrate that the firm had established and implemented an effective compliance policy and program to prevent SNAP violations within the specified timeframe. As such, the Retailer Operations Division determined that Appellant was not eligible for a trafficking CMP in lieu of permanent disqualification.

Appellant made no mention 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 two Attachments of EBT transaction data, the inadequacy of the store's staple food stock as observed during the store visit to support large transactions in short time frames, the lack of adequate evidence for customer spending habits given that there are other SNAP authorized stores located within proximity to Appellant that likely offer a greater selection of eligible food items at competitive prices, and the irregular SNAP transaction data of Appellant as compared to other like type and larger stores in the county and state.

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

March 19, 2018