

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

**Ethan Grocery Llc,**

**Appellant,**

**v.**

**Retailer Operations Division,**

**Respondent.**

**Case Number: C0218073**

**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 Ethan Grocery Llc (hereinafter "Ethan Grocery Llc" or "Appellant") 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 Ethan Grocery Llc.

**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 13, 2019, the Retailer Operations Division informed the Appellant that Ethan Grocery Llc 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." The letter also noted that the Appellant could request a trafficking civil money penalty (CMP) in lieu of a permanent disqualification within 10 days of receipt under the conditions specified in 7 CFR § 278.6(i). Per UPS confirmation of delivery, the charge letter was delivered to the Appellant at the store address of record on June 14, 2019.

The Appellant, through counsel, responded to the charges in letter dated June 19, 2019 denying the trafficking allegations and requesting consideration of a civil money penalty in lieu of a permanent SNAP disqualification. The letter of response also included a request for information and documents from FNS with regard to the agency's case against Ethan Grocery Llc pursuant to the Freedom of Information Act (FOIA). In a letter dated July 12, 2019, FNS provided a response to counsel's FOIA request. In a letter dated July 25, 2019, the Appellant's counsel filed a FOIA appeal of the documents provided by FNS in response to the FOIA request. The record reflects that FNS provided a response to counsel's FOIA appeal, dated February 17, 2021. On February 18, 2021, the Retailer Operations Division sent a 10 day letter to counsel providing the opportunity to respond to the letter of charges. In a letter dated March 1, 2021, the Appellant, through counsel, provided an additional response to the charge letter of June 13, 2019.

After considering the Appellant's replies and the evidence in the case, the Retailer Operations Division issued a determination letter dated March 2, 2021, informing the Appellant that Ethan Grocery Llc was being permanently disqualified from participation in the SNAP in accordance with 7 CFR § 278.6(e)(1) for trafficking violations. The letter also stated that the Appellant was not eligible for a trafficking civil money penalty (CMP) as the Appellant did not submit sufficient evidence to demonstrate that the firm had established and implemented an effective compliance policy and program to prevent violations of the SNAP.

In a letter postmarked March 10, 2021, the Appellant, through counsel, 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 March 30, 2021.

## **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 2018 through April 2019. This involved the following SNAP transactions patterns which are indicative of trafficking:

- There were multiple transactions made from the accounts of individual SNAP households within a set time period; and
- There were EBT transactions conducted that are large based on the observed store characteristics and recorded food stock.

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.

### 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 replies to the charge letter and in the administrative review request, the Appellant, through counsel, stated the following summarized contentions, in relevant part:

- The Appellant denies that trafficking of SNAP benefits took place at the firm.
- With regard to the SNAP transactions documented in charge letter Attachment 1, of the transaction sets noted over the six month period, 5 U.S.C. § 552 (b)(6) & (b)(7)(C), thereby under cutting any claim that the withdrawals were within an unusually short timeframe.
- The average for all transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C). In light of the value of the average transaction in Hartford County, the Appellant's sales average is in line with the county sales average.
- As for the remainder of transaction sets, the Appellant cannot prevent an individual from using his or her benefits at any time of his or her choosing or in the manner of his or her choosing. SNAP regulations do not prohibit recipients from making multiple withdrawals during a single day.
- There are times when one member of the family lends his account to another member of the family, which results in multiple short term withdrawals. While it is true that SNAP benefits are available to all eligible households and each eligible member receives their own card and pin, that statement overlooks the fact that not everyone in the household is

eligible for benefits. The end result is the card is given to, and used by, an ineligible household member.

- Also, there are customers who have life issues and are not as organized and skilled as the average individual. The owner has personally observed situations where that person will complete a transaction and shortly thereafter engage in another transaction or a series of transactions because of the person's inability to conceptualize in a clear and rational manner what is needed to sustain him or her through a longer time period. There is nothing out of the ordinary in that scenario.
- Some individuals purchase just enough items so they can carry them to their homes. They return to the store **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** to purchase the balance of the goods that they were not able to carry on the first trip. This is not the case where there are super stores and large grocery stores within walking distance of the Appellant. As for the other neighborhood stores, the vast majority of them do not participate in SNAP. That means that the Appellant's clients are limited to purchasing a substantial amount of their food needs from the Appellant even if prices are higher and the selection is more limited.
- With regard to the SNAP transactions documented in charge letter Attachment 2, the Appellant is a large store and is well stocked with a substantial variety of quality goods, including staple and non-staple food items, which in some cases are relatively expensive. The store visit photos document the large amount of shrimp, rice, cooking oil, corned beef and baby formula that the Appellant sells and stocks. These are high priced items. Therefore, it is no surprise that some of the transactions that seemed excessively large were in fact ordinary payments for food, vegetables, and other items covered by SNAP. A comparison of all of the Appellant's SNAP transactions to the average SNAP transaction in Hartford County would be illuminating and would show how closely the two average transaction amounts mirror each other.
- Secondly, approximately one-third of the transactions in Attachment 2 were for less **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. Per the study, *Analysis of EBT Benefit Redemption Patterns: Methods for Obtaining, Preparing, and Analyzing the Data*, FNS, USDA, November 2005, approximately 16% of all SNAP transactions are in dollar amounts **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. In the case at hand the percent of SNAP transactions that were in excess **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** to a smaller percentage when compared to the store's total sales. What that means is that the store is right in line with the number of large purchases that would be predicted by the government's own statistical and empirical research.
- Also, the pricing structure in a small grocery store is very different from the pricing in a very large supermarket. The large market counts on volume to make a reasonable return on capital. The small grocery store's business model requires a substantial mark-up on its inventory in order to justify the investment in the store. According to a well-respected study, the National Association of Convenience Stores (NACS) State of the Industry Annual Report, 2022 Data, the typical mark-up for SNAP eligible items in a small store is 65 percent. The owner estimates that the local Meriden market supports a mark-up of 100 percent. A mark-up of that size will result in a series of larger than expected sales. A higher price point necessarily produces seemingly excessively large purchases.
- The relevant Federal regulations, 7 CFR 271-282, allow a disqualification of the Appellant where there is a . . . clear and repetitive pattern of unusual, irregular, and

inexplicable activity. It is black letter law that a vendor ". . . has a property interest in continued participation in the food stamp program and cannot be deprived of this interest without due process." Ibrahim v. US Through Dept. of Agriculture, 650 F. Supp. 163, (Dist. Court, ND New York 1987). It is further undisputed law that an administrative penalty imposed by USDA FNS must be set aside if it is arbitrary or capricious. McGlory v. United States, 763 F.2d 309 (1985); Ramirez v. United States 514 F. supp. 759, 763 (1981).

- The factual predicate for a finding of trafficking does not exist and a permanent disqualification is both unwarranted and a violation of the regulations and case law. A careful review of the evidence and rationale provided by the Appellant demonstrates by a preponderance of the evidence that the disqualification should be reversed. The allegedly unusual, irregular and inexplicable activity is in fact regular, usual and has been appropriately explained.
- A SNAP disqualification would cause hardship to SNAP households because there is no other authorized retail food store in the area selling as large a variety of staple food items at comparable prices.
- The Appellant requests consideration for a civil money penalty in lieu of permanent SNAP disqualification. Pursuant to Section 278.6(i), the firm had an effective compliance program. The owner has owned the business for nearly two years and this is the first time she has been cited for any SNAP violations. The compliance policy and program were in effect since 2017 when the owner first purchased the store. The fact that the owner has successfully operated the business for almost two years prior to the incidence in question is proof positive of the efficacy of the policy and program that were in effect.
- During her ownership, the owner has employed two full-time and one part-time employee. Since being authorized she has insured that each individual who has worked the cash register has a firm grasp of what is allowed under SNAP regulations and clearly knows how to handle SNAP transactions. All of the employees are trained shortly after being hired. Furthermore, the owner continues to monitor the employees until they exhibit a firm grasp of the precepts noted herein. Finally, the owner was not aware of, did not approve, did not benefit from, and was not in any way involved in the conduct or approval of trafficking violations.

## ANALYSIS AND FINDINGS

### **SNAP Authorization**

FNS authorized Ethan Grocery Llc for participation in the SNAP on August 20, 2018. During the review period of November 2018 through April 2019, Ethan Grocery Llc was classified as a convenience store. The owner signed a SNAP application for the store and acknowledged he was aware of the SNAP regulations and understood those regulations. That application included a certification and confirmation that the owner would "accept responsibility on behalf of the firm for violations of the SNAP regulations, including those committed by any of the firm's employees, paid or unpaid, new, full-time or part-time." The violations listed on this certification include accepting SNAP benefits in exchange for cash, otherwise known as

trafficking, and other violations such as accepting SNAP benefits as repayment on credit accounts or in exchange for ineligible items.

### **Store Visit Observations**

The case file indicates that in reaching a disqualification determination, the Retailer Operations Division considered information obtained during a May 6, 2019 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 1,000 square feet in size with no additional storage outside of public view;
- No storage coolers/freezers;
- No shopping carts and two hand-held baskets available for customer use;
- One cash register and one EBT point-of-sale (POS) device for use in ringing-up SNAP transactions;
- One small checkout counter area with limited check-out counter space;
- No optical scanners;
- Does not primarily sell one food type such as meat, poultry, dairy, seafood, fruits, baked goods, or vegetables;
- No signs posted or flyers available advertising the availability of bulk foods offered at a discounted rate to include meats in bulk, foods sold by the case, and grocery package deals;
- No meat/seafood specials or bundles or fruit/vegetable boxes that might sell for high prices;
- No evidence of a wholesale business such as posted prices or separate entrances for wholesale customers;
- Had an ATM for customer use;
- Firm was not a WIC Program vendor;
- Firm had a special pricing structure, such as prices ending in \$x.x9 and/or \$x.00;
- Transaction totals were not rounded up or down at the checkout counter;
- Telephone orders were taken;
- Delivery was not offered;
- The four most expensive (costing \$5.00 and above) eligible foods items in stock were Monster energy drink at \$40.00 per 24 pack (1 unit in stock); Pepsi at \$20.00 per 36 pack (2 units in stock); Similac infant formula at \$17.99 per 12.4 ounces; and Red Bull energy drink at \$15.00 per 12 pack (4 units in stock);
- No fresh or frozen meats, poultry, or seafood in stock;
- Frozen food items included ice cream treats and two bags of mixed vegetables;
- Had a kitchen and prepared, made-to-order sandwiches were sold;
- Had a deli area and deli meats and cheeses were sold at \$5.00 per pound;
- Meat items included units of canned fish/seafood, canned/potted meat, meat jerky, and eggs;

- Dairy included milk (cow, almond, and coconut varieties), butter, margarine, and cheese;
- A limited variety and amount of fresh produce stock which was stocked in the deli counter and appeared to also be used in the preparation of prepared, made-to-order sandwiches sold at the store;
- Other staple foods available for purchase included such items as juice, pasta, rice, corn meal, cereal, loaf bread, flour, buns/rolls, oats, baking mix, and canned goods;
- Much of the remaining food stock consisted of accessory foods such as candy, carbonated and non-carbonated drinks, condiments, snack foods, vegetable oil, and coffee; and
- Ineligible nonfood items included tobacco products, health and beauty aids, paper products, household cleaning supplies, automotive supplies, pet food, housewares, and gift items/party goods/souvenirs.

The available inventory of SNAP eligible food at the time of the store visit showed food stock that would be typical of a convenience store, where households normally purchase a limited number of items. The SNAP eligible food stocked by the store was generally of a low dollar value, consisting mainly of inexpensive canned and packaged goods, snack foods, single-serving food items and accessory food items. There was little indication that SNAP households would be inclined to regularly visit the store to purchase large quantities of groceries. Given the available inventory and the store's characteristics, this review could find no reason why the Appellant firm's SNAP redemption patterns differed so significantly from those of similar sized competitors.

### **Charge Letter Attachments**

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. The Retailer Operations Division presented a case that the Appellant trafficked SNAP benefits. Each Attachment furnished with the charge letter represents the questionable and unusual patterns of SNAP transactions indicative of trafficking which were conducted at the Appellant during the review period. A singular transaction could appear in more than one Attachment as it can meet the criteria for several different types of flags. As patterns of unusual transactions appear across multiple Attachments the case of trafficking becomes more convincing.

### **Repeat Transactions by the Same Household (Charge Letter Attachment 1)**

This charge letter Attachment documents 32 sets of transactions (75 total transactions) **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** in SNAP benefits to meet the parameters of this scan. These transactions were conducted by 22 different SNAP households. Multiple transactions conducted by the same household account within a short period of time is a method which violating stores use to avoid single high dollar transactions that cannot be supported by a retailer's inventory and structure.

The Appellant contends that of the transaction sets noted over the six month period, **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**, thereby under cutting any claim that the withdrawals were within an unusually short timeframe. As for the remainder of transaction sets, the Appellant



cannot prevent an individual from using his or her benefits at any time of his or her choosing or in the manner of his or her choosing. Also, there are customers who have life issues and are not as organized and skilled as the average individual.

Although it is not uncommon for customers to have more than one transaction per day and there are no limits on the number of times EBT cards may be used or the amount of eligible foods that may be purchased, it is not common that such multiple transactions are for large dollar amounts. The SNAP transactions noted in the charge letter 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 the Appellant's stock and facilities and are therefore, indicative of trafficking.

The report and photographs from the store visit offer no explanation as to why SNAP customers would routinely shop at Ethan Grocery Llc multiple times during a short period or purchase such a large volume of items, there being no great variety of products, price advantage, profusion of large packages, or significant bulk items or food cases for sale. In addition, there was a small checkout area with one cash register and one EBT POS device for ringing-up SNAP transactions. There were no shopping carts and only two hand-held baskets at the time of the store visit available to customers for transporting food within the store. There were no optical scanners or conveyor belts to expedite high dollar or rapid consecutive purchases.

**5 U.S.C. § 552 (b)(7)(E).**

As to whether or not co-shopping and/or sharing of EBT cards actually affected the Appellant firm during the review period, this argument is little more than conjecture. The Appellant has provided no evidence to show that co-shopping and/or sharing of EBT cards is particularly common among SNAP recipients in Meriden, Connecticut. If co-shopping and/or sharing of EBT cards truly impacted Ethan Grocery Llc, it would stand to reason that co-shopping and/or sharing of EBT cards would affect other nearby firms as well. This would manifest itself in comparable firms having similar transaction patterns – multiple transactions from the same household in a short period of time. But this is simply not the case.

The Appellant contends that some individuals purchase just enough items so they can carry them to their homes. They return to the store **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** to purchase the balance of the goods that they were not able to carry on the first trip. This is not the case where there are super stores and large grocery stores within walking distance of the Appellant. As for the other neighborhood stores, the vast majority of them do not participate in SNAP. The Appellant's clients are limited to purchasing a substantial amount of their food needs from the Appellant even if prices are higher and the selection is more limited.

It is recognized that sometimes a firm may have unusual transaction patterns due to a recipient's lack of access to other SNAP authorized stores. However, there are 27 SNAP authorized retailers, including 2 supermarkets and 1 super store, located within a 1.0 mile radius of Ethan Grocery Llc that can meet the nutritional needs of SNAP customers. Some of the area authorized SNAP stores noted are larger than Ethan Grocery Llc and offer a greater quantity and variety of food products at comparable or better prices as compared to the subject store.

The record indicates that SNAP customers who shopped at Ethan Grocery Llc during the 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 or the availability of other food stores does not appear to be an explanation for the Appellant's abnormally high SNAP transaction amounts conducted within a short timeframe of each other.

Unfortunately, the Appellant has not provided any evidence to show that the transactions listed in this Attachment were legitimate purchases of eligible foods and not the result of trafficking of SNAP benefits. The Appellant has the burden to provide relevant evidence to rebut the trafficking charges. This burden has not been met.

### **Excessively Large Transactions (Charge Letter Attachment 2)**

This charge letter Attachment documents 259 SNAP transactions, **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. These large transaction amounts are not consistent with the store's observed characteristics and food inventory. The frequency of high dollar purchases in the review period calls into question the legitimacy of these transactions.

The Appellant has provided several contentions with regard to the transactions documented in Attachment 2, including a claim that it is a large store and is well stocked with a substantial variety of quality goods, including staple and non-staple food items, which in some cases are relatively expensive. The store visit photos document the large amount of shrimp, rice, cooking oil, corned beef and baby formula that the Appellant sells and stocks. These are high priced items. Therefore, it is no surprise that some of the transactions that seemed excessively large were in fact ordinary payments for food, vegetables, and other items covered by SNAP.

The food stock and facilities of the Appellant as reported in the store visit documentation do not appear sufficient to provide for all of one's food needs. People generally do not spend large sums at such stores. They usually stop at convenience stores to pick up a few staple food items, such as bread, milk, or a can or two of food that they may consider are not worth a trip to the supermarket to purchase. The Appellant contends that these large transactions are not the result of trafficking of SNAP benefits. However, it is rare for a convenience store such as Ethan Grocery Llc to have purchases like those included in this Attachment to the charge letter. A review of the store visit report and photos indicates that Ethan Grocery Llc is a convenience store offering a minimal variety and amount of staple food items and does not offer any specialty or ethnic food items that are not available at other area authorized retail food stores. The Appellant mainly sells snacks, drinks, and packaged food items. The stock of SNAP eligible foods is minimal with no fresh meats, poultry, or seafood, no frozen meats, poultry, or seafood, a minimal variety and amount of fresh produce (which was also used in the preparation of deli/prepared sandwiches), a limited variety and amount of frozen foods, and lacks an abundant depth and breadth of staple foods.

There were no signs posted or flyers available advertising the availability of bulk foods offered at a discounted rate to include meats in bulk, foods sold by the case, and grocery package deals, no evidence of meat/seafood specials or bundles/plans or fruit/vegetable boxes that might sell for high prices, and no evidence of a wholesale business such as posted prices or separate entrances

for wholesale customers. The store visit evidence also shows only a few high priced eligible foods in stock (most of which were in limited quantities) so the majority of the food items stocked at the store are low priced items. These large transaction amounts are not consistent with the Appellant store's inventory.

While there is no definition in the SNAP regulations for an excessively large purchase or transaction, FNS makes its determination based on the store type, characteristics and stocked inventory. The burden is on the Appellant to prove transactions FNS identified as large for the store type (in this case, a convenience store) are for legitimate purchases. According to the store visit of May 6, 2019, the subject store did not have inventory to support the numerous large transactions. The Appellant also provided no evidence of continuously purchasing inventory throughout the review period to satisfy the large transactions. The store must have stocked inventory to repetitively generate large sales, which was not evident in the store visit.

The Appellant contends that approximately one-third of the transactions in Attachment 2 were for less 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Per the study, *Analysis of EBT Benefit Redemption Patterns: Methods for Obtaining, Preparing, and Analyzing the Data*, approximately 16% of all SNAP transactions are in dollar amounts 5 U.S.C. § 552 (b)(6) & (b)(7)(C). In the case at hand the percent of SNAP transactions that were in excess 5 U.S.C. § 552 (b)(6) & (b)(7)(C) amounted to a similar percentage when compared to the store's total sales.

The study referenced by the Appellant indicates that 15.8 % of SNAP purchases 5 U.S.C. § 552 (b)(6) & (b)(7)(C) for all store types, including supermarkets, which have vastly larger stocks than convenience stores like the Appellant. The same study found that 83% of SNAP redemptions are redeemed at supermarkets, so the 16% figure referenced by the Appellant mostly reflects supermarket purchases. Therefore, that figure is not applicable to the Appellant, since a supermarket stock could support the large number 5 U.S.C. § 552 (b)(6) & (b)(7)(C) transactions seen in Attachment 2 due to its much larger stock. While the Appellant contends that a comparison of all of the Appellant's SNAP transactions to the average SNAP transaction in Hartford County would be illuminating and would show how closely the two average transaction amounts mirror each other, the study noted by the Appellant indicates that the average EBT purchase amount for a convenience store like Ethan Grocery Llc was \$7.86. Also, the average transaction dollar amount for a convenience store in **New Haven** County, Connecticut (where the Appellant is located) during the review period (November 2018 -- April 2019) was \$8.31 according to ALERT analysis.

The Appellant contends that the pricing structure in a small grocery store is very different from the pricing in a very large supermarket. The large market counts on volume to make a reasonable return on capital. The small grocery store's business model requires a substantial mark-up on its inventory in order to justify the investment in the store. The owner estimates that the local Meriden market supports a mark-up of 100 percent. A mark-up of that size will result in a series of larger than expected sales.

5 U.S.C. § 552 (b)(7)(E).

While the Appellant firm may be located in a neighborhood with households that qualify for SNAP benefits, these factors are not an indication that questionable transactions would be occurring at any given store. The subject store shows unusual transaction patterns that are not displayed in other similarly stocked stores. If specific household needs are causing these questionable transactions at the subject store, it would be expected that similar patterns would also present themselves at nearby firms as well. But this is simply not the case.

#### 5 U.S.C. § 552 (b)(7)(E).

The USDA employs a computerized fraud detection tool to identify EBT transactions that form patterns that have characteristics indicative of trafficking. However, this tool does not, by itself, determine or conclude that trafficking has occurred. The Retailer Operations Division analyzes the transaction data and patterns along with other documentation such as, information from the onsite store visit report including photographs of stock and the store layout, an analysis of recipient shopping behavior, and comparisons with similar store types in local area, to render a determination as to whether or not the questionable transaction patterns were, more likely than not, the result of trafficking. The regulations at 7 CFR § 278.6(a) state that FNS may disqualify any authorized retail food store if the firm fails to comply with the Food and Nutrition Act of 2008, as amended, and that such disqualification shall result from a finding of a violation on the basis of evidence that may include facts established through, inconsistent redemption data, and evidence obtained through a transaction report under an electronic benefit transfer system.

Based on the discussion above and in the absence of credible evidence for 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. Nevertheless, transactions having such characteristics do sometimes have valid explanations that support that they were the result of legitimate purchases of eligible food items, and this is why opportunities are afforded to charged retailers to explain the questionable transactions cited. In this case, however, the Retailer Operations determined that the Appellant’s contentions did not outweigh the evidence. Assertions that the firm has not violated program regulations, by themselves and without supporting evidence and rationale, do not constitute valid grounds for dismissal of the current charges of violations. As noted herein, the Appellant has the burden of providing credible, relevant evidence, which 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 not true. This burden has not been met.

#### **Due Process/Case Laws**

The Appellant contends that relevant Federal regulations, 7 CFR 271-282, allow a disqualification of the Appellant where there is a . . . clear and repetitive pattern of unusual, irregular, and inexplicable activity. It is black letter law that a vendor “. . . has a property interest in continued participation in the food stamp program and cannot be deprived of this interest without due process.” Ibrahim v. US Through Dept. of Agriculture, 650 F. Supp. 163, (Dist. Court, ND New York 1987). It is further undisputed law that an administrative penalty imposed

by USDA FNS must be set aside if it is arbitrary or capricious. McGlory v. United States, 763 F.2d 309 (1985); Ramirez v. United States 514 F. supp. 759, 763 (1981).

The Appellant, through counsel, replied to the charges in writing, denying the charge of trafficking and offering various explanations and evidences for the questionable transactions. After considering the evidence of the case and the Appellant's replies, the Retailer Operations Division determined that a permanent disqualification was warranted. The action was not arbitrary or capricious as it followed the agency's due process procedures which are two-fold in nature. First, the retailer is afforded an opportunity to reply to the charges as specified by the Retailer Operations Division; the Appellant, through counsel, has availed itself of this first aspect of the due process procedures in the form of written replies to the Retailer Operations Division. The second level of due process involves an administrative review, of which the Appellant, through counsel, has likewise availed itself and in the process of which the Appellant was granted an additional three weeks within which additional information may be provided in support of the request for review.

The purpose of the administrative review process is to ensure that firms aggrieved by FNS's adverse actions have the opportunity to have their position fairly considered by an impartial reviewing authority prior to that adverse action becoming final. The Appellant has been duly given, and has taken, the opportunity to present to USDA through the administrative review process whatever evidence and information it deems as pertinent in support of its position that the Retailer Operations Division's adverse action should be reversed. Therefore, any evidence and information that the Appellant presented to the Retailer Operations Division, as well as any such information submitted subsequently, have now been considered in this administrative review in rendering the final agency administrative decision in this case. The record does not indicate any departure from established policy or procedures with regard to the Appellant's right to a fair and thorough review. The Appellant has exercised its opportunity to reply to the charge letter and its administrative review rights, and by doing so has availed itself of the full complement of the agency's statutory obligations with regard to due process.

With regard to the case laws cited by the Appellant, it is beyond the scope and authority of this review to determine the applicability of same. This review is limited to consideration of whether or not the Retailer Operations Division duly adhered to the Food and Nutrition Act of 2008, as amended, and the implementing regulations, and whether or not the action taken is sustainable by a preponderance of the evidence. Therefore, the application of any judicial precedent is better addressed via judicial review. Accordingly, no further findings or conclusions are rendered in this regard.

### **Customer Hardship**

With regard to the Appellant's contentions that a SNAP disqualification will impose a hardship on area 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.

### **CIVIL MONEY PENALTY**

In the June 13, 2019 charge letter the Appellant was informed by the Retailer Operations Division that, under certain conditions, FNS may impose a civil money penalty (CMP) of up to \$59,000 in lieu of permanent disqualification of a firm for trafficking. Per Section 278.6(i) of the SNAP regulations, four criteria must be met in order to be considered for a trafficking civil money penalty. If requesting a trafficking CMP, an Appellant must meet each of the four criteria listed and provide the documentation as specified within ten days of the Appellant’s receipt of their charge letter. As specified in 7 CFR § 278.6(i), in determining the minimum standards of eligibility of a firm for a civil money penalty in lieu of trafficking, the firm shall, at a minimum, establish by substantial evidence its fulfillment of each of the following four criteria:

Criterion 1. The firm shall have developed an effective compliance policy as specified in 7 CFR § 278.6(i)(1);

Criterion 2. The firm shall establish that both its compliance policy and program were in operation at the location where the violation(s) occurred prior to the occurrence of violations cited in the charge letter;

Criterion 3. The firm had developed and instituted an effective personnel training program as specified in 7 CFR § 278.6(i)(2); and

Criterion 4. Firm ownership was not aware of, did not approve, did not benefit from, or was not in any way involved in the conduct or approval of trafficking violations.

In the reply to the charge letter of June 19, 2019, the Appellant, through counsel, requested consideration for a civil money penalty in lieu of permanent SNAP disqualification. The Appellant contends that pursuant to Section 278.6(i), the firm had an effective compliance program. The compliance policy and program were in effect since 2017 when the owner first purchased the store. The fact that the owner has successfully operated the business for almost two years prior to the incidence in question is proof positive of the efficacy of the policy and program that were in effect. Since being authorized the owner has insured that each individual who has worked the cash register has a firm grasp of what is allowed under SNAP regulations and clearly knows how to handle SNAP transactions. All of the employees are trained shortly after being hired. Furthermore, the owner continues to monitor the employees until they exhibit a firm grasp of the precepts noted herein. Finally, the owner was not aware of, did not approve, did not benefit from, and was not in any way involved in the conduct or approval of trafficking violations.

The Retailer Operations Division determined that the Appellant was not eligible for a trafficking civil money penalty in lieu of a disqualification under 7 CFR § 278.6(i) because the Appellant failed to submit sufficient evidence to demonstrate that the firm had established and implemented an effective compliance policy and program to prevent SNAP violations. **5 U.S.C. § 552 (b)(7)(E).**

With regard to the Appellant's contention that the owner has owned the business for nearly two years and this is the first time she has been cited for any SNAP violations, the case record indicates that FNS sent an official warning letter to the Appellant, dated March 20, 2019, for selling ineligible nonfood items with SNAP benefits during a USDA undercover compliance investigation of the firm. The acceptance of SNAP benefits in exchange for ineligible items is a violation of Section 278.2(a) of the regulations. However, even if the Appellant had not been cited for any prior SNAP violations by FNS, 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.

Therefore, the Retailer Operations Division's decision not to impose a civil money penalty in lieu of disqualification is sustained as appropriate pursuant to 7 CFR § 278.6(i).

### **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 Ethan Grocery Llc 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 10, 2021