

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

Las Americas Market,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0247988

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 Las Americas Market (hereinafter “Las Americas Market” 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 Las Americas Market.

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 October 18, 2021, the Retailer Operations Division informed the Appellant that Las Americas Market 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 October 19, 2021.

The record reflects that via email of October 24, 2021, the Appellant requested an extension in time for providing a response to the letter of charges. Via letter of October 25, 2021, the Retailer Operations Division granted the Appellant's time extension request to November 28, 2021. The Appellant was informed in that letter that the time to request a civil money penalty in lieu of permanent disqualification and to provide documentation to support such a request could not be extended per SNAP regulations.

In responses to the Retailer Operations Division of October 24, 2021 and November 28, 2021, the Appellant, through counsel, replied to the letter of charges. The record reflects that the Retailer Operations Division received and considered the information provided prior to making a determination.

After considering the Appellant's responses and the evidence in the case, the Retailer Operations Division issued a determination letter dated January 12, 2022, informing the Appellant that Las Americas Market 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) in accordance with 7 CFR § 278.6(i) 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 January 21, 2022, 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 January 27, 2022. In an email correspondence of February 17, 2022, the Appellant, through counsel, submitted additional information in support of the request for administrative review.

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 February 2021 through July 2021. 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, in the administrative review request, and in subsequent correspondence to FNS, the Appellant, through counsel, stated the following summarized contentions, in relevant part:

- The Appellant denies that trafficking took place.
- The charge letter relies only on conclusionary findings, without any specifics which any reasonable party could rely upon to evidence impropriety by the Appellant.
- The data provided in Attachments 1 and 2 is circumstantial, at best, with a presumption of misconduct and malfeasance on the part of the Appellant and without context to the business's demographics or geography. FNS's conclusions are made without providing any information relevant to a review of same, including the size of each identified household, the total SNAP benefits for each identified household, the typical purchasing

habits of each identified household, which member of the household made the purchases in question, or any details relative to the products purchased by said household in a given transaction.

- FNS relied upon a flawed investigation report to allege that the Appellant's inventory is insufficient to support the transactions occurring despite the fact that the store visit report, in particular, specifically directs the reviewer to omit meat, poultry, and seafood when identifying the highest priced items at the store even though said products account for nearly one-fifth of the annual SNAP expenditures.
- The transaction pattern Scans do not take into account critical data and patterns of behavior typical of SNAP households in a low-income area with low access to supermarkets and vehicles.
- FNS has not previously warned the Appellant about the possibility that violations were occurring.
- Las Americas Market has no prior history of violations or warnings by FNS or any other related agency and there exists no other evidence that shows Las America Market's intent to violate the regulations.
- The Appellant is a neighborhood grocery and general store which caters to individuals and families in the neighborhood and surrounding area.
- The Appellant is a primary food retailer in the neighborhood.
- The store visit report indicated that the Appellant was sufficiently stocked in the four staple food categories.
- Further, due to its proximity within a densely populated neighborhood, it is not uncommon for patrons to shop at the Appellant several times within a day or week, nor is it rare for several members of a given household (some being multi-unit and/or multigenerational households) to shop at the store together or on the same day.
- According to the Food Access Research Atlas, the Appellant is located towards the center of a census tract that is notable for being identified as: (a) A tract with a poverty rate of 20% higher, or tracts with a median family income less than 80% of median family income for the state or metropolitan area; (b) A low-income census tract where a significant number or share of residents is more than ½ mile (urban) or 10 miles (rural) from the nearest supermarket; (c) A tract in which at least 500 people or 33% of the population lives farther than ½ mile (urban) or 10 miles (rural) from the nearest supermarket; (d) A low-income census tract where more than 100 housing units do not have a vehicle and are more than ½ mile from the nearest supermarket, or a significant number or share of residents are more than 20 miles from the nearest supermarket; and (e) A tract in which more than 100 households have no access to a vehicle and are more than ½ mile from the nearest supermarket, or a significant number or share of residents are more than 20 miles from the nearest supermarket.
- Based upon the Atlas data, those individuals residing in the immediate vicinity of the Appellant tend to be of generally lower income, lacking access to a vehicle, and residing more than ½ mile from a supermarket.
- According to the caseload data available on the Massachusetts Department of Transactional Assistance website, from January 2021 through August 2021 the SNAP supported an average of 10,076.13 households and 17,319.5 recipients in the zip code alone.

- The area immediately surrounding the Appellant is heavily residential and is located a few hundred feet from the Boston Housing Authority's Franklin Field apartment complex which has over 400 units in total, of which only 93 are designated to be one-bedroom units. Therefore it follows that there are at least 300 units having two or more bedrooms and, thus, occupied by households consisting of two or more people.
- There is also a large concentration of churches and schools in the immediate vicinity.
- Given the restricted access those in the neighborhood surrounding the Appellant have to supermarkets (both by distance and access to vehicles), many residents rely on the Appellant for their everyday groceries and may stop by more than once in a day or on back to back days.
- It is not unusual for several members of the same family to pass by the Appellant and pick up items at separate times on the same day in the usual course of walking to and from school, work, or church.
- Because of the area's noted limited access to vehicles, some shoppers may be required to split up their shopping over the course of multiple trips conducted in a single day or over the course of two days. Sometimes shoppers forget and/or overlook items when shopping and other times customers may be rung up, only realize a particular item was on sale and go back to purchase more.
- Other times, the store will offer bulk sales on highly desirable items such as chicken wings or seafood that were not available the prior day.
- All but 3 of the 104 flagged sets have purchases occurring nearly an hour or more apart from one another and approximately 75% of those sets have purchases occurring on separate calendar days.
- The submitted affidavits from over a dozen customers of the Appellant attest that they use the store as their primary, or one of their primary grocery markets and that they frequently shop at the Appellant, sometimes more than once on the same day or multiple times a week. They also attest that their SNAP purchases never include nonfood items and that the store has never charged them additional money to use SNAP benefits or offered cash in exchange for said benefits.
- Per the SNAP Retailer Management Year End Summary for 2020, national SNAP redemptions increased significantly in Fiscal Year 2020 to approximately \$78 billion from approximately \$56 billion in Fiscal Year 2019.
- According to USDA's *Foods Typically Purchased by SNAP Households*, the top ten expenditures by categories were: (1) meat, poultry or seafood (19.2%); (2) sweetened beverages (9.3%); (3) vegetables (7.2%); (4) frozen prepared foods (6.9%); (5) prepared desserts (6.9%); (6) high fat dairy/cheese (6.5%); (7) bread and crackers (5.4%); (8) fruits (4.7%); (9) milk (3.5%); and (10) salty snacks (3.4%).
- The Appellant carries a significant stock of all ten of the top expenditure categories, including in particular hundreds of units of vegetables, fruit, and meat, poultry, and fish.
- Unfortunately, the store visit report specifically excludes meat, seafood, vegetables and fruit from identifying the six most expensive SNAP-eligible food items offered for sale.
- The submitted inventory invoices substantiate the firm's inventory and demonstrate that there was adequate eligible food items to account for the transactions during the review period.

- Given the inventory maintained by the Appellant and the surrounding neighborhood's limited access to supermarkets, it is typical for neighborhood residents to perform their weekly food shopping at the Appellant.
- To assist customers, the store offers shopping baskets for use while in the store.
- Several customer affidavits attest to their purchases of SNAP qualifying groceries can at times be quite large, oftentimes \$150.00 or more.
- Several households in Attachment 2 appear multiple times and, in some cases, several times in one month. These purchases are easy to explain. For example, household 0765 was flagged multiple times, at least once in each month of the review period. Assuming that this household has at least three people, entitling to an adjusted (+15%) maximum SNAP allotment of \$616.00 in April 2021 according to the Massachusetts Department of Transactional Assistance so the household would still have several hundred dollars in benefits remaining each month. This household must have three or more people, since a family of two would only receive \$430.00 per month—an insufficient amount for SNAP expenditures in April and July. It is clear that this household generally conducts a handful of relatively large transactions monthly.
- In the months since receipt of the charge letter, the Appellant has taken significant steps to evidence its continued commitment to abide by and comply with all SNAP rules including (1) Creation of a SNAP training program for all employees relative to the SNAP rules including (a) How SNAP works; (b) Proper acceptance and handling of food coupons; (c) Identification of eligible and ineligible items; and (d) Understanding and avoiding trafficking. The training program is comprised of various FNS materials and a training certification; (2) Engagement of Juniorsoft Technology to assist in implementing technological upgrades, including a POS system, new cash register software, new payment processing system, and a new closed circuit television (CCTV) camera integration with the POS; and (3) Expansion of the existing CCTV system to integrate with the POS and register software, as well as increased storage for retention of recorded footage.
- The Appellant requests reversal of the imposed permanent SNAP disqualification.
- In the alternative, the Appellant requests that FNS instead: (1) Issue an official warning letter; (2) Impose a civil money penalty; or (3) Impose a shorter period of SNAP disqualification.

In support of these contentions, the Appellant, through counsel, submitted the following information for review:

- Inventory purchase invoices for January 2021 – July 2021;
- Census tract information/maps (five each) downloaded from <https://www.ers.usda.gov/data-products/food-access-research-atlas/go-to-the-atlas/>;
- Affidavits of 14 SNAP customers;
- *Foods Typically Purchased by SNAP Households*, USDA, FNS, November 2016.
- *Fiscal Year 2020 Year End Summary*, USDA, FNS;
- Massachusetts Department of Transactional Assistance news article downloaded from <https://www.mass.gov/news/massachusetts-residents-will-receive-increased-snap-benefits-tohelp-buy-groceries-during> entitled *Massachusetts Residents Will Receive*

Increased SNAP Benefits to Help Buy Groceries During COVID-19: SNAP Benefits Amounts Will Increase 15% starting in February;

- Copy of the Appellant's SNAP training program with various training materials and a training certificate; and
- Work proposal provided by Juniorsoft Technology with literature relative to a new POS, register software, and CCTV integration.

ANALYSIS AND FINDINGS

SNAP Authorization

During the review period of February 2021 through July 2021, Las Americas Market was classified as a small grocery store. When the Appellant was authorized by FNS for participation in the SNAP, 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 March 4, 2021 store visit conducted by a FNS contractor to observe the nature and scope of the firm's operation, stock, and facilities. The available inventory of SNAP eligible food at the time of the store visit showed food stock that would be typical of a small grocery 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. 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 1,500 square feet in size with approximately 800 square feet of storage area outside of public view which stocked predominantly nonfood items and non-staple foods;
- Did not have storage coolers/freezers;
- No shopping carts and three hand-held baskets available for customer use;
- One small checkout counter area with limited check-out counter space;
- One specialty cash register (lottery, Western Union, etc.);
- One cash register and two EBT point-of-sale (POS) devices for use in ringing-up SNAP transactions;
- Did not have optical scanners;

- Did not have a special pricing structure, such as prices ending in \$.x9;
- Did not round transactions up or down at the checkout counter;
- Had ATM or money transfer service;
- 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;
- Telephone and on-line orders were not taken;
- Delivery was not offered;
- The six most expensive (i.e., costing \$5.00 and above) SNAP-eligible food items in stock were Wellsley Farms shrimp at \$18.99 per 1.5 pounds; Goya corn oil at \$10.49 per 96 fluid ounces (6 units in stock); Cibao Brand longaniza at \$8.99 per 22.4 ounces; Carolina rice at \$8.49 per 1 pound (6 units); Coffee Mate at \$6.49 per 22 ounces (8 units in stock); and Land O Lakes butter at \$5.49 per 1 pound (6 units in stock);
- Store stock includes some Hispanic foods;
- No fresh meats, poultry, or seafood;
- A limited variety and amount of frozen meats, poultry, and seafood;
- Frozen food stock included such items as Hot Pockets, fruit, vegetables, waffles, ice cream, and pizza;
- Did not have a kitchen and hot foods were not sold;
- Did not have a deli or prepared food section and deli meats and cheeses were not sold by the pound;
- Meat items included units of canned fish, eggs, sausage, bacon, packaged lunch meat, canned/potted meat, meat jerky, and hot dogs;
- Dairy included milk (cow/dairy and coconut varieties), butter, sour cream, margarine, yogurt, and cheese;
- Had a limited variety and amount of fresh produce stock;
- Other staple foods available for purchase included such items as juice, pasta, rice, cereal, loaf bread, buns/rolls, baking mix, flour, oats, corn meal, and canned goods;
- Much of the remaining food stock consisted of accessory foods such as candy, carbonated and non-carbonated drinks, condiments, sugar, snack foods, and cakes/pastries; and
- Ineligible nonfood items included tobacco products, health and beauty aids, paper products, household cleaning supplies, automotive supplies, lottery tickets, cell phone accessories, clothing, household items, jewelry, and housewares.

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.

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

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

This charge letter Attachment documents 104 sets of transactions (259 total transactions) that total \$16,320.07 in SNAP benefits to meet the parameters of this scan. These transactions were conducted by 48 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 it is not unusual for several members of the same family to pass by the Appellant and pick up items at separate times on the same day in the usual course of walking to and from school, work, or church. Because of the area’s noted limited access to vehicles, some shoppers may be required to split up their shopping over the course of multiple trips conducted in a single day or over the course of two days. Many residents rely on the Appellant for their everyday groceries and may stop by more than once in a day or on back to back days. All but 3 of the 104 flagged sets have purchases occurring nearly an hour or more apart from one another and approximately 75% of those sets have purchases occurring on separate calendar days.

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 repetitive nature of the transactions identified in Attachment 1 are vastly different at the subject firm than in any other nearby comparable firm giving creditability that trafficking is more likely than not occurring at the subject firm. 5 U.S.C. § 552 (b)(7)(E).

The Appellant contends that the store will offer bulk sales on highly desirable items such as chicken wings or seafood that were not available the prior day. However, the Appellant did not provide any documentation to support this statement, 5 U.S.C. § 552 (b)(7)(E). In addition, the

store visit report, which was signed by and completed in cooperation with a store employee, as well as the stock photos offer no explanation as to why SNAP customers would routinely shop at the Appellant 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. The second, third, and subsequent transactions in each set are too large to consist of forgotten items. While the Appellant is correct in that the firm was sufficiently stocked in the four staple food categories at the time of the store visit, the majority of the store's food stock consists of generally low dollar items such as packaged food items, canned items, accessory food items, snacks, and beverages. The inventory purchase receipts provided by the Appellant confirm that purchases of these low dollar items are predominant and account for a considerable portion of the firm's overall SNAP sales. While research reports acknowledge the rapid spending habits of SNAP participants as normal practices, it is expected SNAP benefits are expended in establishments with adequate inventory to support purchases. Such inventory was not confirmed in the subject store.

In addition, there was a small checkout counter with limited space, one cash register for food purchases, no shopping carts and only three hand-held baskets available to customers for transporting food within the store, and no optical scanners or conveyor belts to expedite high dollar or rapid consecutive purchases. The store visit observations also indicate that firm offered no special or custom services to customers, such as on-line or telephone orders and/or delivery services, which would entice SNAP customers to utilize the subject store over other area authorized retail stores.

As to whether or not co-shopping 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 is particularly common among SNAP recipients in 5 U.S.C. § 552 (b)(6) & (b)(7)(C). If co-shopping truly impacted Las Americas Market as the Appellant suggests, it would stand to reason that co-shopping 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 those individuals residing in the immediate vicinity of the store lack access to a vehicle and reside more than ½ mile from a supermarket. 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, during the review period there were 15 SNAP authorized retailers of comparable or larger size located within a 1.0 mile radius of Las Americas Market, including 10 other small grocery stores (one of which is located 0.15 miles away), 2 medium grocery stores (one of which is located 0.09 miles away), 2 supermarkets (one of which is located 0.27 miles away), and 1 super store which could meet the nutritional needs of SNAP customers. Some of these area authorized stores offer a comparable or greater quantity and variety of food products at comparable or better prices as compared to the subject store.

5 U.S.C. § 552 (b)(7)(E). 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 Attachment 1 were legitimate purchases of eligible foods. The arguments presented by the Appellant hold little weight without some kind of evidence to substantiate its claims.

Excessively Large Purchase Transactions (Charge Letter Attachment 2)

This charge letter Attachment documents 463 SNAP transactions, as large as \$268.75, that total \$34,854.08. 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 contends that the store is a neighborhood grocery and general store which caters to individuals and families in the neighborhood and surrounding area. The Appellant is a primary food retailer in the neighborhood.

However, 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 small grocery 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 the large transactions are not the result of trafficking of SNAP benefits. However, it is rare for a small grocery store such as Las Americas Market to have purchases like those included in this Attachment to the charge letter.

A review of the store visit report and photos indicates that Las Americas Market is a small grocery store offering a moderate variety and amount of staple food items, no fresh meats, poultry, or seafood, a limited variety and amount of frozen meats, poultry, and seafoods, a limited variety and amount of fresh produce stock, and does not offer any specialty or ethnic food items that are not available at other area authorized retail food stores. The store visit observations indicate that 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.

In addition, the firm offered no special or custom services to customers, such as on-line or telephone orders and/or delivery services, which would entice SNAP customers to utilize the subject store over other area authorized retail stores. There was a limited checkout counter space, one cash register for food purchases, and no optical scanners or conveyor belts to expedite high dollar or rapid consecutive purchases. While the Appellant is correct in that the firm had three hand-held baskets available for customer use, there were no shopping carts available in which to transport the large number of items required to make up these large transaction amounts. Without these, it is unlikely that such large dollar value transactions could be for actual food purchases and more likely they are trafficking.

The Appellant contends that the store visit report specifically excludes meat, seafood, vegetables and fruit from identifying the six most expensive SNAP-eligible food items offered for sale. The store visit report, which was completed in collaboration with and signed by a store employee, as well as the store photos noted that the six most expensive (i.e., costing \$5.00 and above) SNAP-

eligible food items in stock were Wellsley Farms shrimp at \$18.99 per 1.5 pounds; Goya corn oil at \$10.49 per 96 fluid ounces (6 units in stock); Cibao Brand longaniza at \$8.99 per 22.4 ounces; Carolina rice at \$8.49 per 1 pound (6 units); Coffee Mate at \$6.49 per 22 ounces (8 units in stock); and Land O Lakes butter at \$5.49 per 1 pound (6 units in stock). While limited amounts of fruits, vegetables, salmon, pollock, tilapia, chicken, and ground beef were observed in the store visit photos and documented on the store visit report, they were not noted on the six most expensive SNAP-eligible food items list on the store visit report. However, even if there were a few food items costing \$5.00 and above not noted in the store visit report's most expensive list that are stocked by the store, the Appellant did not have the inventory to support the numerous large transactions and did not provide adequate evidence of continuously purchasing inventory throughout the review period to satisfy the large transactions noted in the charge letter (see Invoice Analysis section of this Final Agency Decision). The inventory purchase invoices provided by the Appellant also confirm that purchases of low dollar value foods, mainly inexpensive canned and packaged goods, snack foods, single-serving items and accessory foods, are predominant and account for a considerable portion of the firm's overall SNAP sales.

While the Appellant firm may be located in a neighborhood with households that qualify for SNAP benefits and within walking distance of multiple schools, churches, and low-income housing apartments and developments, and it may be true that national SNAP redemptions increased significantly in Fiscal Year 2020, 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 or an increase in household SNAP benefits 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.

The Appellant contends that according to USDA's *Foods Typically Purchased by SNAP Households*, the top ten expenditures by categories were: (1) meat, poultry or seafood (19.2%); (2) sweetened beverages (9.3%); (3) vegetables (7.2%); (4) frozen prepared foods (6.9%); (5) prepared desserts (6.9%); (6) high fat dairy/cheese (6.5%); (7) bread and crackers (5.4%); (8) fruits (4.7%); (9) milk (3.5%); and (10) salty snacks (3.4%). The Appellant carries a significant stock of all ten of the top expenditure categories, including in particular, hundreds of units of vegetables, fruit, and meat, poultry, and fish.

It is acknowledged that the subject store does offer items that SNAP households would purchase; however, many of these items are accessory items that a SNAP customer would not purchase all the time. However, the key findings of the noted study indicate that there were no major differences in the expenditure patterns of SNAP and non-SNAP households, no matter how the data was categorized. The study noted that similar to most American households: About 40 cents of every dollar of food expenditures by SNAP households was spent on basic items such as meat, fruits, vegetables, milk, eggs, and bread; another 20 cents out of every dollar was spent on sweetened beverages, desserts, salty snacks, candy and sugar; the remaining 40 cents was spent on a variety of items such as cereal, prepared foods, dairy products, rice, and beans; and the top 10 summary categories and the top 7 commodities by expenditure were the same for SNAP and non-SNAP households, although ranked in slightly different orders.

5 U.S.C. § 552 (b)(7)(E).

The Appellant provided statistics pertaining to the general demographic and noted that households that conducted these transactions have a larger amount of SNAP residents residing in their homes. However, there is no indication as to how this explains the questionable transaction patterns addressed in the charge letter. Many households are comprised of a diverse family dynamic, yet this is not an indication that questionable transactions would be occurring at any given store. The subject store shows unusual transaction patterns that are not occurring in other similarly or even better stocked stores. If specific family needs are causing these questionable transactions at the subject store, it would be expected that similar patterns would exist at other neighboring stores. However, this is not the case.

The Appellant contends that given the inventory maintained by the Appellant and the surrounding neighborhood's limited access to supermarkets, it is typical for neighborhood residents to perform their weekly food shopping at the Appellant. As noted previously, 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, during the review period there were 15 SNAP authorized retailers of comparable or larger size located within a 1.0 mile radius of Las Americas Market, including 10 other small grocery stores (one of which is located 0.15 miles away), 2 medium grocery stores (one of which is located 0.09 miles away), 2 supermarkets (one of which is located 0.27 miles away), and 1 super store which could meet the nutritional needs of SNAP customers. Some of these area authorized stores offer a comparable or greater quantity and variety of food products at comparable or better prices as compared to the subject store.

5 U.S.C. § 552 (b)(7)(E).

Based on the store layout, infrastructure, and available inventory, it is not credible that the Appellant would so frequently conduct large transactions closely resembling those typically found at a supermarket or super store. It is not plausible that the firm's customers would regularly carry very large amounts of merchandise around the store without the benefit of shopping carts, especially since larger, better-stocked stores are readily available and in the vicinity of the Appellant firm. The Appellant is not set up to process high-dollar transactions, as indicated by its lack of equipment to facilitate large transactions and limited counter space. There are no legitimate bases for SNAP customers' unusual attraction to the firm such as a superior selection of staple foods, price advantages, package specials, bulk or promotional items, an extensive variety of otherwise unavailable ethnic food items at other area stores, or special services rendered. The Appellant failed to provide convincing evidence to establish the legitimacy of these excessively large transactions, such as itemized cash register receipts. Based on all of these factors discussed in this section, the large volume of transactions for high dollar amounts is unlikely to indicate a pattern of legitimate food purchases.

The Appellant requests in lieu of a permanent SNAP disqualification that the firm be issued either an official warning letter or a shorter period of SNAP disqualification. However, neither the Food and Nutrition Act of 2008, as amended, nor the accompanying regulations 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 extremely serious, even when the exchange of SNAP benefits for cash is dollar-for-dollar or is conducted by a nonmanagerial 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, § 278.6(e)(1)(i) of the SNAP regulations states that FNS must 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.

Evidence of Trafficking

Regarding the Appellant’s contentions with respect to the reliability of the ALERT system, 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.

Customer Affidavits

The Appellant contends that the submitted affidavits from over a dozen customers of the store attest that they use the store as their primary, or one of their primary grocery markets and that they frequently shop at the Appellant, sometimes more than once on the same day or multiple times a week. They also attest that their SNAP purchases never include non-food items and that the store has never charged them additional money to use SNAP benefits or offered cash in exchange for said benefits. Several customer affidavits attest to their purchases of SNAP qualifying groceries can at times be quite large, oftentimes \$150.00 or more.

5 U.S.C. § 552 (b)(7)(E).

It is noted that customer statements virtually always deny violative activity. Customers involved in violations would have a vested interest in helping the retailer, and thus may misrepresent the truth. Further, coaching or template statement language is often provided to those who submit affidavits raising questions about the veracity of the claims therein. While FNS acknowledges the statements, customer statements provided in cases where violations are suspected are frequently considered unreliable because the persons writing them historically give inaccurate information. These affidavits, even if well-intentioned, are typically not accurate depictions of a household’s shopping behavior, as households generally do not retain records of transactions and often do a poor job of recalling actual spending patterns at a

particular location. 5 U.S.C. § 552 (b)(7)(E). As such, these statements are not found to be more persuasive of legitimate SNAP transactions for eligible foods than the evidence supporting trafficking.

Inventory Invoices

The Appellant contends that the submitted inventory invoices from the review period substantiate the firm's inventory and demonstrate that there was adequate eligible food items to account for the transactions during the review period.

The Retailer Operations Division conducted an analysis of the inventory purchase invoices provided for the review period. 5 U.S.C. § 552 (b)(7)(E). In sum, the invoices do not explain the questionable transactions at the Appellant.

Compliance History

The Appellant contends that the store has no prior history of violations or warnings by FNS or any other related agency and there exists no other evidence that shows Las America Market's intent to violate the regulations.

5 U.S.C. § 552 (b)(7)(E). Regardless, 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.

No Warning

The Appellant contends that there has been no prior action taken by FNS to warn the firm about the possibility that violations are occurring. 7 CFR § 278.6(d)(2) and (3) of the SNAP regulations provides that "The FNS office making a disqualification or penalty determination ... shall consider ... any prior action ... to warn the firm about the possibility that violations are occurring...." The citation simply requires FNS to consider any prior warnings when determining a sanction. It does not require FNS to give such warnings. FNS did not consider prior actions to warn the Appellant about the possibility that violations were occurring because there were no prior warnings.

Corrective Action

The Appellant contends that in the months since receipt of the charge letter, the firm has taken significant steps to evidence its continued commitment to abide by and comply with all SNAP rules including (1) Creation of a SNAP training program for all employees relative to the SNAP rules including (a) How SNAP works; (b) Proper acceptance and handling of food coupons; (c) Identification of eligible and ineligible items; and (d) Understanding and avoiding trafficking. The training program is comprised of various FNS materials and a training certification; (2) Engagement of Juniorsoft Technology to assist in implementing technological upgrades, including a POS system, new cash register software, new payment processing system, and a new closed circuit television (CCTV) camera integration with the POS; and (3) Expansion of the

existing CCTV system to integrate with the POS and register software, as well as increased storage for retention of recorded footage. In support thereof, the Appellant submitted a copy of the firm's SNAP training program with various training materials and a training certificate and a work proposal provided by Juniorsoft Technology with literature relative to a new POS, register software, and CCTV integration.

It is important to clarify for the record that the purpose of this review is to either validate or to invalidate the earlier decision of the Retailer Operations Division. This review is limited to what circumstances were at the basis of the Retailer Operations Division action at the time such action was made. It is not the authority of this review to consider what subsequent remedial actions may have been taken so that the store may begin to comply with program requirements. There is no provision in the SNAP regulations or internal agency policy directives for waiver or reduction of an administrative penalty assessment on the basis of after-the-fact corrective action implemented subsequent to investigative findings of program violations. Therefore, the Appellant's contention that it has taken or will take corrective actions, though they would have been valuable towards preventing future program violations, does not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

CIVIL MONEY PENALTY

In the October 18, 2021 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.

If the Appellant's request for a trafficking CMP and the required documentation are not submitted on time, it will lose its right for any further consideration for a trafficking CMP. The SNAP regulations are specific at 7 CFR §278.6(b)(2)(iii) 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, the firm shall not be eligible for such a penalty". The regulations do not provide the agency discretion to extend the time within which documentation and evidence in support of a trafficking civil money penalty may be submitted.

In the January 21, 2022 request for administrative review and in the February 17, 2022 response in support of the request for administrative review, (i.e., past the 10 day required timeframe of receipt of the October 18, 2021 charge letter), the Appellant, through counsel, requested consideration for a civil money penalty in lieu of permanent.

However, the record supports that the Appellant did not submit a timely request and timely substantial evidence, as required by the regulations, to meet the criteria for a trafficking CMP in lieu of permanent disqualification. 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 Las Americas Market 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

March 23, 2022