

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

**Jamacha Produce Market,**

**Appellant,**

**v.**

**Office of Retailer Operations  
and Compliance,**

**Respondent.**

**Case Number: C0202514**

**FINAL AGENCY DECISION**

The record supports that the Jamacha Produce Market (Appellant), committed violations of the Supplemental Nutrition Assistance Program (SNAP). It is the decision of the USDA that there is sufficient evidence to sustain the permanent disqualification of Appellant from participation as an authorized retail food store in the SNAP, as imposed by the Office of Retailer Operations and Compliance (Retailer Operations).

**ISSUE**

The issue accepted for review is whether Retailer Operations took appropriate action, consistent with 7 CFR § 278.6(a), (c), and (e)(1) in its administration of the SNAP, when it assessed a permanent disqualification against Appellant.

**AUTHORITY**

7 U.S.C. § 2023 and the implementing regulations at 7 CFR § 279.1, provide that a food retailer aggrieved by administrative action under § 278.1, § 278.6, or § 278.7, may file a written request for review of the administrative action with the Food and Nutrition Service (FNS).

**CASE CHRONOLOGY**

By Charge letter dated October 17, 2017, Retailer Operations informed the owners that it had compiled evidence that Appellant had violated the SNAP regulations based on electronic benefit transfer transactions that established clear and repetitive patterns of unusual, irregular, and inexplicable SNAP activity for the firm type. Retailer Operations charged Appellant with trafficking. The sanction for trafficking is permanent disqualification.

By letter dated October 27, 2017, counsel made a FOIA request. The USDA FOIA office provided a FOIA response dated December 12, 2017. Counsel appealed the FOIA response by letter dated March 6, 2018. The FOIA office replied to the appeal by letter dated September 25, 2020. On September 29, 2020, Retailer Operations emailed counsel a notice to reply to the 2017 Charge letter in ten days. The record shows that no retailer reply was received to the Charge letter. The only response to the charges was counsel's brief submitted for administrative review, dated after the Determination letter was issued.

Retailer Operations issued a Determination letter dated October 14, 2020, to the store; no owners are listed. This letter informed Appellant that it was permanently disqualified as a retail food store in accordance with Sections 278.6(c), and 278.6(e)(1) of the regulations. Retailer Operations considered Appellant's eligibility for a civil money penalty (CMP) according to Section 278.6(i) of the regulations, and found it was not eligible because insufficient evidence was submitted timely to demonstrate that the firm had established and implemented an effective SNAP compliance policy and program to prevent violations.

Counsel requested administrative review by letter dated October 23, 2020. The review was granted by letter dated November 3, 2020. This letter is correctly addressed to Appellant's one owner of record. The record supports that two former store owners were disassociated from Appellant in 2009. Counsel provided a brief to this office dated November 24, 2020.

### **STANDARD OF REVIEW**

In an appeal of an adverse action, the Appellant bears the burden of demonstrating, by a preponderance of the evidence, that the administrative action should be reversed. That means 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.

### **CONTROLLING LAW AND REGULATIONS**

The controlling statute in this matter is contained in the Food and Nutrition Act of 2008, as amended, 7 U.S.C. § 2021, and § 278 of Title 7 of the Code of Federal Regulations (CFR). Sections 278.6(a) and (e)(1) establish the authority upon which a permanent disqualification may be imposed against a retail food store or wholesale food concern in the event that personnel of the firm have engaged in trafficking SNAP benefits.

7 CFR § 271.2 states: "Eligible foods means: Any food or food product intended for human consumption except alcoholic beverages, tobacco and hot food products prepared for immediate consumption."

7 CFR § 278.6(e)(1) states: "FNS shall disqualify a firm permanently if personnel of the firm have trafficked as defined in § 271.2." Trafficking is defined, in 7 CFR § 271.2, as: "(1) 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, 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;... (4) Purchasing a product with SNAP benefits with the intent of obtaining cash or consideration other than eligible food by reselling the product, and subsequently intentionally reselling the product purchased with SNAP benefits in exchange for cash or consideration other than eligible food; or (5) Intentionally purchasing products originally purchased with SNAP benefits in exchange for cash or consideration other than eligible food.”

7 CFR § 278.6(a) states: “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.”

7 CFR § 278.6(b)(2)(ii) states: “Firms that request consideration of a civil money penalty in lieu of a permanent disqualification for trafficking shall have the opportunity to submit to FNS information and evidence that establishes the firm’s eligibility for a civil money penalty in lieu of a permanent disqualification in accordance with the criteria included in § 278.6(i). This information and evidence shall be submitted within 10 days, as specified in § 278.6(b)(1).”

7 CFR § 278.6(i) states: “FNS may impose a civil money penalty in lieu of a permanent disqualification for trafficking if the firm timely submits to FNS substantial evidence which demonstrates that the firm had established and implemented an effective compliance policy and program to prevent violations of the Program.”

## **SUMMARY OF THE CHARGES**

The issue in this review is whether, through a preponderance of evidence, it is more likely true than not true, that the questionable transaction patterns were the result of trafficking. The charges were based on an analysis of SNAP transaction data during the period of February 2017 through August 2017. The transaction patterns indicative of trafficking are:

- Multiple transactions made from individual benefit accounts in unusually short time frames.
- The majority or all of individual recipient benefits were exhausted in unusually short periods of time.
- Excessively large purchase transactions made from recipient accounts.

## **APPELLANT’S CONTENTIONS**

In reaching a decision, consideration has been given to all contentions, including any not referenced. Submissions included: an article *U.S. Grocery Shopping Trends, 2016*; an April 2016 article *Know Your Core, Protect Your Core*; a letter from former partners dated December

17, 2009; a one page copy of the *USDA Profile of SNAP Households for California in 2017*; five handwritten pages regarding a SNAP training program; a November 2016 USDA article, *Foods Typically Purchased by SNAP Households*; more than 300 pages of vendor invoices; and three California state tax submissions.

- My clients categorically deny that any violations have occurred as set forth in the Charge Letter. Trafficking simply did not happen at the store during the Review Period, or at any other time. The Department's Scan categories are not sufficient to meet the criteria necessary for a prima facie case of trafficking. Even if they were, the explanation of trafficking is neither the only supported explanation, nor the most likely.
- Neither of the scans have been tested and demonstrated to have any statistically meaningful correlation to the act of trafficking in SNAP benefits. There is no study to substantiate FNS's claims, no statutory authority from Congress to just wrotely [sic] accept these transaction categories as de facto violations, just decades old references within FNS's records to a root document that does not exist. The statute does not authorize the Department to rely upon a system that inaccurately accounts for what is "consistent" or "inconsistent."
- The retailer has no control over what transactions are ultimately run. Whatever items are presented for purchase, so long as they're eligible, a retailer must conduct the transaction. If a retailer is presented with a SNAP participant who wants to buy five cases of soda for \$100, the retailer cannot decline.
- The danger of Confirmation Bias is obvious: the Department starts with the theory that trafficking exists because that's allegedly what the ALERT patterns were designed to detect, and if the store is flagged often enough, then the automatic hypothesis put forth by the Department is that trafficking is occurring. In this instance, ambiguous or contradictory evidence has been disregarded or interpreted in such a way that unreasonably favors the Department's hypothesis that trafficking is occurring at the Appellants' Store.
- It is more likely that the Department has misidentified legitimate transactions as a result of an errant assumption about the Store's inventory and clientele. As such, the Appellants have shown by a preponderance of the evidence that the transactions cited in the Charging Letter are more likely than not innocent transactions rather than trafficking. Therefore, the Appellants request that this Division reverse their disqualification from SNAP.

## **ANALYSIS AND FINDINGS**

Retailer Operations uses data patterns, onsite store photographs, shopping histories, and other analyses to evaluate the type and extent of potential SNAP violations by authorized retailers. This review encompasses the examination of the information in this case to determine whether the owner demonstrates by a preponderance of the evidence, that the permanent disqualification should be reversed. As to any court cases cited by counsel, the administrative review process should determine whether FNS followed the Food and Nutrition Act and the regulations issued under the Act when it took action against the retailer. The administrative review officer is not responsible for determining whether cited legal cases apply to Appellant's situation. If the final

agency decision is appealed to the federal district court, the judge is responsible for determining whether case citations are on point and applicable to Appellant's case.

The retailer reply references studies and articles that deal with SNAP households' shopping behaviors and retail shopping trends. The cited reports do not directly address the Attachment patterns at Appellant. That SNAP households in the area are in poverty and have children, does not preclude Appellant from participating in trafficking activity with said households. Retailers exchange SNAP benefit amounts electronically with households for a range of cash amounts. The charge of trafficking is based on the Attachment patterns, not any single transaction.

Appellant, was authorized December 19, 2016, and typed as a convenience store. A contracted FNS-onsite store visit was conducted on September 1, 2017. Appellant was estimated to be 2,000 square feet. No shopping carts or baskets for customer use were recorded. There is a small checkout counter, bordered by an array of items allowing limited space to place items. The four highest priced foods listed on the store visit report ranged from \$5.99 to \$7.99. No fresh fruits or vegetables were recorded on the onsite visit inventory. The only fresh, frozen, or refrigerated staple foods in the meat/poultry/fish category were eggs, deli meats/hot dogs, and bacon/sausage. The firm did not appear to offer any fresh, unprocessed meats, fish, or poultry. Appellant was stocked with common food items and brands typical of convenience stores. The store stocked many SNAP ineligible items such as: alcohol, tobacco products, lottery tickets, auto products, health/beauty aids, paper goods, cleaning products, and housewares. Much of the store's square footage appeared to be devoted to stock of noneligible SNAP items.

**Attachment 1:** Nine unique households (HHs) conducted 12 sets of 24 transactions within a set time period. Retailer Operations determined that this Attachment was not more likely indicative of trafficking than of possible eligible food purchases, and dismissed this Attachment. On review Attachment 1 is dismissed.

Retailer Operations determined Attachments 2 and 3 were persuasive of trafficking. The following contentions were advanced as to these Attachments:

- It's important to consider that the Appellants were being compared in Scan C and F to other convenience stores to determine what the thresholds were. However, this store is obviously miscategorized, it fits far better into the category of small grocer than it does into a convenience store model. This miscategorization skews the entire Scan, rendering it invalid.
- Aside from the obvious miscategorization, the store's inventory and delivery services were driving factors for the retailer's transactions.
- The inventory noted by the Contractor in the Store Visit Report was exceptionally full, including virtually maximum varieties and stocking units almost across the board. It's unsurprising that a superior inventory leads to larger purchase transactions. Accordingly, and especially considering that the store is being compared to convenience stores, Scan C and F transactions are far more likely to occur in the manners in which we see the transactions set out in Attachment 2 and 3.
- No supermarkets or superstores exist within walking distance in fact the closest supermarket is 1.69 miles away, and no SNAP retailers to the southeast for roughly 5 miles and nearly all

of the other comparison convenience stores are located much closer to competitor stores than the Market.

- The Store serves the surrounding community, is also located directly on a main transportation route and less than a mile away from Del Parque County Park. The park generates a considerable amount of walk-in service, including instances with larger purchases where a participant will purchase foods for several different people (and children) at the same time. Furthermore, the Appellants have a very good reputation within the local community.
- The stores set out in the CAD show that there are very few large grocers in the area. This means that the local SNAP population depends more significantly on smaller stores for purchases than may be present in the remainder of the state. Furthermore, the area southeast of the store has little in the way of EBT stores, making the Market more convenient.
- These geographic realities have a meaningful impact on the Appellant's transactions: (1) the Market has a monopoly on sales to SNAP participants that frequent the park, meaning sporting event and party meals (snacks, drinks and the like) are going to be purchased from the Market; and (2) the frequency of purchases is going to be higher because there's nowhere else immediately nearby to go to.
- With regard to the alleged analysis of the store comparison, it is entirely impossible for the undersigned to deduce what the actual data used was or the result concluded therefrom. However, there are likely differences between the Appellant's store and those to which the Appellant's store has been compared. Inventory prices, convenience of the store, local population density play material parts in the success or failure of otherwise identical stores with identical business models. A deviation from "average" is reasonably expected.
- We submitted more than 300 pages of invoices from the store's inventory during the review period to show that the store does make purchases to stock the store frequently.
- There's no credible argument that, based upon the Store Visit Report, there's not enough inventory to account for the transactions in question. The store clearly and obviously has more **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** worth of eligible items on its shelves at any given time.
- According to the Contractor's Store Visit Report the store sufficiently well stocked wherein there were at least 6 varieties in the Bread/Cereals category, 5 of which had 20 plus units; at least 6 varieties in the Meats, Poultry, and Fish category, 3 of which had 20 plus units, 2 of which had 6 plus units; at least 5 varieties in the Dairy category, 4 of which had 20 plus units; 1 of which had 6 plus units; and at least 11 varieties in the Fruit/Vegetables category, 6 of which had 20 plus units, 2 of which had 6 plus units.
- The Inspector noted the presence of some of the other more expensive food items maintained by the Store but failed to cite them on the list of the most expensive food items in the Store's inventory. A list of the items missed by the Inspector include: Coke Cola (Case), \$34.99; Pepsi Soda (Case), \$34.99; Red Bull (Case), \$34.99; Monster Energy (Case), \$34.99, Lunch Meat, \$7.99, Salmon, \$6.99, Ham/Pork, \$5.99 Turkey, \$5.99, Beef Jerky, \$5.99, Nuts/Seeds, \$5.99, Bacon, \$5.49, Chicken, \$4.99.
- This store's inventory is not meaningfully comparable to the average convenience store's inventory. Common convenience stores do not carry salmon, chicken or bacon in the volumes that this store does.
- Unlike normal shopping habits, SNAP participants buy sweetened beverages, frozen prepared foods and prepared desserts at a much higher rate than traditional consumers.

- The transaction categories set forth are the result of the Appellants' pricing structure, inventory contents, hours of operations, the credit system, co-shopping, and/or a reflection on the normal shopping patterns of the Store's clientele. The transaction patterns identified have been explained by the Appellants as required in *Skysen* and, the Department's finding that trafficking had more likely than not occurred at the Store is erroneous.

**Attachment 2:** Listed are 46 transactions in 31 sets conducted by 18 households (HHs) whereby the majority or all of the recipient's benefits were exhausted in unusually short periods of time. The households listed depleted 91% or more of their total available SNAP benefits at Appellant on a single day. The depletion, or near deletion, of SNAP benefits in a single day, especially at a convenience store with marginal staple foods, leaving few if any benefits for the remainder of the month, is unusual shopping behavior for SNAP households. Large single transactions, or multiple transactions at a store with marginal eligible foods, which deplete the benefits during a short period of time, are indicative of SNAP benefit trafficking.

The criteria for this Attachment's flag thresholds are the same for convenience stores and small grocery stores, so even if the firm were typed as a small grocery, it would not impact the transactions flagged on this Attachment. Retailer Operations determined that neither of the two local same type comparator stores had any data flagged on the Attachment 2 parameters.

**Attachment 3:** Listed are 230 transactions, that are excessively large purchase transactions, conducted by 58 unique HHs. Each of these transactions is at least three times larger than the average transaction made at the same store type during the period. Retailer Operations determined that the store is a convenience store, and noted that store type is based on the store type declaration on the SNAP application form, the stated dollar volume of staple foods, the annual total retail sales amount reported and/or verified, the onsite visit report, and other quantifiable factors. Appellant's application information shows that it reported 45% of its sales as non-food, 35% of sales as staple foods, and 20% as accessory foods.

Retailer Operations identified the average SNAP transaction amount at a small grocery store in California for the review period was \$14.62. Retailer Operations stated that had Appellant been typed as a small grocery store, the firm would still have had 162 Attachment 3 transactions in amounts from 5 U.S.C. § 552 (b)(6) & (b)(7)(C), that are more than four times higher than the average California small grocery store transaction amount for the review period. During the review period, the average SNAP transaction amount at Appellant was more 5 U.S.C. § 552 (b)(6) & (b)(7)(C) higher than the average San Diego County convenience store transaction amount, 18.7% higher than small groceries' average transaction amount, and 6% higher than same County medium groceries.

The store visit report includes question 18 regarding store delivery. This report shows with the "NO" box checked, that Appellant did not provide delivery. This report directly contradicts the contention that Appellant offered delivery services. No logs, signs or other records were advanced to substantiate that Appellant offered delivery services.

The documented eligible food inventory at the time of the onsite store visit did not appear to be exceptional. Retailer Operations found that the firm did not appear to offer a unique inventory or

eligible items that would be unavailable at other stores. Though counsel cited the volume of salmon, chicken and bacon carried at the firm, the store visit shows the firm carried just five items of pork (Ham, Bacon, Sausage, etc.), and 6-20 items of deli meats/hot dogs. The firm did carry 20+ items of canned/potted meat. As such, the contention that Appellant would likely have transaction activity that was different from other comparable firms of the same type in the area was not supported. Retailer Operations did find that other authorized retailers nearby to the southeast of the firm were lacking; however, this area appears to be largely rural without much in the way of housing, development, or roads.

There was no indication in the onsite store visit report, or seen in the FNS photos, that the firm offered cases of soda and energy drinks priced as cited by counsel. While the firm may now offer drink case sales at \$34.99, the record lacks evidence to support that the firm had those case offerings at the time of the store visit. Retailer Operations' review of the vendor invoices provided by the firm show that it purchased Red Bull, Monster and soda during the review period. Retailer Operations found however, that Appellant did not appear to purchase inventory that supports the contention of case sales during the review period. For the 7 month review period, the firm purchased just twenty-nine cases (24 packs) and (2) 12 packs of Red Bull. The invoices show that the firm spent 5 U.S.C. § 552 (b)(6) & (b)(7)(C) an average of \$180.37/month in Red Bull purchases during the review period. Similarly, the firm purchased a total of (7) 24 pack cases and (5) 12 packs of Monster during the 7 month review period, for a total of \$338.18. Retailer Operations concluded that while the firm purchased soda, including Coke and Pepsi, the purchases were most often limited to a few cases at a time, and appeared more likely to be to replenish stock rather than support large volumes of case sales. Therefore, Retailer Operations concluded that the contention that the firm sold large volumes of cases of energy drinks and soda priced at \$34.99 during the review months, was not more likely than that drink stock was sold in smaller volumes at lower prices. As such, accessory-foods, drink case sales, did not appear to be a compelling contributor to the transactions pattern.

Retailer Operations determined 345 invoices were submitted, of which two invoices were outside of the review period, and two were duplicates. These four invoices were excluded from consideration. The remaining invoices were reviewed. Retailer Operations noted that Appellant documented enough eligible food inventory to cover its SNAP redemptions during the review period. However, the firm also provided sales tax records for the first, second, and third quarters of 2017. Based on these tax filings, SNAP redemptions appear to comprise approximately 23% of the firm's total non-taxable sales of food products. California designates any eligible foods sold in exchange for SNAP benefits to be non-taxable. Retailer Operations then compared the firm's reported nontaxable sales of food products (which includes any eligible items sold in exchange for SNAP benefits, and their other sales (cash, credit, debit, check) of food products for human consumption), to the invoices provided by the firm. This analysis found that the firm fell short of acquiring eligible foods to cover their reported nontaxable food sales. Even when Retailer Operations applied a 100% markup to eligible foods, the firm did not meet its nontaxable food sales as reported in the sales tax documentation provided.

Retailer Operations charted Appellant's transaction activity, after the store visit and receipt of the Charge letter. The data show that there was a precipitous drop in the SNAP total dollar volume after both the store onsite visit, and the firm's receipt of the Charge letter. The number of



flagged transactions also dropped after receipt of the Charge letter. Retailer Operations found this suspicious.

Retailer Operations compared Appellant to two other convenience stores located within a mile of the firm. Appellant had a significantly higher number of flagged transactions on this Attachment during the review period than these nearby competitors of the same type which had 38 and 15 flags on this Attachment as compared to Appellant's 230 flags. Retailer Operations noted that within a 1½ mile radius of Appellant, there are two authorized super stores. Retailer Operations determined that 100% of the households listed on Attachments 2 and 3 completed transactions at other authorized firms during the review period. Retailer Operations was not convinced by a preponderance of the evidence that the Attachment patterns were more likely for eligible food items than the result of trafficking.

Retailer Operations noted that counsel did not offer any context or explanation for why the pricing strategy at the firm would explain the unusual transaction activity on Attachments 2 and 3. The store visit report did not record that Appellant had an unusual pricing strategy. According to onsite store report, the firm is open from 8:00 AM to 10:00 PM Monday through Saturday and Sunday 8:00 AM to 9:00 PM. Retailer Operations did not see how these hours of operation would impact the transactions on the data patterns. A convenience store located on the next block is reported to operate 24 hours a day, seven days a week. The other comparator same type firm is open 7:00 AM to 10:00 PM Monday through Sunday. As both competitor firms of the same type located within a mile of Appellant have comparable or more operating hours, it does not appear that Appellant's hours of operations explains the unusual transaction activity listed on the Charge letter Attachments. In regard to counsel's reference to a credit system, the practice of allowing SNAP households to purchase food items on credit is prohibited by regulation. If a firm is found to have committed credit account violations instead of trafficking, the firm would be subject to a one-year disqualification from SNAP in accordance with 7 CFR § 278.2(f). The credit system reference is raised in the brief without evidence of credit accounts. As such it is insufficient to eliminate trafficking as the reason for the unusual transaction patterns identified in the Charge letter.

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. The owner 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. The owner has not provided a preponderance of evidence to support that the patterns represent transactions for eligible foods rather than the charged trafficking.

#### **CIVIL MONEY PENALTY**

The regulations at 7 CFR Section 278.6(i) specify the criteria for a firm's eligibility for a CMP in lieu of permanent disqualification for trafficking. The criteria are identified as a minimum standard that firms must meet to be eligible for CMP consideration. The owner submitted five pages of handwritten training information in support of this request. This information however, it is not substantive documentation which demonstrates that the firm had established and implemented an effective compliance policy and program to prevent SNAP violations as required by the regulations. Furthermore, Appellant firm did not request a CMP within ten days of receipt of the Charge letter. Therefore, Appellant is not eligible for a trafficking CMP.

### **CONCLUSION**

Retailer Operations' analysis of Appellant's SNAP transaction data was the primary basis for its determination to permanently disqualify Appellant. The record also included onsite store photographs, an onsite store report, households' shopping histories, and other data that provided evidence that the questionable transaction patterns during the review period had characteristics that are consistent with trafficking violations in SNAP benefits. Based on the entirety of the record, the preponderance of the evidence supports that violations did occur at Appellant as charged by Retailer Operations on two of three Attachment patterns. Retailer Operations denial of a trafficking CMP was also proper per the applicable regulations. Therefore, the decision to impose a permanent disqualification against Appellant is sustained. This decision is effective 30 days from its delivery to Appellant.

### **RIGHTS AND REMEDIES**

Attention is called to Section 14 of the Food and Nutrition Act of 2008, and to 7 CFR § 279.7 of the regulations, with respect to the applicable rights to judicial review of this decision. If 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 Appellant's owner resides or is 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 delivery of this decision.

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

M. Viens  
ADMINISTRATIVE REVIEW OFFICER

January 19, 2021