

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

J's All Night Store,

Appellant,

v.

Case Number: C0205993

Retailer Operations Division,

Respondent.

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 J's All Night Store 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 J's All Night Store on July 24, 2018.

AUTHORITY

7 U.S.C. 2023 and its implementing regulations at 7 CFR § 279.1 provide that "[A] food retailer or wholesale food concern aggrieved by administrative action under § 278.1, § 278.6 or § 278.7 . . . may file a written request for review of the administrative action with FNS.

CASE CHRONOLOGY

In a letter dated February 14, 2018, the Retailer Operations Division informed the Appellant that J's All Night Store 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."

In responses to the Retailer Operations Division of February 20, 2018, February 21, 2018, March 20, 2018, March 28, 2018, and March 29, 2018, the Appellant, through counsel, denied the

trafficking allegations and provided various explanations for the questionable SNAP transactions that were outlined in the February 14, 2018 Charge Letter.

After considering the Appellant's replies and the evidence in the case, the Retailer Operations Division issued a Determination Letter dated July 24, 2018, informing the Appellant that J's All Night Store was being permanently disqualified from participation in the SNAP in accordance with 7 CFR § 278.6(e)(1) for trafficking violations.

The record indicates that on July 30, 2018, the Appellant's counsel requested information and documents from FNS with regard to the agency's case against J's All Night Store pursuant to the Freedom of Information Act (FOIA). The record reflects that FNS provided a response to counsel's FOIA request, dated August 7, 2018, and received no further communication from the Appellant or counsel with regard to the agency's response.

In a letter postmarked July 30, 2018, 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 August 9, 2018.

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 September 2017 through December 2017. This involved the following SNAP transactions patterns which are indicative of trafficking:

- There were multiple transactions made from individual benefit accounts within a set period of time; and
- There were excessively large purchase transactions made from recipient accounts.

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 store, which is approximately 2,200 square feet, has operated without issue at this same location for over nine years under the owner.
- Regarding the transactions included in Attachment 1 of the Charge Letter, there are only three sets of transactions where there are three sale transactions occurring within the same day and only one set where there were five transactions within the same day. There are 14 sets of sale transactions by the same household that are one day apart from each other. Hurricane Irma hit South Florida on or about September 9, 2017. The fact that there are less sets of sale transactions occurring in one day than potentially could have resulted during this recovery time period following the hurricane, only serves to move us further away from the statistical basis used by the FNS to assert that such sale transactions indicated the occurrence of trafficking events. Approximately 58% of those sale transactions occurred before the end of the second month following the hurricane. FNS allowed SNAP recipients to use their benefits to purchase hot foods/ready-to-eat food items from SNAP retailers, which also increases the frequency and dollar amount of sale transactions. The Appellant also prepared and sold sandwiches and other ready-to-eat foods during this time period following the FNS decision to allow SNAP benefits to be used in this manner after the hurricane.
- The store stocks a lot of food items which are sold in bulk/by the case, as well as other accessory foods and cold sandwiches which are offered at consistently cheaper prices than other markets within a several mile radius.
- The sale transactions in Attachment 1 are not at all unusual or atypical but are a reflection in large part of the community of residents recovering from the hurricane which

devastated South Florida. It is not unusual for SNAP recipients/households, living in these small micro-communities in close proximity to their neighborhood convenience food stores, to make food purchases with greater frequency as part of a daily routine.

- Frequency of shopping can also be the result of SNAP recipients not having transportation, having limited transportation, or deciding to restrict using such transportation by walking to the local food store to conserve such costs. Some SNAP recipients will also travel outside their immediate area to shop for other food items, even perhaps on the very same day. Some SNAP recipients will allow other family members or even friends to use their EBT card/account to purchase food items. The Appellant does not have any discretion, or for that matter, any authority to deny an individual who has possession of an EBT card and the PIN number to access that account to purchase food items.
- Regarding the transactions included in Charge Letter Attachment 2, only 25 percent of the listed transactions are over 5 U.S.C. § 552 (b)(6) & (b)(7)(C) (86 sale transactions), and only 15% of the sale transactions are over 5 U.S.C. § 552 (b)(6) & (b)(7)(C) (51 sale transactions). There is nothing unusual about these sale transactions that occurred over this four month period of time. The higher dollar sale transactions reflected in this Attachment are consistent with the sale of food items sold in bulk/case quantities and other food items purchased by SNAP recipients during the aftermath of a strong hurricane making landfall in South Florida. Additionally, the Appellant maintains lower prices on many food products as compared to other local competitor stores.
- There is sufficient level of eligible food inventory to support the higher dollar sale transactions identified in this Attachment. Additionally, there is sufficient counter space at the check-out area, as well as food stocking configuration and staffing (the store has four employees) to assist in properly processing and completing the sales of eligible food items which make up the higher dollar sale transactions identified in this Attachment. There are several hand-baskets available and one grocery cart for customer use, if needed.
- Statistical analysis of typical or usual shopping patterns of SNAP recipients cannot be the main or overriding factor in the FNS decision to conclude that trafficking events must have occurred at this food store within the months under review, particularly when it is to be determined from a paper case and not from an on-site investigation.
- Taking into consideration a profit margin of 40%, the food inventory purchased during the review period sufficiently supports the Appellant's redemption sale volume that is reflected in the Charge Letter Attachments. The Appellant maintains a sufficient level of inventory stock to accommodate the sale transactions set forth in the Attachments.
- The Appellant requests that FNS overturn its decision to permanently disqualify it from participation in the SNAP.

In support of the Appellant's contentions, the following information/documents were submitted to FNS:

- Customer affidavits;
- List of food pricing examples;
- Examples of cheaper pricing on food items;
- Example purchases;

- Examples of higher dollar value sales transactions;
- Hand-written summary of food inventory purchased for the review months;
- Photos of store and food stock; and
- Purchase invoices for the review period.

ANALYSIS AND FINDINGS

Store Characteristics

FNS authorized J's All Night Store as a convenience store on October 16, 2009. The case file indicates that in reaching a disqualification determination, the Retailer Operations Division considered information obtained during a November 15, 2017 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 (information provided by the store manager) with no additional food storage outside of public view;
- No shopping carts or 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;
- Limited check-out counter space;
- No optical scanners;
- 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;
- No indication from the store visit report that the firm has a special pricing structure, such as prices ending in \$x.x9 and/or \$x.00;
- The four most expensive foods items in stock were sausage at \$6.89 per 1.75 pounds; cereal at \$5.89 per 8.7 ounces; vegetable oil at \$5.69 per 48 fluid ounces; and milk at \$5.00 per gallon;
- There were no fresh or frozen meats, poultry, or seafood;
- Deli meats and cheeses were sold by the ½ pound;
- Hot foods were not/no longer sold;
- Meat items included units of canned/potted meat, canned fish, eggs, hot dogs, sausage, and meat jerky;
- Dairy included milk, margarine, and cheese;
- Fresh produce was limited to only a few bananas, two onions, and one tomato;
- Other staple foods available for purchase include such items as juice, pasta, rice, bread, cereal, flour, cakes/pastries, snack foods, flour, corn meal, and canned goods;

- Much of the remaining food stock consists of accessory foods such as candy, carbonated and non-carbonated drinks, condiments, and vegetable oil; and
- Ineligible nonfood items included tobacco products, health and beauty items, paper products, household cleaning supplies, clothing, lottery tickets, alcohol, automotive products, pet food, and household items.

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. 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 J's All Night Store'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.

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 31 sets of transactions (72 total transactions) **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** in SNAP benefits to meet the parameters of this scan. 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.

Although it is not uncommon for customers to have more than one transaction per day, 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 photographs from the store visit offer no explanation as to why SNAP customers would routinely shop at J's All Night Store 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, fourth, and fifth transactions in each set are too large to consist of forgotten items.

The Appellant, through counsel, has provided several contentions related to Attachment 1, including a claim that the transactions are the result of the before and after effects of Hurricane Irma hitting South Florida on or about September 9, 2017. The fact that there are less sets of sale transactions occurring in one day than potentially could have resulted during this recovery time period following the hurricane, only serves to move us further away from the statistical basis used by FNS to assert that such sale transactions indicated the occurrence of trafficking events. Approximately 58% of those sale transactions occurred before the end of the second month following the hurricane. FNS allowed SNAP recipients to use their benefits to purchase hot foods/ready-to-eat food items from SNAP retailers, which also increases the frequency and dollar amount of sale transactions. The Appellant also prepared and sold sandwiches and other ready-to-eat foods during this time period following the FNS decision to allow SNAP benefits to be used in this manner after the hurricane. The store stocks a lot of food items within the store, which are sold in bulk/by the case, as well as other accessory foods and cold sandwiches, which are consistently cheaper prices than other markets within a several mile radius. The sale transactions in Attachment 1 are not at all unusual or atypical but are a reflections in large part, of the community of residents recovering from the hurricane devastating South Florida. It is not unusual for SNAP recipients/households, living in these small micro-communities in close proximity to their neighborhood convenience food stores, to make food purchases with greater frequency, as part of a daily routine.

Frequency of shopping can also be the result of SNAP recipients not having transportation, having limited transportation, or deciding to restrict using such transportation by walking to the local food store to conserve such costs. Some SNAP recipients will also travel outside their immediate area to shop for other food items, even perhaps on the very same day. Some SNAP recipients will allow other family members or even friends to use their EBT card/account to purchase food items. The Appellant does not have any discretion, or for that matter, any authority to deny an individual who has possession of an EBT card and the PIN number to access that account to purchase food items.

With regard to these contentions, while there are no limits on the number of times EBT cards may be used or the amount of eligible foods that may be purchased, the SNAP transactions noted in this Charge Letter Attachment are questionable because they display characteristics of use inconsistent with the nature and extent of the store's stock and facilities and are indicative of trafficking. Although it is not uncommon for customers to conduct more than one transaction per day, it is not common that such multiple transactions are for large dollar amounts. J's All Night Store is not set up to provide for all of one's food needs with no fresh or frozen meats, poultry, or seafood, no frozen fruits or vegetables, a very minimal variety and amount of fresh produce, and lacks an abundant depth and breadth of staple foods. Also, the store visit

observations indicate that there is no evidence of a price advantage or custom or special services rendered at the subject store that are not offered at other authorized SNAP stores in the area. 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 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 report and photos also indicate that there is no storage area/space outside of public view. It is irregular for convenience stores to have purchases such as those cited, especially when J's All Night Store stocks only a few high priced food items so the majority of the food items stocked at the store are low priced items.

The Appellant has provided an argument that the multiple transactions made from individual benefit accounts within a set period of time are the result of residents utilizing the neighborhood store as a result of the before and after effects of a hurricane. However, the information provided by the Appellant is not sufficient to support that these transactions were due to transactions resulting from a hurricane. If the hurricane truly impacted J's All Night Store as the Appellant suggests, it would stand to reason that the hurricane would affect other nearby firms as well. This would manifest itself in comparable firms having similar transaction patterns – multiple transactions made from individual benefit accounts within a set period of time. But this is simply not the case.

The Appellant contends that FNS allowed SNAP recipients to use their benefits to purchase hot foods/ready-to-eat food items from SNAP retailers, which also increases the frequency and dollar amount of sale transactions. FNS acknowledges that on September 11, 2017, the agency approved Florida's request to waive the SNAP regulations to allow program participants to buy hot foods and hot ready-to-eat foods with their benefits in certain counties that had been affected by the hurricane. FNS notified qualified authorized SNAP retailers of this waiver which was in effect through September 30, 2017. While hot food sales may have attributed to some of the Appellant's SNAP sales during the September 2017 review month, the store's sales actually increased 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in the October 2017 review month, after the hot food waiver had expired. Therefore, the Appellant's contention that hot food sales contributed to an increase in the firm's sales during the four month review period is without merit.

A review of client shopping data for the review period shows that clients shopping at J's All Night Store are also shopping at other area grocery stores, as well as full-line supermarkets and super stores that most likely offer customers a much larger quantity and variety of eligible food items for better prices. Based on these shopping patterns, transportation to other stores is not an issue for these SNAP customers. Yet, these customers continue to shop and spend suspicious high dollar amounts in short timeframes at J's All Night Store, where the eligible food stock is minimal, 5 U.S.C. § 552 (b)(6) & (b)(7)(C) of their purchases at better stocked stores. This is a strong indicator of trafficking.

Sometimes a firm may have unusual transaction patterns due to a recipient's lack of access to other SNAP authorized stores. However, there are 12 SNAP authorized retailers located within a 1.0 mile radius of J's All Night Store that can meet the nutritional needs of SNAP customers. Several of these authorized SNAP stores are larger than J's All Night Store and offer a greater

quantity and variety of food products at comparable or better prices as compared to the subject store. As mentioned previously, SNAP customers who shopped at J's All Night Store 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 does not appear to be an explanation for J's All Night Store's abnormally high SNAP transaction amounts conducted within a short timeframe of each other.

As to whether or not SNAP recipients sharing their EBT cards and PIN numbers with others 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 sharing of EBT cards is particularly common among SNAP recipients in Miami, Florida. FNS acknowledges that the SNAP regulations and statute do not govern or mandate how or when a SNAP household should spend its benefit allotment. Regulations also do not govern how frequently a customer may visit a store or whether household members should purchase items independently. SNAP benefits are issued to individual households and as such are meant to provide most of the nutritional needs of that household. Although sharing of SNAP benefits can occur, they are not intended to be used by households purchasing eligible food items for other household members or other households. Again, the SNAP regulations do not govern what happens to the food once it is purchased. However, the repetitive nature of the transactions identified in Attachment 1 are vastly different in J's All Night Store than in any other nearby comparable firm giving credibility to the notion that trafficking is mostly likely taking place.

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 lists 342 transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. These large transactions are not consistent with a convenience store in Miami-Dade County, Florida. During the review period, the average transaction amount for a convenience store in Miami-Dade County, Florida was \$9.86. The average transaction in Attachment 2 is more than 5.5 times larger than the average purchase amount for this store type. There is no evidence that the firm would be likely to have SNAP redemption patterns that differ considerably from similar-sized competitors. These large transaction amounts are also not consistent with the store's inventory. There were no fresh or frozen meats, poultry, or seafood and the only fresh produce was a few bananas, two onions, and one tomato. Most of the food products in J's All Night Store consisted of accessory food items such as snack foods, candy, and soda and inexpensive staple foods such as canned and packaged goods. The frequency of high dollar purchases in the review period calls into question the legitimacy of these transactions.

The Appellant, through counsel, has provided several contentions related to Attachment 2 including an argument that the excessively large purchase transactions are the result of residents utilizing the neighborhood store as a result of the aftermath of a hurricane. As noted previously, the information provided by the Appellant is not sufficient to support that these transactions were due to transactions resulting from a hurricane. If the hurricane truly impacted J's All Night Store as the Appellant suggests, it would stand to reason that the hurricane would affect other nearby

firms as well. This would manifest itself in comparable firms having similar transaction patterns – excessively large purchase transactions. But this is simply not the case.

5 U.S.C. § 552 (b)(7)(E).

With regard to the Appellant's claim that the store sells food items in bulk/by-the-case at comparatively cheaper prices than other area markets, FNS store visit of November 15, 2017 indicates 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; there were no meat/seafood specials or bundles or fruit/vegetable boxes that might sell for high prices; and there was no evidence of a wholesale business such as posted prices or separate entrances for wholesale customers. The numerous examples of potential high dollar purchases (including cases of various foods) and examples of cheaper priced foods provided to FNS appear to be contrived by the Appellant in effort to support its case. There is no evidence to support the Appellant's contention that the excessively large purchase transactions are the result of bulk/case food purchases by SNAP customers or the result of J's All Night Store offering foods at cheaper prices compared to other area authorized stores. As noted previously, the store visit observations indicate that most of the food products in J's All Night Store consisted of accessory food items such as snack foods, candy, and soda and inexpensive staple foods such as canned and packaged goods. The frequency of high dollar purchases in the review period calls into question the legitimacy of these transactions.

The Appellant argues that J's All Night Store has sufficient counter space at the check-out area, as well as food stocking configuration and staffing (the store has four employees) to assist in properly processing and completing the sales of eligible food items and several hand-baskets available and one grocery cart for customer use, if needed. However, both the store visit report and photographs show that J's All Night Store was stocked with a minimal quantity and variety of staple foods with no fresh or frozen meats, poultry, or seafood and only three varieties of fresh produce in very limited quantities. The majority of foods stocked at the store were accessory foods such as snack foods, candy, and soda and inexpensive staple foods such as canned and packaged goods. While the Appellant argues that there is plenty of counter space to ring-up large transactions, the inventory report and photos indicate that the store has a very limited checkout counter space and no shopping carts or hand-held baskets 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 also noted that the firm has four employees; however there is no way for FNS to know how many staff are employed by the subject firm as the Appellant did not provide the agency with complete personnel records of who was or how many were employed at the subject firm.

The Appellant provided FNS with numerous photos showing higher priced food items stocked at the subject firm. The Appellant also provided FNS with numerous examples of potential transactions that could constitute higher dollar transactions. However, during the store visit of November 15, 2017, the store manager noted to the contracted reviewer that the four most expensive food items stocked at J's All Night Store are sausage at \$6.89 per 1.75 pounds; cereal at \$5.89 per 8.7 ounces; vegetable oil at \$5.69 per 48 fluid ounces; and milk at \$5.00 per gallon.

Both the photos and the examples of potential high dollar transactions provided by the Appellant appear to be contrived in an effort to support its case. There is no evidence to support the Appellant's contention that the excessively large purchase transactions are the result of J's All Night Store stocking many high priced food items.

The Appellant also provided photos for review with customers waiting in line buying three and four boxes of snack chips which consist of 42 bags each; however, irrespective of an aftermath pre and post hurricane, one would not expect customers to live off potato chips alone when the Appellant claims, per statements and photos, that it carries a variety of single serve items which are typical of a small convenience store. The photos of purchase transactions provided by the Appellant appear to be contrived in an effort to support its case.

The Appellant provided FNS with numerous itemized sales receipts; however, the sales receipts were for the months of February 2018 and March 2018 which are outside of the review period of September 2017 through December 2017. In addition, there was hand-written information noted on the itemized sales receipts by the Appellant and none of the sales receipts indicated purchases of foods by the actual bulk or case. It is also important to note that the receipt amounts are questionable as they end in even dollar amounts. Therefore, the itemized sales receipts have no bearing on this case.

The record shows that the Retailer Operations Division compared the Appellant firm, a convenience store, to three comparable SNAP authorized convenience stores located within 0.48 miles of the subject firm. 5 U.S.C. § 552 (b)(7)(E).

Lastly, the case record documents that the Retailer Operations Division conducted a detailed analysis of three SNAP households identified in the Charge Letter to analyze their shopping patterns at J's All Night Store compared to their shopping patterns at other SNAP authorized stores. Each of these households had access to, and shopped at larger stores including super stores and/or supermarkets. It is obvious that these SNAP households had transportation available to them to reach these other authorized stores. However, despite this access to better stocked stores, these sampled households conducted excessively large transactions at J's All Night Store 5 U.S.C. § 552 (b)(6) & (b)(7)(C) of shopping at the larger stores where they conducted much smaller SNAP purchases. It is highly unlikely that a convenience store with minimal staple foods would have legitimate SNAP transactions greater than these larger and better stocked stores.

In summary, the store's layout, infrastructure, and food inventory do not support a high percentage of transactions markedly exceeding those of similar type stores. In addition to the statistical irregularity of such high dollar transactions, the limited availability of counter space for checking out and the lack of shopping carts and hand-held baskets support the Retailer Operations Division's determination. It is not plausible that the store's customers are carrying large amounts of food around the store without the benefit of shopping carts and/or hand-held baskets. Customers purchasing such large quantities of food items would have to hold them in their arms, or enlist the help of others while shopping. Based on the preponderance of the evidence, the irregular transaction patterns cited in Charge Letter Attachment 2 are more likely than not the result of trafficking in SNAP benefits.

Statistical Analysis

The Appellant contends that a statistical analysis of typical or usual shopping patterns of SNAP recipients cannot be the main or overriding factor in the FNS decision to conclude that trafficking events must have occurred at this food store within the months under review, particularly when it is to be determined from a paper case and not from an on-site investigation.

Firms are chosen for analytical investigation based upon numerous detailed and rigorous mathematical algorithms. This data presents the Retailer Operations Division with a statistically valid prima facie indication of highly unusual transaction activity; the activity therein identified is not marginally aberrant, but markedly so. Properly analyzed and interpreted, the Retailer Operations Division does not contend that EBT transactions are overtly suspicious when they occur on an occasional or intermittent basis, but when such transactions form repetitive patterns, on a comparative basis, over a period of time that ensures such activity is not simply intermittent, such activity is identified for further analysis. Once such firms have been identified as potential compliance cases, from approximately 263,105 authorized firms nationwide, the Retailer Operations Division undertakes a detailed examination of the available transaction data and obtains further relevant information regarding the firm's business operations such as the level and condition of staple food stock maintained by the firm, the presence or absence of the firm's logistical retail wherewithal and numerous other factors pertinent to the firm's ability to legitimately process the transaction activity for which the firm has been flagged.

Agency policy and procedures direct that only after a careful, comprehensive and complete analysis, from which appropriate conclusions are logically derived, will the firm be issued a Charge Letter. The firm is then given the opportunity to reply to those charges and provide any information it deems appropriate in justifying as legitimate the transaction activity detailed in the Charge Letter. In the present case, these policies and procedures are shown by the record to have been duly performed in all relevant and pertinent detail. Moreover, 7 CFR § 278.6(a), noted above, established the authority upon which FNS may disqualify any authorized retail food store on the basis of evidence obtained through a transaction report under an electronic benefit transfer system. The Retailer Operations Division's use of transaction data and other reports, in addition to store visit observations and an analysis of household shopping behavior and other relevant data and information, in rendering a finding that trafficking is the most likely explanation of the transaction activity, is as valid a means of establishing evidence as that obtained through an on-site investigation and the eye witnessing of trafficking. Accordingly, the Appellant's contention that the charges are speculative and based solely upon a computer generated analysis is not compelling.

Invoices

The Appellant argues that taking into consideration a profit margin of 40%, the food inventory purchased during the review period sufficiently supports the store's redemption sale volume that is reflected in the Charge Letter Attachments. The Appellant maintains a sufficient level of inventory stock to accommodate the sale transactions set forth in the Attachments. The

Appellant provided invoices for the review period and a summary total of the submitted invoices in support of its contentions.

FNS conducted an analysis of the invoices provided for October 2017 through December 2017 using a 48% mark-up (Note: The Appellant previously provided FNS with an estimate mark-up of 40% to 50%). Some of the invoices provided for review were outside the review period, not the Appellant's invoices, or non-food invoices; therefore, they were not counted in the analysis. While the invoice analysis appears to indicate that enough foods were purchased to cover the SNAP redemptions conducted during the noted three months, the analysis does not include food purchases made by cash, credit, debit, or check.

Even if the invoices provided for review appear to indicate that the Appellant had purchased sufficient food inventory to account for the firm's SNAP redemption volume, sufficient inventory alone does not explain the suspicious patterns of SNAP transactions such as rapid and consecutive transactions by individuals during the same store visit or in a single day. Even the large dollar transactions would remain questionable if there were sufficient food inventory to support such transactions when consideration is made of there being only a limited variety of stock in the store, no fresh or frozen meats, no frozen fruits or vegetables, a greater variety of foods at comparable or lower prices at other stores, no shopping carts or hand-held baskets available for customer use, and little counter space to place food for purchase at the checkout counter. Even if there were sufficient food stock at J's All Night Store to mathematically support high dollar transactions, there does not appear to be anything that would reasonably attract SNAP households to shop there, a convenience store, in some cases traveling a few miles to do so, and spend substantial amounts of their SNAP benefits.

SNAP Customer Affidavits

The Appellant provided FNS with numerous affidavits signed by households in support of J's All Night Store. The affidavits indicate that the permanent SNAP disqualification of J's All Night Store would impose a hardship on these households. The affidavits provided by the Appellant do not, however, attest that the Appellant did not traffic SNAP benefits during the review period.

With regard to the affidavit claim that a permanent SNAP disqualification will impose a hardship on 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.

While the Appellant asserts that the statements/affidavits provided to FNS purpose to establish that questionable transactions were legitimate and that no trafficking occurred, the truth of such declarations cannot be verified. Customers engaging in trafficking transactions would be unlikely to admit to this behavior. On the contrary, customer statements would be expected to

attest to the legitimacy of questionable transactions regardless of whether they were, in fact, legitimate.

No Prior Violations

The Appellant contends that J's All Night Store, which is approximately 2,200 square feet, has operated without issue at this same location for over nine years under the owner. It is important to note that the store visit report indicates that the subject firm is approximately 1,000 square feet in size – information that was provided by the store manager during the store visit. With regard to the Appellant's claim that the store has operated without issue for over nine years, a record of participation in the SNAP with no documented previously violations does not constitute valid grounds for mitigating the impact of the present serious determination of trafficking.

Dismissal of Charges

The Appellant requests that FNS overturn its decision to permanently disqualify it from participation in the SNAP. However, the Food and Nutrition Act of 2008 at § 2021 does not allow for discretion in determining sanctions for trafficking and is specific in its requirement that "... a disqualification . . . 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 ...". In keeping with this legislative mandate, 7 CFR § 278.6(e)(1)(i) of the SNAP regulations states that FNS shall disqualify a firm permanently if personnel of the firm have trafficked. There is no agency discretion in the matter of what sanction is to be imposed when trafficking is involved.

CIVIL MONEY PENALTY

As previously indicated, the July 24, 2018 Determination Letter advised the Appellant of the ineligibility for consideration for a trafficking civil money penalty according to the terms of Section 278.6(i) of the SNAP regulations. The letter of charges dated February 14, 2018 advised the Appellant that documentation of eligibility for that alternative sanction was to be provided within 10 days. The regulations specify that such documentation must, in part, establish that there was an effective compliance policy and training program and that both were in effect and implemented prior to the occurrence of violations. The letter indicates that no information was provided by the Appellant for consideration; therefore, on review the Retailer Operations Division's determination that the Appellant firm is ineligible for the imposition of civil money penalties in lieu of disqualification is affirmed.

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 J's All Night Store 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 25, 2019