

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

Ladi 99 Cent Plus Store,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0210600

FINAL AGENCY DECISION

The U.S. Department of Agriculture, Food and Nutrition Service (FNS), finds that there is sufficient evidence to support the determination by the Retailer Operations Division to impose a permanent disqualification against Ladi 99 Cent Plus Store (hereinafter Appellant) from participating as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with Title 7 of the Code of Federal Regulations (CFR) § 278.6(a), (c) and (e)(1)(i), when it imposed a permanent disqualification against Appellant on August 16, 2018.

AUTHORITY

According to 7 U.S.C. § 2023 and the implementing regulations at 7 CFR § 279.1, “A food retailer or wholesale food concern aggrieved by administrative action under § 278.1, § 278.6 or § 278.7 . . . may . . . file a written request for review of the administrative action with FNS.”

CASE CHRONOLOGY

By letter dated July 23, 2018, the Retailer Operations Division charged Appellant with trafficking based on a series of irregular SNAP transaction patterns that occurred in January 2018 through June 2018. The letter noted that the penalty for trafficking is permanent disqualification as provided by 7 CFR § 278.6(e)(1). The letter also noted that the Appellant could request a trafficking civil money penalty (CMP) in lieu of a permanent disqualification within ten days of receipt under the conditions specified in 7 CFR § 278.6(i).

Appellant, through counsel, responded to the charges in a letter submitted via fax on August 3, 2018, which did not request or provide any documentation in support of a CMP. The Retailer Operations Division notified Appellant by letter dated August 16, 2018, that the firm was permanently disqualified from participation as a SNAP retailer in accordance with 7 CFR § 278.6(c) and 278.6(e)(1) for trafficking violations. This letter also stated that Appellant was not eligible for the CMP because insufficient evidence was submitted to demonstrate that it had established and implemented an effective compliance policy and program to prevent SNAP violations.

By letter dated August 24, 2018, Appellant, through new counsel, appealed the Retailer Operations Division's assessment and requested administrative review. The appeal was granted. Counsel also submitted a Freedom of Information Act (FOIA) request via email to USDA FNS on September 25, 2018. USDA FNS responded to this request in a letter dated October 25, 2018, that was received by counsel on October 29, 2018. Subsequent correspondence dated November 19, 2018, was also received.

STANDARD OF REVIEW

In an appeal of an adverse action, Appellant bears the burden of proving by a preponderance of evidence that the administrative action should be reversed. That means Appellant has the burden of providing relevant evidence that a reasonable mind, considering the record as a whole, would accept as sufficient to support a conclusion that the argument asserted is more likely to be true than untrue.

CONTROLLING LAW

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

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(e)(1)(i) states: "FNS shall disqualify a firm permanently if personnel of the firm have trafficked as defined in § 271.2." Trafficking is defined in part as, "The buying, selling, stealing, or otherwise effecting an exchange of SNAP benefits for cash or consideration other than eligible food". Trafficking includes "Intentionally purchasing products originally purchased with SNAP benefits in exchange for cash or consideration other than eligible food".

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.”

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).” Part 278.6(b)(2)(ii) further states that if a firm fails to request a civil money penalty in lieu of a permanent disqualification for trafficking and submit documentation and evidence of its eligibility within the specified 10 days, the firm shall not be eligible for such a penalty.

SUMMARY OF THE CHARGES

The issue in this review is whether, through a preponderance of evidence, it is more likely true than not true that the questionable transactions were the result of trafficking. The charges on review were based on an analysis of SNAP EBT transaction data during the six month period of January 2018 through June 2018. This involved two patterns of EBT transaction characteristics indicative of trafficking:

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

APPELLANT’S CONTENTIONS

The following may represent a summary of Appellant’s contentions in this matter; however, in reaching a decision, full attention and consideration has been given to all contentions presented, including any not specifically recapitulated or specifically referenced herein:

Submitted by original counsel:

- The firm is a 2,000 SF store located in a heavily residential and densely populated area. Approximately 60 percent of customers are regulars and there are about 20 EBT recipients and 60 cash basis regulars;
- The firm is mixed food and merchandise with food totaling about 35 percent of floor space and accounting for about 60 percent of sales. EBT sales were about 5 U.S.C. § 552 (b)(6) & (b)(7)(C) during the review period while other sales were about 5 U.S.C. § 552 (b)(6) & (b)(7)(C) and primarily cash;
- The listed transactions are not excessively large as they total only about 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The suggestion that almost 90 percent of all EBT transactions are excessively large 5 U.S.C. § 552 (b)(6) & (b)(7)(C); and,

- Only the owner, her husband, and her mother-in-law work in the store and the owner read the SNAP instructions and explained them to her husband and mother-in-law as soon as they signed-up for SNAP. Counsel reviewed the regulations with them and they seemed very in touch with them. Counsel also discussed the importance of not ringing-up transactions in very short proximity to avoid the appearance of impropriety.

Submitted by current counsel:

- Appellant denies that trafficking occurred. The firm has been a SNAP retailer since July 8, 2016, and has never been charged with violating SNAP regulations. The Department conducted four previous investigations of the firm and store personnel refused to violate SNAP regulations in each of the four investigations;
- The firm is approximately 2,000 square feet and is located near multiple schools which results in additional foot traffic. The firm's substantial inventory provides the community with an expansive and diverse selection of grocery products including a variety of staple food items such as canned and packaged foods, bread, pasta, eggs, dairy items, and snacks. The firm stocks the majority of a SNAP household's preferred needs and has sufficient variety and quantity to meet the needs of several households all at once without having to replenish inventory;
- Area households typically are large and low income with 32,692 households receiving SNAP benefits. Appellant provided additional information on area households and a statement from an FNS report on redemptions that a large portion of SNAP households redeem nearly all their benefits within the first two weeks of the month;
- Appellant provided statistics from a 2016 study by Convenience Store News on customer shopping patterns and states that SNAP participants shopping daily or weekly are significantly more likely to do so in the morning (6 AM-8:59 AM) or during the late evening (7 PM-10 PM) and that customer shopping habits in 2016 trend to an increase in the use of convenience store, small grocers, and ethnic food stores. Appellant also references another Departmental study that, unlike normal shopping habits, SNAP participants buy sweetened beverages, frozen prepared foods, and prepared desserts at a much higher rate than traditional customers;
- It is not uncommon for customers to make multiple purchases in a short period of time after receiving their SNAP benefits. Often, they realize after making their first purchase that they forgot an item or now decide to purchase items they saw while shopping. Also members of the same household will shop together and make their purchases separately using the same EBT card or will go on a spending spree making purchase after purchase without leaving the store or by returning after a brief absence. Households may also participate in co-shopping where different adult household members share shopping responsibilities which could result in separate transactions in a short period of time;
- 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The vendor invoices and store photos submitted by Appellant clearly show far more than 5 U.S.C. § 552 (b)(6) & (b)(7)(C) of inventory. The innocence of these transactions is further supported by eight customer statements attesting to spending 5 U.S.C. § 552 (b)(6) & (b)(7)(C) per shopping trip and to using 50-80 percent of their SNAP benefits at the firm. The large transactions may also be made by larger SNAP households that would require a larger quantity of groceries each month. The transactions in Attachment 2 are supported by the firm's substantial

inventory and photos, and are reasonably explained by co-shopping, reliance on the firm as a primary grocery, or the general aberration and statistical outlier to the average whole. These transactions are of little consequence as most other grocers in the firm's geographic area are likely to have the same number (or greater) of similar transactions;

- The ALERT system simply reviews transactions and identifies those found as being suspicious, it does not identify trafficking. Data analysis is required as the results do not account for special business practices, differences in demographics and food stuffs, and geographic areas. Analysts may not understand ALERT's capabilities and may overly rely on the ALERT data when issuing a charge of trafficking. The Case Analysis Document was heavily redacted and provides no statistical or useful information including which stores, if any, were used as proper comparison stores and what the store's inventories consisted of. A Confirmation Bias may also exist. Without meaningful comparison stores, there is no context. ALERT's conclusions are directly rebutted by the store photos, the inventory invoices, and the customer statements; and,
- Appellant properly trained personnel using the materials found on the Department's website. They pride themselves on following proper SNAP procedures and even have a sign at the checkout stating that the store does not offer credit.

Appellant submitted photos, invoices/receipts from suppliers, an itemized spreadsheet of purchases, and customer statements in support of these contentions.

ANALYSIS AND FINDINGS

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. Nevertheless, transactions having such characteristics are sometimes valid and sufficient evidence that support that they were the result of legitimate purchases of eligible food items is provided. This is why opportunities are afforded to charged retailers to explain the questionable transactions cited and to provide evidence that they are legitimate.

The Retailer Operations Division presented a case that Appellant trafficked SNAP benefits. Each Attachment furnished with the letter of charges represents the questionable and unusual patterns of SNAP transactions indicative of trafficking which were conducted at Appellant's store during the review period. As patterns of unusual transactions appear across multiple Attachments, the case of trafficking becomes more convincing.

Store Background and FNS Store Visit

FNS initially authorized the firm on July 8, 2016. The case file shows that in reaching a disqualification determination, the Retailer Operations Division considered information obtained during a July 3, 2018, store visit conducted by a FNS contractor to observe the nature and scope of the firm's operation, stock, and facilities. This information was then used to ascertain if there

were justifiable explanations for the firm's suspicious SNAP transactions. The store visit documented the following store size, description, and characteristics:

- The firm was a sizeable convenience store offering an extremely limited quantity and variety of staple foods and carrying no unique items or offering any distinctive services. The firm primarily stocked traditional American brands, but also had a limited stock of Hispanic products.
- The store visit report and photos showed no shopping carts and only seven small hand baskets for use by customers.
- No food packages, bundles, case sales, bulk items, or other sales were evident that would explain the unusual transactions and no cased items were available for purchase.
- The store visit report specifically noted that the firm was not a specialty store and that there were no meat bundles or fruit and vegetable boxes for sale.
- The checkout area was the top of a glass display case approximately 1.5 feet wide and 1.5 foot deep with many displays and the cash register taking up space on both sides leaving limited space for customers to place their purchases. The very small checkout area would make it problematic to process large orders. The checkout area had one cash register, no optical scanner, and a POS terminal as confirmed by the owner's spouse.
- The firm had an extremely limited stock of staple foods that also included many single serving and pre-packaged items with a significant portion of inventory in soda, candy, snacks, and other drinks as well as many ineligible items.
- The firm had no fresh unprocessed meat or seafood, no frozen unprocessed meat or seafood, an extremely limited quantity and variety of processed meats consisting of only one can of tuna, no bacon, no hot dogs, no canned meat/poultry, no other canned fish, no jerky, no deli meats, no packaged lunch meats, no sausages, no frozen entrees, no frozen dinners, several cartons of eggs, no fresh fruit or vegetables, no frozen fruits or vegetables, no dried fruits, only six small bags of dried beans, no other dried vegetables, no canned fruit, an extremely limited selection of canned vegetables, a very limited selection of single serving nuts, no canned soups, a very limited quantity and variety of 100 percent fruit juices, no 100 percent vegetable juices, an extremely limited quantity and variety of canned and packaged staple food items, no deli cheeses, no packaged cheeses, no yogurt, no sour cream, no butter, no margarine, only 10 jars of baby food (vegetable), no other baby foods or cereals, no infant formula, no bread, no rolls, no pitas, only three packages of tortillas, only three packages of tostadas, no corn meal, no flour, only four small bags of rice, no pancake mixes, no cold cereals, no hot cereals, many single serving Ramen noodle soups, a limited quantity of dry pasta, no dry noodles, no mac&cheese, no coffee, no tea, no cocoa, and no expensive staple food items.

NOTE: The firm failed to meet the minimum stocking requirements for authorization as a SNAP retailer since it was deficient in two of the four required stable food categories having only milk in the dairy category and only one can of tuna and seven cartons of eggs in the meat/poultry, or fish category.

- Ineligible items included: household and paper products, health and beauty items, party supplies, phones/phone accessories, shoes, sunglasses, jewelry, toys, and pepper spray while accessory foods included: candy, spices, condiments, cooking oil, two bags of sugar, snacks, baked goods, single serving ice cream, and un/carbonated drinks.

- Signage was in English and there were no SNAP posters (anti-fraud, eligible items, reporting trafficking, etc.) visible in the store. There was a sign at the checkout counter stating “no credit”, but it was not SNAP specific.
- The firm’s hours of operation were 8 AM-8 PM daily as confirmed by the owner’s spouse. He also stated that the firm did not take phone or online grocery orders, did not deliver groceries, and did not round prices up or down.
- Most food items were priced with all visible food prices ending in .x9 cents. The FNS store visit report was completed in conjunction with the owner’s spouse and specifically stated that most of the food prices ended in .x9 cents. A price ending in .x9 cents is the most common pricing structure for stores of this type.
- The FNS store visit report has a section to list the four most expensive items costing more than \$5.00 for sale in the store, but there were none as confirmed by the owner’s spouse during the store visit.
- The firm was a not a WIC vendor.
- The store visit report and photos showed many empty or marginally stocked display racks, shelves, coolers, and a freezer as well as dust on some stock indicating a slow turnover of inventory.
- The quantity and variety of the store’s staple food inventory was well less than half of that seen during the previous FNS store visit on June 28, 2016.

Multiple transactions in unusually short time frames

This Attachment documents 82 individual transactions in 36 sets of two or more transactions conducted by 19 different households in a short period of time. Two households were responsible for seven of the 36 sets. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The dollar amounts of subsequent transactions in each set are substantial and nearly equal or exceed the dollar amount of the initial transaction in 29 of the 36 sets. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). It is unlikely given the great number of steps required to complete a SNAP transaction, the lack of any items costing \$5.00 or more, and the setup of the Appellant firm that a transaction 5 U.S.C. § 552 (b)(6) & (b)(7)(C) could be completed 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Two sets are comprised of four individual transactions and six sets are comprised of three individual transactions while the remaining 28 sets are comprised of two individual transactions. It is not a usual shopping pattern to see so many purchases, in a short period of time, by the same recipients as documented in this Attachment. Multiple transactions conducted by the same household within a short period of time is a method which violating stores use to avoid single high dollar transactions that cannot be supported by store inventory and structure. These sets of transactions appear to be in amounts which are indicative of trafficking.

Appellant contends it is not uncommon for customers to make multiple purchases in a short period of time after receiving their SNAP benefits. Often, they realize after making their first purchase that they forgot an item or now decide to purchase items they saw while shopping. Also members of the same household will shop together and make their purchases separately using the same EBT card or will go on a spending spree making purchase after purchase without leaving the store or by returning after a brief absence. Households may also participate in co- shopping

where different adult household members share shopping responsibilities which could result in separate transactions in a short period of time.

SNAP households have no limit on the number of times they may use their benefits or the dollar value of eligible food they may purchase. The SNAP transactions listed in this Attachment are questionable not because they exceed any limits for use, but rather because they display characteristics of use inconsistent with the nature and extent of a convenience store's stock and facilities and are thus indicative of trafficking. These transaction sets do not contain the characteristics associated with a household purchasing a forgotten item right after checking-out or of household members/friends shopping together and making separate purchases as 25 of the 36 transaction sets 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The transaction sets also do not contain the characteristics of a household returning later in the day or sending their child to purchase a forgotten item or two as all of the sets have subsequent transactions in amounts 5 U.S.C. § 552 (b)(6) & (b)(7)(C) with 33 of the 36 sets having subsequent transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C), far more than the cost of a forgotten item or two. Appellant's contentions also provide no explanation as to why households would conduct three or four sizeable transactions at an extremely poorly stocked firm 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

It is certainly not unusual for a small number of SNAP households to conduct multiple transactions in a short period of time. However, it is unusual that subsequent transaction dollar amounts are substantial in these transaction sets and that all of the sets in this Attachment total 5 U.S.C. § 552 (b)(6) & (b)(7)(C) when the comparable average convenience store SNAP transaction amount in Los Angeles County during the review period was \$6.85. These multiple transactions indicate that the amounts were contrived in an attempt to avoid suspiciously high transactions that would be indicative of trafficking by breaking them into multiple, smaller amounts. FNS transaction data shows that this same pattern of multiple transactions in unusually short time frames is not evident at other nearby like type grocery stores further supporting that trafficking was occurring at the Appellant firm during the period under review.

The store visit report specifically notes that Appellant's pricing structure has most food prices ending in .x9 cents which was confirmed by the owner's spouse who completed the store visit form in conjunction with the contract reviewer and answered "no" to the question asking if the firm had a pricing structure with most prices ending in amounts other than .x9 cents. The owner's spouse also told the contract reviewer that the firm had no items with an individual pricing of \$5.00 or higher. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). That 49 of the 82 transactions end in .x5 cents is also irregular based on the pricing structure as the purchase of several items with prices ending in .x9 cents would most likely not result in a large number of transactions ending in .x5 cents as multiples of nine seldom have a value ending in .x5 cents making it statistically impossible that more than half of these transactions would end in .x5 cents with legitimate food purchases. This further supports that the transaction amounts were contrived and are the result of trafficking.

The Retailer Operation Division's analysis of shopping patterns for households listed in this Attachment shows they have ready access to transportation as evidenced by their shopping at a variety of larger food stores located nearby and at a distance from Appellant's location, including

a variety of super stores and supermarkets. Appellant's contentions fail to offer any explanation or rationale as to why households who are shopping and spending large dollar amounts at many larger and better stocked stores would conduct multiple purchases totaling to high dollar values at a much smaller and extremely poorly stocked grocery store. Common sense dictates that it is improbable that households would choose to spend large dollar amounts at the Appellant firm if their purchases consisted solely of eligible food items that could be purchased at any of the super stores and/or supermarkets they were already regularly shopping at and therefore more likely than not that these households were trafficking SNAP benefits at the Appellant firm.

5 U.S.C. § 552 (b)(6) & (b)(7)(C). There is no legitimate reason why this household would spend so much of its SNAP allotment at an extremely poorly stocked convenience store when it clearly had access to and frequently shopped at supermarkets and super stores located nearby and at a distance. The more plausible explanation is that this household was trafficking at the firm. Other households analyzed exhibited similar shopping patterns indicative of trafficking.

Appellant claims that co-shopping may account for some of the transaction sets. Appellant's claim is based on a survey that involved interviews with 10 consumers from five two-shopper households in Seattle in 2016. However, a review of the survey report finds no mention of SNAP households being interviewed. This reviewer is also not aware of any co-shopping studies that specifically address SNAP households therefore Appellant's contentions regarding co-shopping are assumptions as opposed to facts. Additionally, Appellant's November 19, 2018, brief references a finding from a USDA report on foods typically purchased by SNAP households which states that, "Unlike normal shopping habits, SNAP participants buy sweetened beverages, frozen prepared foods, and prepared desserts at a much higher rate than traditional consumers". This shows that SNAP households are not comparable to non-SNAP households in all areas which would likely include co-shopping. Additionally, unlike non-SNAP households, under SNAP regulations there can be multiple benefit households under the same roof each with its own EBT card and SNAP benefits. This provides additional SNAP benefits in a separate EBT account for individuals such as the elderly or disabled living with family members who have their own shopping priorities or needs. During SNAP eligibility interviews, the family structure is carefully evaluated to determine if multiple households may be authorized which would reduce the numbers, if any, of SNAP recipients co-shopping. Based on this discussion, it seems unlikely that co-shopping would have any measurable effect on SNAP shopping patterns.

There may be legitimate reasons why a SNAP household might return to a store during a short period of time, but the examples in this Attachment indicate a series of SNAP purchases that total to large dollar amounts. Multiple transactions over a short period of time, especially those of high dollar values, are indicative of attempts to obscure trafficking by dividing a large dollar value transaction into a series of smaller dollar value transactions and are a method which violating stores use to avoid high dollar transactions that cannot be supported.

High Dollar Value Transactions

This Attachment lists 141 individual EBT transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The substantial number of high dollar transactions is uncharacteristic for a grocery store offering an

extremely limited stock of staple foods and calls into question the legitimacy of these transactions. The transactions are also substantially higher than the average SNAP transaction of \$6.85 for this store type in Los Angeles County. This is unusual and indicative of trafficking.

The evidence under review shows that SNAP households shopping at the Appellant firm are also shopping at many full-line supermarkets and super stores, located nearby as well as at a distance from Appellant's location that offer a greater quantity and variety of SNAP eligible foods items for better prices than customers can find at the Appellant firm. The high dollar transactions remain questionable when considering the proximity of these other stores that would be better shopping options for consumers. Based on their shopping patterns, transportation does not appear to be an issue for these households. Yet, these recipients continue to shop and spend suspicious high dollar amounts at the Appellant firm, where the eligible food stock is limited, 5 U.S.C. § 552 (b)(6) & (b)(7)(C) of their purchases at larger food stores.

While households residing in areas with extremely limited grocery options may conduct high dollar transactions at small grocery or convenience stores out of necessity, this is not the case when they have better alternatives. FNS records show there are 15 comparably sized or larger SNAP retailers located within a one mile radius of the Appellant firm that includes a super store, a supermarket, and a medium grocery store with the medium grocery located just steps away from Appellant's location. All of these larger stores would offer greater quantities and varieties of staple foods at lower prices than would be found at an extremely poorly stocked convenience store offering no fresh or frozen unprocessed meats or seafood and no fresh or frozen produce.

The difference in the average SNAP transaction amount, the total SNAP transaction dollar volume, and the total SNAP transaction count for Los Angeles County convenience stores during the review months and at the Appellant firm is significant. Appellant's SNAP transaction dollar amount is 5 U.S.C. § 552 (b)(6) & (b)(7)(C) larger than that of Los Angeles County convenience stores while its total SNAP transaction count is 83.18 percent smaller than the County average and its average SNAP transaction dollar volume is 25.43 percent smaller than the County average. A comparison of Appellant's SNAP redemptions to that of nearby like type stores having redemptions for the review period shows that none exhibit the same suspicious transaction patterns listed in the charge letter for the Appellant firm even though all are located in proximity to Appellant's location and would therefore be expected to share the same SNAP customer base and shopping patterns. This is further indication that the transactions in this Attachment do not represent legitimate food purchases. The Retailer Operations Division considered all of these to be indicators of unusual and suspicious activity

The firm also had irregular SNAP transaction data compared to like type stores in Los Angeles County. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). These unusual spikes in both transaction numbers and dollar volume do not appear in the transaction count and dollar volume averages for other like type stores. These large dollar transactions are considered to be irregular and suspicious based on the firm's food inventory. The Retailer Operations Division determined there was no credible reason for the firm to have transactions at these dollar levels given the very limited stock of staple foods and the lack of any specialty, bulk, or ethnic foods that might sell for large dollar amounts and also considered this to be a strong indication of trafficking. None of Appellant's contentions explain these unusual and suspicious differences.

5 U.S.C. § 552 (b)(6) & (b)(7)(C). The innocence of these transactions is further supported by eight customer statements attesting to spending 5 U.S.C. § 552 (b)(6) & (b)(7)(C) per shopping trip and to using 50-80 percent of their SNAP benefits at the firm. The large transactions may also be made by larger SNAP households that would require a larger quantity of groceries each month. The transactions in Attachment 2 are supported by the firm's substantial inventory and photos, and are reasonably explained by co-shopping, reliance on the firm as a primary grocery, or the general aberration and statistical outlier to the average whole. These transactions are of little consequence as most other grocers in the firm's geographic area are likely to have the same number (or greater) of similar transactions. Appellant submitted photos, invoices/receipts from suppliers, an itemized spreadsheet of purchases, and customer statements in support of these contentions.

The SNAP transactions noted in this Attachment are not presumed to be trafficking because they exceed a set dollar amount; they are questionable because they are inconsistent for this type of store and store stock. A shopping pattern analysis by the Retailer Operations Division shows that households in this Attachment are regularly shopping at much larger stores, and conducting high dollar value transactions, yet are conducting comparable or higher dollar value transactions at the Appellant firm. It makes no sense for a household that regularly shops at larger stores and apparently has no transportation limitations to spend large dollar amounts at the Appellant firm since its cost of goods is higher than that of larger stores such as supermarkets or super stores.

Contrary to Appellant's allegations, the July 3, 2018, FNS store visit report and photos confirm that the Appellant firm offers an extremely limited quantity and variety of SNAP eligible staple food items, many accessory foods, and many ineligible items. Much of the inventory for sale consists of inexpensive snacks, candy, drinks, and single serving foods as well as many ineligible items. The fact that household and paper products, health and beauty items, party supplies, phones/phone accessories, shoes, sunglasses, jewelry, toys, and pepper spray are not eligible for purchase with SNAP benefits also provides no justification for the high transaction amounts.

Higher food prices make it even more unlikely that SNAP recipients, with very limited food benefits, would want to spend a considerable part of their benefits in a store that does not address all of their food needs when they are already shopping at larger, fully-stocked stores that would offer a greater variety of foods at lower prices. Many of these stores also offer store brand products at lower prices, weekly specials, and have shopping carts and checkouts with built-in scanners and conveyor belts to facilitate processing purchases quickly. Additionally, Appellant furnished no itemized cash register and EBT receipts for the period under review to document the legitimacy of these excessively large transactions. The firm has an extremely small checkout area and no shopping carts thereby making it difficult to facilitate the great quantities of eligible food items required to make up these large dollar transactions. Therefore, it is improbable that the food items purchased in these high dollar amounts could be carried to the register without the use of carts and more likely that the amounts were contrived.

A review of Appellant's photos shows that the majority are similar to those taken during the FNS store visit and confirm that the store offers an extremely limited stock of staple foods that includes many single serving and pre-packaged items. The photos almost exclusively show an

overwhelming portion of food inventory devoted to accessory foods such as beverages, candy, snacks, and single serving ice cream. Appellant's photos also show many more ineligible items than were visible in the FNS photos and support the reply to the charge letter that stated eligible food items accounted for only 35 percent of the firm's floor space. The few photos that do display staple foods show a greater quantity and variety than was present in the FNS photos raising the likelihood that they were staged by firm ownership in an attempt to falsely support the contention that the firm has a substantial inventory and offers a variety of staple food items. The photos also show one additional staple food item, cold cereal, which was not present during the FNS store visit. Accordingly, these photos are of no evidentiary value.

Appellant's customer statements are preprinted with blanks to be filled-in. None contain any household information such as SNAP account numbers or EBT card numbers that would facilitate identifying the cardholder and only one lists an actual address. A search by name of the State SNAP database shows that three of the names do not have SNAP cases and another three names are too common to be identified. Both of the remaining names were in the database with one having no transactions at the Appellant firm during the review period and the other having 11 transactions that were identified as suspicious. In summary, the eight statements account for only 11 transactions representing approximately five percent of the charge letter transactions thereby providing no basis to support the legitimacy of the charge letter transactions or to explain the irregular SNAP transaction patterns. It is further noted that none of the statements admit to having transactions less than 14 days apart and that seven of the eight statements allege purchases 5 U.S.C. § 552 (b)(6) & (b)(7)(C) while the eighth statement claims purchases 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The charge letter has no transactions exceeding 5 U.S.C. § 552 (b)(6) & (b)(7)(C) and a review of all store transactions for 2017 and 2018 shows none exceeding 5 U.S.C. § 552 (b)(6) & (b)(7)(C) indicating that this statement may have been fabricated in an attempt to explain the large purchases as being legitimate. Additionally, the listings of items purchased include items not carried by the firm such as canned fruit, bread, frozen foods, and coffee further reinforcing that the statements are fabricated and therefore without merit.

Contrary to Appellant's contention that the firm is located near multiple schools resulting in additional foot traffic, there are no schools within one-third of a mile. There are only three schools within a one mile walk or drive with two (the Tweedy Elementary School and the Legacy High School) located 0.4 miles away and the third (Bryson Elementary School) located one mile away. There are also two other convenience stores located closer to these schools so it would be unlikely that the firm would derive much, if any, business as a result of these schools.

A detailed analysis of invoices submitted for inventory purchases was conducted by the Retailer Operations Division and the dollar amount of eligible food purchases plus markup compared to the firm's SNAP redemptions for the review period. This analysis determined that ineligible items had not been excluded from the many Cash N Carry and Vernon Sales invoices in its calculations. A review by this Review Officer found that this oversight extended to invoices from other vendors as well. The Retailer Operations Division analyzed the invoices provided for the months of March and May 2018 after excluding all ineligible items and their calculations show that the firm had insufficient inventory to support the SNAP redemptions for these months. Their review of Cash N Carry and Vernon Sales invoices for the remaining four months showed

that ineligible items had also not been excluded from them in any of Appellant's calculations. The review of invoices and receipts also confirms that no expensive foods were purchased and shows that the vast majority of SNAP eligible items purchased are inexpensive accessory foods such as snack foods, beverages, and candy. Insufficient inventory is a sign of trafficking.

Additionally, that households were shopping at super stores and supermarkets prior to, just after, or even in between suspicious transactions at the Appellant firm casts doubt on their legitimacy. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). An analysis of the household's SNAP transactions shows that it frequently conducted sizeable transactions at the Appellant firm immediately prior to or after shopping at super stores and supermarkets. There is no reasonable explanation other than trafficking that satisfactorily explains why a SNAP household would expend a significant portion of their monthly benefits at a convenience store with extremely limited staple foods when it is shopping at much larger stores on the very same day. The analysis identified other households with this same irregular pattern of high dollar value transactions at the Appellant firm and transactions, often of lower dollar value, at larger stores 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

It is further noted that SNAP redemptions at the firm fluctuated unusually following the FNS store visit on July 3, 2018. The average SNAP transaction dollar amount decreased 41.92 percent from June 2018 to July 2018 while the volume of SNAP redemptions increased 23.00 percent and the average SNAP transaction count also increased 111.76 percent during the same period. A pronounced change in SNAP redemptions following the FNS store visit is a clear indication of trafficking since, if trafficking were not occurring, there would be no abnormal fluctuations in redemption amounts.

Based on this discussion, Appellant did not provide adequate evidence to support the legitimacy of the excessively large transactions in this Attachment.

Other Contentions

Regarding Appellant's denial of trafficking, the purpose of this review is to either validate or to invalidate the earlier decision of the Retailer Operations Division and is limited to what circumstances were at the basis of the action at the time such action was made. In an appeal of an adverse action, the Appellant bears the burden of proving by a preponderance of evidence that the administrative action should be reversed. That means the Appellant has the burden of providing relevant evidence that a reasonable mind, considering the record as a whole, would accept as sufficient to support a conclusion that the argument asserted is more likely to be true than untrue. Assertions that the firm has not violated program rules, by themselves and without supporting evidence and rationale, do not constitute valid grounds for dismissal of the current charges of violations or for mitigating their impact. When the store owner signed the certification page of the SNAP retailer authorization application to become a SNAP retailer in June 2016, she confirmed she understood and agreed to abide by program rules and regulatory provisions. She also agreed to accept responsibility on behalf of the firm for violations of the SNAP including those committed by any of the firm's employees, paid or unpaid, new, full-time or part-time. The certification is clear that store ownership understood by signing the document that violations of program rules can result in administrative actions such as fines, sanctions, withdrawal, or

disqualification from the SNAP. Additionally, a record of participation in SNAP with no previously documented instance of violations does not constitute valid grounds for dismissal of the current charges of violations or for mitigating the impact of those charges.

In regard to case law cited by Appellant, considerations of relevant legal precedent through case law, or the lack thereof in relation to the present case, are beyond the scope of this review; this review relies upon the statute and regulations governing the SNAP and evaluates whether the decision of the SNAP Office to impose a disqualification upon the Appellant was in accordance with same and sustainable by a preponderance of the evidence. Appellant's case law references are acknowledged in this context only.

Regarding Appellant's contentions concerning the ALERT system, the record in this case documents that the Retailer Operations Division analyst knew the limitations of the ALERT system and that ALERT does not identify trafficking or credit, but only identifies suspicious transactions. This knowledge was used to conduct a thorough examination and analysis of pertinent information that ultimately lead to the determination of trafficking at the Appellant business. The record also shows that the analyst immediately recognized the Appellant business as a convenience store and, as such, identified like type convenience stores offering the same type of foods and used these stores as comparison stores. There is also no basis to support Appellant's claim of a "Confirmation Bias" being present in this case. The firm was extremely poorly stocked as evidenced by being deficient in two of the four required staple food categories, had suspicious transaction patterns, and had insufficient inventory to support redemptions.

The owner and the firm were charged with trafficking based on a computer analysis of the store's transactions for the review period. The charges do not derive from the use of a confidential informant or independent investigator who visited the store and made illegal purchases to support findings of trafficking, but by a computer program used by SNAP Administrators. While traditional undercover operations are still in use by USDA, for many years federal regulations have also authorized the use of evidence consisting of EBT transaction data in investigations of SNAP retail stores to determine if trafficking is occurring and U.S. District Courts have long upheld the validity of EBT transaction data.

The issue under review involves a charge of trafficking SNAP benefits based on EBT transaction data. EBT transaction data is covered in SNAP regulations at 7 CFR § 278.6(a) and is addressed below. Trafficking is always considered to be the most serious violation even if it is a first offense therefore a temporary suspension or lesser penalty would not be applicable. SNAP regulations at 278.6(e)(1) clearly state that, "FNS shall disqualify a firm permanently if personnel of the firm have trafficked as defined in § 271.2." SNAP regulations at 7 CFR § 271.2, define trafficking as, "The buying, selling, stealing, or otherwise effecting an exchange of SNAP benefits for cash or consideration other than eligible food". SNAP regulations at 7 CFR § 278.6(a) clearly 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, 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". In the present case, the data presented in the Attachments is solely based on the SNAP EBT transactions conducted at

the Appellant firm during the review period. This firm was selected as a result of a series of complex algorithms that make numerous data comparisons with other like type firms during the review period. All of the transactions were then reviewed and analyzed by the Retailer Operations Division staff before the decision was made to issue a charge letter. This investigative process included a detailed examination of information obtained from various sources, including, but not limited to the inventory report and photos from the FNS store visit, a transaction comparison and analysis of like type and larger stores, and analysis of shopping patterns for recipient households conducting transactions at the Appellant firm during the review period. This analysis also included a review of the firm to ensure its store classification was correct and the data comparisons with like type firms valid. Additionally, there are nearby like type stores whose transaction data does not form these suspicious patterns and are therefore not at risk of disqualification for trafficking. There is also no regulatory requirement that trafficking disqualifications be based solely on on-site undercover operations.

Based on this empirical data, and in the absence of sufficient evidence for the legitimacy of such transaction patterns, a conclusion can be drawn, through a preponderance of evidence that the “unusual, irregular, and inexplicable” transactions and patterns cited in the charge letter evidence trafficking as the most likely explanation for the questionable transactions listed. It is herein determined that Appellant did not provide a preponderance of evidence demonstrating that the transactions contained in the charge letter were more likely due to eligible food sales than not. Under review, the evidence more substantially supports a conclusion that the transaction activity in the charge letter Attachments is due primarily to trafficking in SNAP benefits.

The Food and Nutrition Act of 2008, as amended, and the regulations issued pursuant thereto do not cite any minimum dollar amount of cash or SNAP benefits, or number of occurrences, for such exchanges to be defined as trafficking. Nor do they cite any degrees of seriousness pertaining to trafficking of SNAP benefits. Trafficking is always considered to be the most serious violation, even when the exchange of SNAP benefits for cash is dollar-for-dollar or is conducted by a non-managerial store clerk. This is reflected in the Food and Nutrition Act, which reads, in part, that disqualification “shall be permanent upon the first occasion of a disqualification based on trafficking by a retail food store.” In keeping with this legislative mandate, Section 278.6(e)(1)(i) of the SNAP regulations states that FNS shall disqualify a firm permanently if personnel of the firm have trafficked. There is no agency discretion in the matter of what sanction is to be imposed when trafficking is involved and second chances are not an authorized option under existing regulations.

CIVIL MONEY PENALTY

A CMP for hardship to SNAP households may not be imposed in lieu of a permanent disqualification as specified in SNAP regulations at 7 CFR § 278.6(f). Trafficking is a permanent disqualification so Appellant is not eligible for a hardship CMP.

The Retailer Operations Division determined that the Appellant was not eligible for a trafficking CMP in lieu of a disqualification under 7 CFR 278.6(i) because Appellant failed to submit any evidence to demonstrate that the firm had established and implemented an effective compliance

policy and program to prevent SNAP violations within the specified timeframe. As such, the Retailer Operations Division determined that Appellant was not eligible for a trafficking CMP in lieu of permanent disqualification.

Based on the above discussion and the evidence under review, Appellant failed to meet the regulatory standard for a trafficking CMP as it did not provide substantial evidence that it met all four criteria required by 7 CFR §278.6(i). Based on the above, the Retailer Operations Division's decision not to impose a CMP in lieu of disqualification is sustained as appropriate pursuant to 7 CFR §278.6(i).

CONCLUSION

The Retailer Operations Division presented a case that Appellant has likely trafficked in SNAP benefits. Their analysis of Appellant's EBT transaction record was the primary basis for its determination to permanently disqualify Appellant. This data provided substantial evidence that the questionable transactions during the review period had characteristics consistent with trafficking violations in SNAP benefits. This is evidenced by: the suspicious patterns in two Attachments of EBT transaction data, the inadequacy of the store's staple food stock as observed during the store visit to support large transactions in short time frames, the lack of adequate evidence for customer spending habits given that there are other SNAP authorized stores located within proximity to Appellant that likely offer a greater selection of eligible food items at competitive prices, and the irregular SNAP transaction data of Appellant as compared to other like type and larger stores in the county and state.

The retailer has not provided sufficient evidence to rebut the case that Appellant most likely trafficked in SNAP benefits. Therefore, based on a review of all of the evidence in this case, it is more likely true than not true that program violations did, in fact, occur as charged. Based on the discussion above, the determination to impose a permanent disqualification against Appellant is sustained. Furthermore, the Retailer Operations Division properly determined that Appellant was not eligible for a trafficking CMP according to Section 278.6(i) of the SNAP regulations.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in 7 U.S.C. § 2023 and 7 CFR § 279.7. If a judicial review is desired, the complaint must be filed in the U.S. District Court for the district in which Appellant's owner resides, is engaged in business, or in any court of record of the State having competent jurisdiction. This complaint, naming the United States as the defendant, must be filed within thirty (30) days of receipt of this decision.

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

ROBERT T. DEEGAN
ADMINISTRATIVE REVIEW OFFICER

March 5, 2019