

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

Latino Food Store,

Appellant,

v.

Case Number: C0207598

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 Latino Food 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 Latino Food Store on June 14, 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 April 12, 2018, the Retailer Operations Division informed the Appellant that Latino Food 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 received by the Retailer Operations Division on April 19, 2018 and May 15, 2018, the Appellant, through counsel, denied the trafficking allegations and provided various

explanations for the questionable SNAP transactions that were outlined in the April 12, 2018 Charge Letter.

After considering the Appellant's replies and the evidence in the case, the Retailer Operations Division issued a Determination Letter dated June 14, 2018, informing the Appellant that Latino Food Store was being permanently disqualified from participation in the SNAP in accordance with 7 CFR § 278.6(e)(1) for trafficking violations.

In a letter postmarked June 25, 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 July 2, 2018.

The record indicates that on June 25, 2018, the Appellant's counsel requested information and documents from FNS with regard to the agency's case against Latino Food Store pursuant to the Freedom of Information Act (FOIA). However, due to the Appellant's inability to pay the FOIA fees, the FOIA request was closed by FNS. In a written response postmarked August 2, 2018, the Appellant, through counsel, provided FNS with additional information in support of the subject case.

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 February 2018. 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 review request postmarked June 25, 2018, and in a subsequent correspondence postmarked August 2, 2018, the Appellant, through counsel, stated the following summarized contentions, in relevant part:

- Hurricane Irma hit South Florida on or about September 9, 2017. This hurricane caused major damage, ongoing power outages, and destruction of property which resulted in an extended period of time for recovery in order to restore power to neighborhoods, clear public roadways, clean up debris, and rehabilitate residential and commercial properties.
- South Florida residents, particularly in the Fort Lauderdale/Miami area, were significantly affected for many months. Consumer purchasing of larger quantities of easy-to-keep store food items, like snacks and beverages, typically increases both before and after a significant hurricane impacts South Florida. During the review period, Latino Food Store sold a lot of food items, many in larger quantities/by-the-case, to the residents living in close proximity to the store.
- 54% of the transactions listed in Charge Letter Attachment 1 and 61% of the SNAP transactions listed in Charge Letter Attachment 2 occurred before the end of the second month following the impact of Hurricane Irma.
- Latino Food Store has operated without issue at the present location for approximately 14 years.
- Latino Food Store is located within walking distance of three major apartment complexes and two larger trailer parks. The store has one cash register and one POS device and sufficient counter space at the checkout area to accommodate the sale transactions outlined in the Charge Letter.
- The store has several hand-baskets and three shopping carts for customer use, when needed.

- Many of the store’s customers living in close proximity to Latino Food Store tend to use their own shopping carts to transport the food items back to their homes.
- Latino Food Store is attractive to customers as an additional food source because of the convenient location in the neighborhood and due to the store selling many ethnic food items as well as other food items that can be purchased in bulk/by-the-case. These bulk foods are offered at comparatively cheaper prices than other markets outside of the immediate area. This situation was undoubtedly appealing to customers during the months of recovery following the hurricane. The Appellant continued to operate during the hurricane when other food stores temporarily closed.
- Regarding the multiple transactions made from individual benefit accounts within a set period of time (Charge Letter Attachment 1):
 - *It is not at all unusual with respect to the timing in between the sale transactions and certainly not confirmation that trafficking events occurred at the store;
 - *FNS does not believe that it is not typical that multiple transactions are going to result in dollar values above an average of 5 U.S.C. § 552 (b)(6) & (b)(7)(C) per sale transaction as determined from FNS’ statistics for convenience stores;
 - *Many convenience stores located in South Florida located within low income neighborhoods operate beyond what statistically may be an average consumer shopping standard.
 - *Many eligible food items sold at Latino Food Store, when combined in one sale transaction, will easily total more than the average amount purchased by a SNAP recipient at such a food store.
 - *It is not unusual for SNAP recipients/households living in these small micro-communities to purchase food items from their neighborhood convenience food stores, with greater frequency, as part of a daily routine.
 - *Although there are other food stores beyond the area of SNAP recipients’ residences, where they also shop, there will be SNAP recipients who shop with greater frequency at a food store for certain basic items because that food store is simply closer to their residence, particularly if prices on certain food items are cheaper or comparable with the prices at other stores located further away from their residential community.
 - *Not all SNAP recipients make prudent choices when purchasing food items for their families with the SNAP benefits allotted to them, including accessory foods purchased in large quantities to satisfy larger/extended families with children.
 - *The transactions in Attachment 1 can also be the result of SNAP recipients not having transportation, having limited transportation, or intentionally deciding to restrict using such transportation by walking to local food stores to cut down on costs and conserve funds.
 - *While SNAP recipients do not shop exclusively at one particular food store for all of their family’s food needs, there will always be personal preferences that customers may have in shopping at an established or familiar corner food store, over another store, for particular food items. Just because SNAP recipients involved in the transactions described in the Charge Letter also traveled outside their immediate area to shop for other food items, within short periods of time, is not convincing proof that trafficking occurred at Latino Food Store.
 - *There are instances where SNAP recipients, on a daily basis, will allow family members, friends, and others use their EBT cards to purchase food items. SNAP retailers

are not authorized to check the identification of the person using the EBT card every time the card is used at an authorized store. The Appellant does not have the authority to deny an individual who has possession of an EBT card and PIN number to access the account and use the EBT card to make a purchase.

- Regarding the excessively large purchase transactions (Charge Letter Attachment 2):
 - *120 of the transactions (61%) listed in Attachment 2 occurred within the first two months following the impact from Hurricane Irma, when power and access to public roadways were compromised for extended periods of time.
 - *It is common during the period of time following a hurricane that food stores in local communities will be utilized in much greater frequency by the residents living close to the store. Many customers, especially in low income communities, purchase food items consisting of accessory food items/less perishable food items that can easily be consumed without cooking and can easily be stored over extended periods of time. The higher transactions listed in this Attachment are consistent with such purchasing during this period of recovery. The transactions are consistent with the types/pricing combinations of food items sold at Latino Food Store.
 - *The Appellant provided FNS with examples of food item purchases that could have been purchased in some of the higher dollar sale transactions.
 - *The Appellant provided FNS with examples of what food items could have been purchased which involve the same SNAP recipient conducting the same dollar amount purchases.
 - *The Appellant has illustrated to FNS the combinations of food items that are available for sale at Latino Food Store that can reasonably account for the dollar amounts of the transactions included in the Charge Letter.
- The SNAP transactions questioned in both Charge Letter Attachments 1 and 2 should focus on whether such transactions can be supported by Latino Food Store having an adequate level of food inventory at the time such transactions occurred. The food purchase invoices provided to FNS indicate that the Appellant purchased enough food inventory to sufficiently support Latino Food Store's SNAP redemptions during the review period.
- Statistical analysis of usual shopping patterns of SNAP recipients when determining whether a transaction is indicative of trafficking cannot be the presumptive factor in concluding that trafficking occurred at Latino Food Store, especially when the investigation results from a paper case only.
- FNS primarily used ALERT data in making the decision that trafficking occurred at Latino Food Store. Though case law precedent supports a paper case as a legitimate means of determining trafficking, it remains a serious concern under our system of justice imposing threshold evidentiary requirements that FNS can permanently disqualify a retailer for what it believes to be trafficking violations from the review of SNAP transaction data alone without any actual confirmation of such by an on-site investigation. Comparing EBT data with that of other similar food stores in the area as well as having knowledge of where SNAP households involved in the sales under investigation and shop for their food needs should not become FNS' evidentiary basis of determining if trafficking occurred, particularly when supporting documentation provided by the retailer suggests otherwise.

- Based on the information/documentation provided by the Appellant, FNS' decision to permanently disqualify Latino Food Store from the SNAP should be overturned.

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

- Examples of cheaper pricing on food items;
- Examples of ethnic foods;
- List of food vendors where Appellant purchases food inventory;
- Customer affidavits in support of sales;
- Example purchases;
- Examples of higher dollar value sales transactions;
- Summary of food inventory purchased for the review months;
- Photos of surrounding area and food stock;
- Photos of higher dollar value food items;
- SNAP sales totals for review period months; and
- Food purchase invoices for review period.

ANALYSIS AND FINDINGS

Store Characteristics

FNS authorized Latino Food Store as a convenience store on January 18, 2017. The case file indicates that in reaching a disqualification determination, the Retailer Operations Division considered information obtained during a March 25, 2018 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 2,600 square feet in size 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;
- 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;

- There were dusty cans/packages, expired/outdated food in stock, and some empty shelves;
- The four most expensive foods items in stock were vegetable oil at \$9.99 per 79 ounces; corned beef (canned) at \$6.99 per 12 ounces; cheese quesos at \$6.99 per 14 ounces; and red beans (dried) at \$5.99 per 58 ounce bag;
- There were no fresh or frozen meats, poultry, or seafood;
- Deli meats and cheeses were not sold by the pound;
- Hot foods were not sold;
- There were units of canned/potted meat, canned fish, eggs, and meat jerky;
- Dairy included milk, butter, and cheese;
- Fresh produce was limited to only two bananas;
- Other staple foods available for purchase include such items as juice, pasta, rice, bread, cereal, flour, cakes/pastries, snack foods, and canned goods;
- Much of the remaining food stock consists of accessory foods such as candy, carbonated and non-carbonated drinks, coffee, condiments, and vegetable oil; and
- Ineligible nonfood items included tobacco products, health and beauty items, paper products, household cleaning supplies, clothing, lottery tickets, gift items/souvenirs, cell phone accessories, alcohol, automotive products, and housewares.

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 Latino Food 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 26 sets of transactions (57 total transactions) that total **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 Latino Food 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 and third 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 Hurricane Irma hit South Florida on September 7, 2017. Hurricanes cause consumers to purchase larger quantities of easy to keep food items and sales of snacks and beverages typically increase. The record reflects that disaster SNAP benefits were issued to Broward County, Florida on October 11-14 and November 7-9, 2017 due to Hurricane Irma. ALERT data indicates that Latino Food Store's SNAP redemptions were slightly higher in October 2017 and November 2017 which may be partially due to issuance of disaster SNAP benefits. However, the Appellant did not provide any evidence that special foods were sold during this time, such as hot foods, which is typical when disaster SNAP benefits are issued. Therefore, the multiple and higher dollar SNAP transactions conducted at the store are still suspect, especially since there are 17 authorized SNAP stores of comparable size or larger than the subject firm located within a 1.0 mile radius of Latino Food Store. These area authorized stores include two supermarkets. Therefore, SNAP households have many options of stores that likely have better prices and a much wider selection of foods, including fresh and frozen meats and produce. If the hurricane truly impacted Latino Food 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. But this is simply not the case.

In addition, analysis of the review period invoices provided to FNS (see further in this document for information regarding FNS' invoice analysis) indicates that in October 2017 and November 2017, the Appellant's eligible food purchases had declined. If legitimate foods were being sold during the issuance of disaster SNAP benefits, it is reasonable that food purchases would increase.

The Appellant argues that not all SNAP recipients make prudent choices when purchasing food items for their families with the SNAP benefits allotted to them, including accessory foods purchased in large quantities to satisfy larger/extended families with children. The transactions in Attachment 1 can also be the result of SNAP recipients not having transportation, having limited transportation, or intentionally deciding to restrict using such transportation by walking to local food stores to cut down on costs and conserve funds. While SNAP recipients do not shop exclusively at one particular food store for all of their family's food needs, there will always be personal preferences that customers may have in shopping at an established or familiar corner food store, over another store, for particular 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. Latino Food 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. It is irregular for convenience stores to have purchases such as those cited, especially when Latino Food 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 argues that Latino Food Store is located within walking distance of three major apartment complexes and two larger trailer parks. The Appellant provided FNS with photos from a Google search showing a nearby trailer park and apartments. FNS does not dispute the Appellant's claim that Latino Food Store is located within walking distance of three major apartment complexes and two larger trailer parks. However, a review of client shopping data for the review period shows that clients shopping at Latino Food 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 Latino Food 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 17 SNAP authorized retailers located within a 1.0 mile radius of Latino Food Store that can meet the nutritional needs of SNAP customers. Several of these authorized SNAP stores are larger than Latino Food 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 Latino Food 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 Latino Food Store's abnormally high SNAP transaction amounts conducted within a short timeframe of each other.

The Appellant also argues that the SNAP transactions listed in Attachment 1 are also the result of SNAP recipients, on a daily basis, allowing family members, friends, and others use their EBT cards to purchase food items.

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 Fort Lauderdale, 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 Latino Food 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 198 transactions (**5 U.S.C. § 552 (b)(6) & (b)(7)(C)**) **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. These large transactions are not consistent with a convenience store in Broward County, Florida. During the review period, the average transaction amount for a convenience store in Broward County, Florida was \$7.97. **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. 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. While Latino Food Store does sell some limited ethnic Hispanic foods, most of these food items are available at other authorized SNAP stores in the area. Most of the food products in Latino Food 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 the review period calls into question the legitimacy of these transactions.

With regard to the Appellant's argument that the excessively large purchase transactions in Attachment 2 are the result of residents utilizing local stores located close to the residents' residence as a result of the aftermath of a hurricane, as noted above, 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 Latino Food 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.

The Appellant argues that Latino Food Store is attractive to customers as an additional food source because of the convenient location in the neighborhood and due to the store selling many ethnic food items as well as other food items that can be purchased in bulk/by-the-case. These bulk foods are offered at comparatively cheaper prices than other markets outside of the immediate area. The Appellant provided FNS with a list of examples of cheaper priced foods offered at the subject firm. The Appellant also stated that Latino Food Store has three shopping carts and several hand-held baskets for customer use.

With regard to the Appellant's claim that the store sells ethnic and other food items in bulk/by-the-case, both the FNS store visit of March 25, 2018 and December 27, 2016 indicate that there were no signs posted or flyers available advertising the availability of bulk foods offered at a discounted rate to include meats in bulk, foods sold by the case, and grocery package deals; 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 were 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 Latino Food Store offering foods at cheaper prices compared to other area authorized stores.

While Latino Food Store does sell some limited ethnic Hispanic foods, most of these food items are available at other authorized SNAP stores in the area. Most of the food products in Latino Food 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 Latino Food Store has three shopping carts and several hand-held baskets for customer use and provided photos to support its claim. However, both the FNS store visit report and photos of March 25, 2018 and December 27, 2016 indicate that Latino Food Store had no shopping carts or hand-held baskets. It is likely that the information provided to FNS was contrived in effort to support the Appellant's case. The evidence supports that the subject firm did not stock any shopping carts or hand-held baskets at the time that the review period transactions were conducted.

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 March 25, 2018, the store owner noted to the contracted reviewer that the four most expensive food items stocked at Latino Food Store are vegetable oil at \$9.99 per 79 ounces; corned beef (canned) at \$6.99 per 12 ounces; cheese quesos at \$6.99 per 14 ounces; and red beans (dried) at

\$5.99 per 58 ounce bag. 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 Latino Food Store stocking many high priced food items.

The Appellant provided FNS with information regarding the SNAP transaction dollar volume of the subject firm during the review period. However, the Appellant's SNAP sales information was slightly different than the firm's actual SNAP sales transaction data which was:

- 5 U.S.C. § 552 (b)(6) & (b)(7)(C)
- 5 U.S.C. § 552 (b)(6) & (b)(7)(C)
- 5 U.S.C. § 552 (b)(6) & (b)(7)(C)
- 5 U.S.C. § 552 (b)(6) & (b)(7)(C)
- 5 U.S.C. § 552 (b)(6) & (b)(7)(C)
- 5 U.S.C. § 552 (b)(6) & (b)(7)(C)

The store visit report and photographs show that Latino Food Store was stocked with a moderate quantity and variety of staple foods with no fresh or frozen meats, poultry, or seafood and only one variety of fresh produce (bananas) in 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. In addition, the store visit report and photos show that there were dusty cans/packages, expired/outdated food in stock, and some empty shelves in the store. 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 record shows that the Retailer Operations Division compared the Appellant firm, a convenience store, to the store type average in Broward County, Florida during the review period. Latino Food Store had much higher than average transaction trends in various dollar ranges (5 U.S.C. § 552 (b)(6) & (b)(7)(C)) compared to the convenience store type average. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). This much higher than average transaction trend is a strong indicator that trafficking may be occurring at the subject firm.

The daily dollar report shows that there were several days in which Latino Food Store had extremely high dollar volumes compared to the store type average. Latino Food Store also had a higher average transaction amount than the convenience store type average in Broward County, Florida. These are also indicators that trafficking is more likely than not occurring at Latino Food Store.

Lastly, the case record documents that the Retailer Operations Division conducted a detailed analysis of six SNAP households identified in the Charge Letter to analyze their shopping patterns at Latino Food 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 Latino Food 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 moderate 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.

Invoices

The Appellant argues that the SNAP transactions questioned in both Charge Letter Attachments should focus on whether such transactions can be supported by Latino Food Store having an adequate level of food inventory at the time such transactions occurred. The food purchase invoices provided to FNS indicate that the Appellant purchased enough food inventory to sufficiently support Latino Food Store's SNAP redemptions during the review period. 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 four of the six months (i.e., September 2017 through December 2017) of the review period. FNS considered the store's 35% mark-up (provided by the Appellant) and estimated 20% for cash/credit sales in its invoice analysis. FNS determined that the invoices provided for eligible food purchases were significantly less in October 2017 and November 2017 than what was purchased in September 2017. Since the store's SNAP redemptions were highest in September 2017 and October 2017, it is reasonable to conclude that higher amounts of foods should have been purchased considering the Appellant's claim of higher food demand following the hurricane.

FNS also determined that there was a substantial difference in the information presented by the Appellant, especially for October 2017 and November 2017. The November 2017 information provided by the Appellant indicates that Latino Food Store had 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in SNAP purchases with a 35% mark-up; however, FNS' invoice analysis indicates that with a 35% mark-up and allowing 20% for cash/credit sales, the store did not purchase enough staple food inventory to cover the SNAP redemptions conducted that month (5 U.S.C. § 552 (b)(6) & (b)(7)(C)). It appears that the Appellant was including numerous ineligible non-food items in its calculations of eligible food items. However, FNS' analysis of the invoices provided for October 2017 through December 2017 indicates the firm had sufficient

food purchases to cover the SNAP redemptions for those months. However, the Appellant's invoices indicate that limited staple foods were purchased and that the majority of foods purchased for those three months were beverages, snack items, and candy.

It is important to note that even if the vendor invoices analyzed by FNS for three of the four review period months indicate that Latino Food Store had purchased sufficient food inventory to account for the firm's SNAP redemption volume during those months, 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 moderate variety of stock in the store, no fresh or frozen meats, poultry, or seafood, no frozen fruits or vegetables, only one variety of fresh produce in a limited amount, 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 very little counter space to place food for purchase at the checkout counter. Even if there were sufficient food stock at Latino Food 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 affidavits signed by 21 households in support of its case. The affidavits indicate that the permanent SNAP disqualification of Latino Food 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 Appellant's/affidavit claim that a permanent SNAP disqualification will impose a hardship on the many 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.

FNS reviewed the SNAP transactions of eight of the SNAP households (just over one-third of the households) that provided signed affidavits. Only one household provided a full EBT card number. Two of the eight SNAP households reviewed conducted no SNAP transactions during the review period. Two other SNAP households conducted no SNAP transactions at Latino Food Store during the review period but both households routinely shopped at well stocked markets during the review period. One SNAP household's highest transaction amount conducted at Latino Food Store **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. The remaining three SNAP households may have conducted legitimate SNAP transactions at Latino Food Store during the review

period; however, some of their SNAP transactions appear to be trafficking especially given the store's overall limited staple food stock.

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.

First Time Violator

The Appellant contends that Latino Food Store has operated without issue at the present location for approximately 14 years. However, 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.

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.

Computer Generated Analysis

The Appellants argues that statistical analysis of usual shopping patterns of SNAP recipients when determining whether a transaction is indicative of trafficking cannot be the presumptive factor in concluding that trafficking occurred at Latino Food Store, especially when the investigation results from a paper case only.

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.

ALERT System

The Appellant argues that FNS primarily used ALERT data in making the decision that trafficking occurred at Latino Food Store. Though case law precedent supports a paper case as a legitimate means of determining trafficking, it remains a serious concern under our system of justice imposing threshold evidentiary requirements that FNS can permanently disqualify a retailer for what it believes to be trafficking violations from the review of SNAP transaction data alone without any actual confirmation of such by an on-site investigation. Comparing EBT data with that of other similar food stores in the area as well as having knowledge of where SNAP households involved in the sales under investigation and shop for their food needs should not become FNS' evidentiary basis of determining if trafficking occurred, particularly when supporting documentation provided by the retailer suggests otherwise.

As previously stated, 7 CFR § 278.6(a) states, in part:

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].

Government analysis of stores caught in trafficking violations during on-site investigations found that transactions involving trafficking consistently display particular characteristic or patterns. These patterns include those cited in the letter of charges. The Appellant is correct that FNS employs a computerized fraud detection tool called ALERT to identify these patterns; however, the Appellant is incorrect in its contention that the Retailer Operations Division overly relied on

the results of the ALERT system when using a charge of trafficking. This tool does not determine that trafficking has occurred. The Retailer Operations Division must still analyze the transaction patterns along with other information such as store visit observations, customer shopping patterns, and comparative data from nearby stores. Only then does the Retailer Operations Division conclude whether questionable transactions were, more likely than not, the result of trafficking.

Nevertheless, transactions with these patterns sometimes have valid explanations that support the idea that they were the result of legitimate purchases of eligible food items, which is why opportunities are afforded to charged retailers to explain the questionable transactions cited. In this case, based on the empirical data of past trafficking investigations, the number of suspicious patterns displayed, the other evidence in the file, and in the absence of any reasonable explanations for such transaction patterns, the preponderance of evidence supports that the “unusual, irregular, and inexplicable” transactions and patterns cited in the letter of charges are the result of trafficking.

CIVIL MONEY PENALTY

As previously indicated, the June 14, 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 April 12, 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 Latino Food 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

October 24, 2018