

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

Little Spirit Shop,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0214064

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 Little Spirit Shop (Appellant) by the Retailer Operations Division of FNS.

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR § 278.6(e)(1)(i) in its administration of the SNAP, when it imposed a permanent disqualification against Little Spirit Shop on June 5, 2019.

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 January 30, 2019, the Retailer Operations Division informed the Appellant that Little Spirit Shop 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 a response to the Retailer Operations Division of February 21, 2019, the Appellant, through counsel, replied to the charges therein denying the trafficking allegations and providing various

explanations for the questionable SNAP transactions outlined in the January 30, 2019 Charge Letter.

After considering the Appellant's reply and the evidence in the case, the Retailer Operations Division issued a Determination Letter dated June 5, 2019, informing the Appellant that Little Spirit Shop was being permanently disqualified from participation in the SNAP in accordance with 7 CFR § 278.6(e)(1) for trafficking violations. The letter also stated that the Appellant was not eligible for a trafficking civil money penalty (CMP) as the Appellant did not submit sufficient evidence to demonstrate that the firm had established and implemented an effective compliance policy and program to prevent violations of the SNAP.

In a letter postmarked June 13, 2019, the Appellant 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 5, 2019.

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 June 2018 through November 2018. This involved the following SNAP transactions patterns which are indicative of trafficking:

- There were multiple transactions made from the accounts of individual SNAP households within a set time period; and
- There were EBT transactions conducted at the store that are large based on the observed store characteristics and recorded food stock.

The issue in this review is whether, through a preponderance of evidence, it is more likely true than not true that questionable transactions were the result of trafficking.

APPELLANT'S CONTENTIONS

The following represents a brief summary of the Appellant's contentions in this matter. Please be assured, however, that in reaching a decision, full attention and consideration was given to all contentions presented, including any not specifically recapitulated or specifically referenced herein.

In the reply to the Charge Letter, in the administrative review request, and in subsequent correspondence to FNS, the Appellant, through counsel, stated the following summarized contentions, in relevant part:

- The Appellant denies the trafficking allegations.
- Regarding the SNAP transactions documented in Charge Letter Attachment 1, the Appellant is an approximately 1,800 square convenience market and liquor store. The Appellant offers a wide variety of grocery and snack foods and has a large refrigerator and freezer section with milk, juices, dairy, eggs, cheeses, ice cream, frozen foods, and other cold items. The Appellant carries a large assortment of grocery items that cater to SNAP customers such as cereals, breads, canned and packaged soups, canned fruits, vegetables and meats, baking items, nut butters and fruit spreads, dried legumes, rice, pre-packaged foods, and fresh produce. The Appellant also carries a large variety of items traditionally carried by convenience stores such as candy, nuts, chips, various snacks, beer, wine, liquor, and small sized beverages. The store carries a large variety of items that would typically be found in a traditional grocery store, and also small sized items that would typically be found in a convenience store. The Appellant also carries other general household items such as paper goods. Out of the 52 SNAP transactions noted in this Attachment, there are only 16 different households referenced (a small number in comparison to the many customers that frequent the store), showing that the same households are regular customers and more apt to make frequent purchases at the store. The Appellant expects that most of these households live within a short driving or walking distance from the subject store and thus, may frequent the store more than once per day. The Appellant is located very near a residential area and has a regular customer base accounting for a large amount of inventory normally kept in the store. Additionally, the store is in an area with a large homeless population who are SNAP recipients. Since

homeless persons do not have food storage or preparation areas, these EBT recipients are much more apt to take care of one another by buying things for each other using their SNAP benefits. Only two of the transaction sets in this Attachment occurred 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The other transactions occurred 5 U.S.C. § 552 (b)(6) & (b)(7)(C) of the previous transaction. The transactions that occurred 5 U.S.C. § 552 (b)(6) & (b)(7)(C) are the result of customers forgetting to purchase an item or purchasing items for a friend in a separate transaction. The number transactions that occurred per month is relative the same throughout the six month review period (except in July), showing consistency among shoppers who frequent the store multiple times within a 1 to 2 day period. Approximately 10 to 15 transactions per month is small in comparison to the numbers of monthly transactions at the firm.

- Regarding the SNAP transactions documented in Charge Letter Attachment 2, the Appellant offers a wide variety of products, ranging from snacks and drinks costing a few dollars, to larger grocery items in the high range of \$7.00 to \$10.00. The store's customers regularly make larger purchase transactions towards the beginning of the month when their SNAP benefits have been recently replenished. Out of the 75 larger purchases listed in this Attachment, 41 were made within the first 10 days of the month, illustrating that customers are more apt to buy more quantities of food at the beginning of the month. Of the transactions in this Attachment, only 11 purchases 5 U.S.C. § 552 (b)(6) & (b)(7)(C). 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Additionally, the Appellant's main competitor has been in existence for many years; however, since mid-2018, it has become clear to the Appellant and the local community that this store is going out of business. As a result of the competitor's dwindling inventory, the Appellant has seen an increase in overall sales and EBT transactions.
- As no transactions were noted for July 2018 in either Attachment, this calls into question the accuracy and validity of the method FNS has of gathering the transactions reflected in the Attachments.
- The Appellant has been participating in the SNAP for two years without being cited for prior SNAP violations.
- A permanent SNAP disqualification will impose a financial hardship on the Appellant and will possibly force it to close.
- The Appellant requests that FNS consider imposing a lesser period of SNAP disqualification.
- The Appellant requests that a trafficking civil money penalty be imposed in lieu of a permanent SNAP disqualification as it meets the four criteria listed in Section 278.6(i) of the SNAP regulations. The Appellant is mainly operated by the owner with the help of a few employees. Whenever a new employee is hired, the owner provides SNAP specific training to the new employee initially upon their hire and repeats this training with long term employees on an annual basis. The owner trains employees to follow the SNAP regulations, including showing them how to process SNAP transactions, and explains that SNAP benefits are only to be used for certain food items. The owner also emphasizes the importance of following the SNAP regulations and that employees would be disciplined and/or terminated if they violate the SNAP rules. The owner also provides employees with a copy of the SNAP Retailer's Handbook. Since being authorized to participate in the SNAP, the Appellant has had only two employees (one was employed between July 2018 to September 2018 and the other has been employed since November 2018) and

none of the employees have been employed for one year. Although the owner is not always at the store to monitor store employees, he ensures that employees stay compliant and up to date on all rules.

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

- Employee training certification for two employees;
- Photos of the Appellant's food stock;
- 30 cash register receipts; and
- Photos of a competitor's food stock.

ANALYSIS AND FINDINGS

Store Characteristics

FNS authorized Little Spirit Shop as a convenience store on June 14, 2017. The case file indicates that in reaching a disqualification determination, the Retailer Operations Division considered information obtained during an October 26, 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 2,200 square feet in size with approximately 200 square feet of additional storage outside of public view that stocked alcohol and drinks;
- No shopping carts or hand-held baskets available for customer use;
- One specialty cash register for lottery ticket sales only;
- One cash register and one EBT point-of-sale (POS) device for use in ringing-up SNAP transactions;
- One checkout counter area with limited check-out counter space;
- Had 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;
- Transaction totals are not rounded up or down at the checkout counter;
- Telephone and on-line orders were not taken and delivery was not offered;
- The four most expensive foods items in stock were Nescafe coffee at \$7.99 per 7 ounces; Folgers coffee at \$6.49 per 11.3 ounces; Jack Links beef jerky at \$5.99 per 3.25 ounces; and cold cereal at two for \$5.00 (12.2 to 15 ounces each);

- No fresh or frozen meats, poultry, or seafood;
- No frozen foods other than ice cream;
- Deli meats and cheeses were not sold by the pound;
- Hot foods were not sold;
- Meat items included units of canned/potted meat, eggs, canned fish, and meat jerky;
- Dairy included milk, margarine, cheese, and sour cream;
- No fresh produce in stock;
- Other staple foods available for purchase include such items as juice, pasta, rice, cereal, flour, loaf bread, buns/rolls, tortillas, and canned goods;
- Much of the remaining food stock consists of accessory foods such as candy, carbonated and non-carbonated drinks, chips/snack foods, cookies, and condiments; and
- Ineligible nonfood items included tobacco products, health and beauty aids, paper products, household cleaning supplies, alcohol, lottery tickets, movie DVDs, sunglasses, candles, pet food, charcoal, and hats.

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. The SNAP eligible food stocked by the store was generally of a low dollar value, consisting mainly of inexpensive canned and packaged goods, snack foods, single-serving food items and accessory food items. 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 the Appellant firm'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. 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 the 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 the Appellant store during the review period. 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 24 sets of transactions (52 total transactions) 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in SNAP benefits to meet the parameters of this scan. Multiple transactions conducted by the same household account within a short period of time is a method which violating stores use to avoid single high dollar transactions that cannot be supported by a retailer's inventory and structure.

The Appellant has provided several contentions with regards to Attachment 1, including the argument that out of the 52 SNAP transactions noted in this Attachment, there are only 16 different households referenced (a small number in comparison to the many customers that frequent the store), showing that the same households are regular customers and more apt to make frequent purchases at the store. Only two of the transaction sets in this Attachment occurred 5 U.S.C. § 552 (b)(6) & (b)(7)(C) and the other transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C) of the previous transaction. The transactions that occurred 5 U.S.C. § 552 (b)(6) & (b)(7)(C) are the result of customers forgetting to purchase an item or purchasing items for a friend in a separate transaction. The number transactions that occurred per month is relative the same throughout the six month review period (except in July), showing consistency among shoppers who frequent the store multiple times within a 1 to 2 day period. Approximately 10 to 15 transactions per month is small in comparison to the numbers of monthly transactions at the firm.

With regard to these contentions, although it is not uncommon for customers to have more than one transaction per day and there are no limits on the number of times EBT cards may be used or the amount of eligible foods that may be purchased, it is not common that such multiple transactions are for large dollar amounts. The SNAP transactions noted in the Charge Letter are questionable not because they exceed any limits for use, but rather because they display characteristics of use inconsistent with the nature and extent of the Appellant's stock and facilities and are therefore, indicative of trafficking.

The Appellant contends that the store is located in an area with a large homeless population who are SNAP recipients. Since homeless persons do not have food storage or preparation areas, these EBT recipients are much more apt to take care of one another by buying things for each other using their SNAP benefits. FNS acknowledges that the Appellant firm may be located in an area with a large homeless population. However, as to whether or not co-shopping actually affected the Appellant firm during the review period, this argument is little more than conjecture. The Appellant has provided no evidence to show that co-shopping is particularly common among SNAP recipients/homeless individuals in Chula Vista, California. If co-shopping truly impacted Little Spirit Shop as the Appellant suggests, it would stand to reason that co-shopping would affect other nearby firms as well. This would manifest itself in comparable firms having similar transaction patterns – multiple transactions from the same household in a short period of time. But this is simply not the case.

The Appellant contends that it is an approximately 1,800 square convenience market and liquor store that offers a wide variety of grocery and snack foods and has a large refrigerator and freezer section. The store carries a large variety of items that would typically be found in a traditional grocery store, and also small sized items that would typically be found in a

convenience store. The Appellant contends that in addition to a large refrigerator section, it has a large freezer section with ice cream and frozen foods. The Appellant submitted numerous photos of its food stock in support of its contentions.

However, the store visit report and photos show that Little Spirit Shop offers a minimal stock of SNAP eligible foods with no fresh meats, poultry, or seafood, no frozen meats, poultry, or seafood, no fresh produce, and lacks an abundant depth and breadth of staple foods. There were no frozen foods in stock other than ice cream, most of which was single-serve units. The store visit documentation also offers no explanation as to why SNAP customers would routinely shop at Little Spirit Shop 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.

As confirmed by the food stock photos provided by the Appellant, most of the food products in Little Spirit Shop consisted of accessory food items such as snack foods, candy, and drinks and inexpensive staple foods such as canned and packaged goods. The Appellant also carries a considerable stock of ineligible nonfood items (i.e., tobacco products, health and beauty aids, paper products, household cleaning supplies, alcohol, lottery tickets, etc.). The second, third, and fourth transactions in each set are too large to consist of forgotten items. In addition to the store's limited checkout space which is unsuitable for large transactions, Little Spirit Shop has no shopping carts or hand-held baskets available to customers for transporting food within the store.

The Appellant contends that it expects that most of the SNAP households who made transactions in this Attachment live within a short driving or walking distance from the subject store and thus may frequent the store more than once per day. With regard to these contentions, sometimes a firm may have unusual transaction patterns due to a recipient's lack of access to other SNAP authorized stores. However, there are 22 SNAP authorized retailers (including 3 supermarkets and 2 super stores) located within a 1.0 mile radius of Little Spirit Shop that can meet the nutritional needs of SNAP customers. Some of these authorized SNAP stores are larger than Little Spirit Shop and offer a greater quantity and variety of food products at comparable or better prices as compared to the subject store.

The record indicates that SNAP customers who shopped at Little Spirit Shop 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 (or the availability of other food stores) does not appear to be an explanation for the Appellant's abnormally high SNAP transaction amounts conducted within a short timeframe of each other.

5 U.S.C. § 552 (b)(7)(E).

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 106 SNAP transactions, 5 U.S.C. § 552 (b)(6) & (b)(7)(C). These large transaction amounts are not consistent with the store characteristics and recorded food stock. The frequency of high dollar purchases in the review period calls into question the legitimacy of these transactions.

The Appellant has provided several contentions regarding the SNAP transactions documented in this Attachment, including an argument that the store offers a wide variety of products, ranging from snacks and drinks costing a few dollars, to larger grocery items in the high range of \$7.00 to \$10.00.

With regard to these contentions, the food stock and facilities of the Appellant as reported in the store visit documentation do not appear sufficient to provide for all of one's food needs. People generally do not spend large sums at such stores. They usually stop at convenience stores to pick up a few staple food items, such as bread, milk, or a can or two of food that they may consider are not worth a trip to the supermarket to purchase. The Appellant contends that the large transactions are not the result of trafficking of SNAP benefits. However, it is rare for a convenience store such as Little Spirit Shop to have purchases like those included in Attachment 2 to the Charge Letter. This Attachment cites 106 EBT transactions during the six month period of investigation 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

The Appellant provided numerous food stock photos in support of its contention that it offers a variety of foods at various prices. However, the FNS store visit report and photos of October 26, 2018, as well as the food stock photos provided by the Appellant, show that Little Spirit Shop offers a minimal stock of SNAP eligible foods with no fresh meats, poultry, or seafood, no frozen meats, poultry, or seafood, no fresh produce, and lacks an abundant depth and breadth of staple foods. The store visit inventory report and photos also show only a few expensive eligible foods in stock that would account for these large amounts as well as showing the store has 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 store visit report and photos also 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, no evidence of meat/seafood specials or bundles or fruit/vegetable boxes that might sell for high prices, and no evidence of a wholesale business such as posted prices or separate entrances for wholesale customers. 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. As noted earlier, the four most expensive food items in stock were Nescafe coffee at \$7.99 per 7 ounces; Folgers coffee at \$6.49 per 11.3 ounces; Jack Links beef jerky at \$5.99 per 3.25 ounces; and cold cereal at two for \$5.00 (12.2 to 15 ounces each). In addition, the Appellant stocked minimal quantities of three of these four foods (i.e., the two varieties of coffee and cereal) at the time of the store visit.

The Appellant contends that the store's customers regularly make larger purchase transactions towards the beginning of the month when their SNAP benefits have been recently replenished. Out of the 75 larger purchases listed in this Attachment, 41 were made within the first 10 days of the month, illustrating that customers are more apt to buy more quantities of food at the beginning of the month.

With regard to these contentions, although many SNAP households do shop early in the month as opposed to later in the month, most households do not spend all or a majority of their monthly benefit allotment in just one or two days, especially from a convenience store that has limited food stock, no fresh produce, and does not carry fresh or frozen meats. A government report on SNAP shopping patterns (*Analysis of EBT Benefit Redemption Patterns: Methods for Obtaining, Preparing, and Analyzing the Data*, FNS USDA, November 2005) indicates that after the first day of benefit issuance, on average, 80 percent of a household's allotment remains unspent. Even after seven days, 40 percent of benefits still remain unspent. It takes two weeks to deplete 80 percent of one's benefits, and three weeks to deplete 90 percent. Depleting one's entire allotment in one or two days, especially in a store such as Little Spirit Shop, leaving no benefits for the rest of the month, is inconsistent with the normal shopping behavior of SNAP benefit households. Rather, multiple transactions over a short period of time, especially of high dollar value, are indicative of attempts to diminish attention to signs of trafficking.

The Appellant contends that Appellant's main competitor has been in existence for many years; however, since mid-2018, it has become clear to the Appellant the local community that this store is going out of business. As a result of the competitor's dwindling inventory, the Appellant has seen an increase in overall sales and EBT transactions. In support of its contentions, the Appellant submitted photos of the competitor's food stock. The record indicates that the noted competitor store, located 0.4 miles away, was withdrawn from participation in the SNAP on April 18, 2019. While acknowledges that the noted competitor store may have closed or was in the process of closing at the time of the review period, these factors are not an indication that questionable transactions would be occurring at any given store. The subject store shows unusual transaction patterns that are not displayed in other similarly stocked stores. If specific household needs due to a closing of an area retail store are causing these questionable transactions at the subject store, it would be expected that similar patterns would also present themselves at nearby firms as well. But this is simply not the case.

The Appellant contends that of the transactions in this Attachment, only 11 purchases
5 U.S.C. § 552 (b)(6) & (b)(7)(C). 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

With regard to these contentions, the average SNAP transaction included in this Attachment
5 U.S.C. § 552 (b)(6) & (b)(7)(C). The large transactions included in this Attachment are not consistent with a convenience store in San Diego County, California. During the review period, the average transaction amount for a convenience store in San Diego County was \$6.91. The average transaction in Attachment 2 is ten (10) times larger than the average purchase amount for this store type. There is no evidence that the firm would be likely to have SNAP redemption patterns that differ considerably from similar sized competitors. These large transaction amounts are also not consistent with the Appellant store's inventory. Most of the food products in Little Spirit Shop consisted of accessory food items such as snack foods, candy, and drinks and inexpensive staple foods such as canned and packaged goods.

As noted previously, there are 22 SNAP authorized retailers (including 3 supermarkets and 2 super stores) located within a 1.0 mile radius of Little Spirit Shop that can meet the nutritional needs of SNAP customers. Some of these authorized SNAP stores are larger than Little Spirit Shop and offer a greater quantity and variety of food products at comparable or better prices as compared to the subject store. An analysis of the shopping patterns for all of the SNAP households listed in this Attachment shows that the majority of the households shopping at Little Spirit Shop have access to transportation and that all are regularly shopping at a variety of larger stores, including super stores and/or supermarkets, located nearby and at several miles distance from the Appellant's location. While Little Spirit Shop does offer some staple food items, SNAP recipients are already shopping at other larger SNAP retailers located in proximity to the Appellant's business offering a greater quantity and variety of products, including fresh meats/seafood and produce, at lower prices.

5 U.S.C. § 552 (b)(7)(E).

The burden to disprove trafficking rests with the Appellant. In this matter, insufficient evidence was advanced to support the contentions. **5 U.S.C. § 552 (b)(7)(E).**

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 Charge letter. Therefore, based on this empirical data, and in the absence of credible evidence for 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 letter of charges evidence trafficking as the most likely explanation. Nevertheless, transactions having such characteristics do sometimes have valid explanations that support that they were the result of legitimate purchases of eligible food items, and this is why opportunities are afforded to charged retailers to explain the questionable transactions cited. In this case, however, the Retailer Operations determined that the Appellant's contentions did not outweigh the evidence. Assertions that the firm has not violated program regulations, by themselves and without supporting evidence and rationale, do not constitute valid grounds for dismissal of the current charges of violations.

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.

Cash Register Receipts

In support of its contentions that the questionable SNAP transactions included in Charge Letter Attachment 2 (excessively large purchase transactions) are legitimate food purchases and not the result of trafficking of SNAP benefits, the Appellant provided FNS with 30 cash register receipts (with their coinciding EBT summary receipt). The Appellant noted mistakes regarding the receipts, which include: (1) A few receipts list a line item for ‘scratchers’, which was caused by the cashier pressing the wrong button; (2) The time stamp on the two receipts may be off by 5 U.S.C. § 552 (b)(6) & (b)(7)(C) because one cash register changes the time automatically for daylight savings while the other does not; and (3) There is 5 U.S.C. § 552 (b)(6) & (b)(7)(C) difference from when the purchase took place in the store and when the transaction hit FNS’ system.

In reference to the Appellant’s contentions regarding the times the transactions occurred against when they hit the system, according to ALERT Help, ALERT transactions are supposed to be in local store time, but FIS (the host processor for California since June 2018) sends the system the time directly from the store’s terminal. Ideally, these would be the same thing, but some stores’ terminals are mistakenly programmed to the incorrect time zone by their third-party processors. In the Appellant’s case, the terminal appears to be programmed to the Eastern Time Zone, so transaction times in ALERT reflect this.

A review of the submitted cash register receipts shows that SNAP households purchased mostly low priced items at the subject firm. The receipts list purchased items as candy, chips, soda, juice, water, and an undescribed item named “grocery”. The highest priced item listed on the receipts is a “grocery” item in the amount 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Out of the 30 cash register receipts submitted, 20 of them display a line item for sales “tax”. Per the SNAP Training Guide for Retailers, a retailer must not charge State or local sales tax on items purchased with SNAP benefits. In addition, the cash register receipts only cover approximately 27 percent of the transactions documented in Attachment 2, leaving the vast majority of transactions unaccounted for. Out of the 30 receipts submitted, none were submitted for transaction amounts 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

The receipts were also numbered by the Appellant to match the transactions listed in Charge Letter Attachment 2. However, FNS’ review of the cash register receipts questions their legitimacy as discrepancies were found. For example, for transaction #96, the cash register receipt displays a sale amount 5 U.S.C. § 552 (b)(6) & (b)(7)(C), but the accompanying EBT summary receipt displays a sale amount 5 U.S.C. § 552 (b)(6) & (b)(7)(C), which matches the Charge Letter Attachment amount. The two receipts document conflicting transaction amounts. In the same fashion, for transaction #75, the cash register receipt displays a total sale amount 5 U.S.C. § 552 (b)(6) & (b)(7)(C) (and is also charging tax), yet the EBT summary receipt and Charge Letter Attachment amount display a sale amount 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

Similarly, to evidence transaction #132, the Appellant submitted two cash register receipts--#1 with a sale amount 5 U.S.C. § 552 (b)(6) & (b)(7)(C) and cash register receipt number #2 includes a sole sale amount 5 U.S.C. § 552 (b)(6) & (b)(7)(C). When combined they equal 5 U.S.C. § 552 (b)(6) & (b)(7)(C), which is different from the coinciding EBT summary receipt

and the Charge Letter Attachment which both total 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Consequently, the Retailer Operations Division ran a transaction report in ALERT to ascertain if a sale or refund transaction was conducted in the amount 5 U.S.C. § 552 (b)(6) & (b)(7)(C) on the date of the transaction (5 U.S.C. § 552 (b)(6) & (b)(7)(C)). The report indicates that no transaction in the amount 5 U.S.C. § 552 (b)(6) & (b)(7)(C) was conducted on that date. It is also speculative that the Appellant sells any items costing 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Based on these discrepancies, it is likely that the cash register receipts were contrived in an effort to support the Appellant's contentions. The cash register receipts provided by the Appellant do not validate that the transactions in Attachment 2 were legitimate and not the result of trafficking of SNAP benefits.

Computer Generated Analysis

The Appellant contends that as no transactions were noted for July 2018 in either Attachment, this calls into question the accuracy and validity of the method FNS has of gathering the transactions reflected in the Attachments.

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 256,516 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 charges are solely based upon numbers generated by a computer program and are speculative is not compelling.

No Prior Violations

The Appellant contends that the firm has been participating in the SNAP for two years without being cited for prior SNAP violations. However, a record of participation in the SNAP with no previously documented violations does not constitute valid grounds for mitigating the impact of the present serious determination of trafficking.

Financial Hardship

The Appellant contends that a permanent SNAP disqualification will impose a financial hardship on the firm and will possibly force it to close. However, there is no provision in the SNAP regulations or internal agency policy directives for waiver or reduction of an administrative penalty assessment on the basis of possible economic hardship to the firm resulting from imposition of such penalty. To allow store ownership from being excused from assessed administrative penalties based on purported economic hardship to the firm would render virtually meaningless the enforcement provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of the USDA.

Moreover, giving special consideration to economic hardship to the firm would forsake fairness and equity, not only to competing stores and other participating retailers who are complying fully with program regulations, but also to those retailers who have been disqualified from the program in the past for similar violations. Therefore, the Appellant's contention that the firm may incur economic hardship based on the assessment of an administrative penalty does not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

Reconsideration of Penalty

The Appellant requests that FNS consider imposing a lesser period of SNAP disqualification. However, the Food and Nutrition Act of 2008, at § 2021, does not allow for discretion in determining sanctions for trafficking and is specific in its requirement that "... a disqualification . . . shall be permanent upon ... the first occasion or any subsequent occasion of a disqualification based on the purchase of coupons or trafficking in coupons or authorization cards by a retail food store or wholesale food concern or a finding of the unauthorized redemption, use, transfer, acquisition, alteration, or possession of EBT cards ...". In keeping with this legislative mandate, 7 CFR § 278.6(e)(1)(i) of the SNAP regulations states that FNS shall disqualify a firm permanently if personnel of the firm have trafficked.

CIVIL MONEY PENALTY

The Appellant requests that a trafficking civil money penalty be imposed in lieu of a permanent SNAP disqualification as it meets the four criteria listed in Section 278.6(i) of the SNAP regulations. The Appellant is mainly operated by the owner with the help of a few employees.

Whenever a new employee is hired, the owner provides SNAP specific training to the new employee initially upon their hire and repeats this training with long term employees on an annual basis. The owner trains employees to follow the SNAP regulations, including showing them how to process SNAP transactions, and explains that SNAP benefits are only to be used for certain food items. The owner also emphasizes the importance of following the SNAP regulations and that employees would be disciplined and/or terminated if they violate the SNAP rules. The owner also provides employees with a copy of the SNAP Retailer's Handbook. Since being authorized to participate in the SNAP, the Appellant has had only two employees (one was employed between July 2018 to September 2018 and the other has been employed since November 2018) and none of the employees have been employed for one year. Although the owner is not always at the store to monitor store employees, he ensures that employees stay compliant and up to date on all rules.

In the January 30, 2019 Charge Letter the Appellant was informed by the Retailer Operations Division that, under certain conditions, FNS may impose a civil money penalty (CMP) of up to \$59,000 in lieu of permanent disqualification of a firm for trafficking. Per Section 278.6(i) of the SNAP regulations, four criteria must be met in order to be considered for a trafficking civil money penalty. If requesting a trafficking CMP, an Appellant must meet each of the four criteria listed and provide the documentation as specified within ten days of the Appellant's receipt of their Charge Letter. As specified in 7 CFR § 278.6(i), in determining the minimum standards of eligibility of a firm for a civil money penalty in lieu of trafficking, the firm shall, at a minimum, establish by substantial evidence its fulfillment of each of the following four criteria:

Criterion 1. The firm shall have developed an effective compliance policy as specified in 7 CFR § 278.6(i)(1);

Criterion 2. The firm shall establish that both its compliance policy and program were in operation at the location where the violation(s) occurred prior to the occurrence of violations cited in the Charge Letter;

Criterion 3. The firm had developed and instituted an effective personnel training program as specified in 7 CFR § 278.6(i)(2); and

Criterion 4. Firm ownership was not aware of, did not approve, did not benefit from, or was not in any way involved in the conduct or approval of trafficking violations.

If the Appellant's request for a trafficking CMP and the required documentation are not submitted on time, it will lose its right for any further consideration for a trafficking CMP. The SNAP regulations are specific at 7 CFR §278.6(b)(2)(iii) that "if a firm fails to request consideration for a civil money penalty in lieu of a permanent disqualification for trafficking and submit documentation and evidence of its eligibility within the 10 days specified, the firm shall not be eligible for such a penalty". The regulations do not provide the agency discretion to extend the time within which documentation and evidence in support of a trafficking civil money penalty may be submitted.

In the reply to the Charge Letter, the Appellant, through counsel, requested consideration of a civil money penalty in lieu of permanent SNAP disqualification. In support of its request, the Appellant provided FNS with signed employee training certifications for two employees. One employee was hired on July 1, 2018 and the second employee was hired on November 1, 2018.

The Retailer Operations Division determined that the Appellant was not eligible for a trafficking civil money penalty in lieu of a disqualification under 7 CFR § 278.6(i) because the Appellant failed to submit sufficient evidence to demonstrate that the firm had established and implemented an effective compliance policy and program to prevent SNAP violations. 5 U.S.C. § 552 (b)(7)(E).

Therefore, the Retailer Operations Division's decision not to impose a civil money penalty in lieu of disqualification is sustained as appropriate pursuant to 7 CFR § 278.6(i).

CONCLUSION

The Retailer Operations Division's analysis of the Appellant's EBT transaction record, upon which charges of violations are based, together with observations made during the store visit and an analysis of customer shopping behaviors, provide substantial evidence that questionable transactions during the focus period have characteristics and display patterns that are not consistent with legitimate sales of eligible food to SNAP benefit customers at a store of this type, size and makeup. Rather, the characteristics are indicative of illegal trafficking in program benefits. The Appellant's contentions do not outweigh this evidence.

The record has yielded no indication of error or discrepancy in the reported findings by the Retailer Operations Division that program benefits were accepted in exchange for cash or consideration other than eligible food. Therefore, based on a review of the evidence in this case, it is more likely true than not true that program violations did, in fact, occur as charged. Therefore, the decision to impose a permanent disqualification from participation in the SNAP against Little Spirit Shop 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

August 20, 2019