

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

**Marisol Bakery,**

**Appellant,**

**v.**

**Retailer Operations Division,**

**Respondent.**

**Case Number: C0201682**

**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 Marisol Bakery (hereinafter “Marisol Bakery” or “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 Marisol Bakery.

**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 October 18, 2017, the Retailer Operations Division informed the Appellant that Marisol Bakery 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." The letter also noted that the Appellant could request a trafficking civil money penalty (CMP) in lieu of a permanent disqualification within 10 days of receipt under the conditions specified in 7 CFR § 278.6(i).

The record indicates that via a letter dated October 26, 2017, the Appellant's counsel requested information and documents from FNS with regard to the agency's case against Marisol Bakery pursuant to the Freedom of Information Act (FOIA). In a letter dated January 8, 2018, FNS provided the Appellant's counsel with a response to the initial FOIA request. The Appellant's counsel appealed the FOIA request in a letter received by FNS on February 8, 2018. In a letter dated September 14, 2020, FNS provided the Appellant's counsel with a response to the FOIA appeal. On September 16, 2020, the Retailer Operations Division sent a 10 day letter to counsel providing the opportunity to respond to the letter of charges.

In a response to the Retailer Operations Division of September 23, 2020, the Appellant, through counsel, replied to the charges therein denying the trafficking allegations and providing various explanations for the SNAP transactions outlined in the October 18, 2017 charge letter. One of the Appellant's contentions was the claim that the firm sells expensive cakes, cheese cakes, and pastry trays. The Retailer Operations Division subsequently requested, in a letter dated September 24, 2020, that the Appellant provide sales receipts for bakery specialty items dated during the review period. On October 2, 2020, the Appellant, through counsel, submitted the requested sales receipts.

After considering the Appellant's replies and the evidence in the case, the Retailer Operations Division issued a determination letter dated November 13, 2020, informing the Appellant that Marisol Bakery 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 November 20, 2020, 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 December 1, 2020.

## **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 February 2017 through July 2017. This involved the following SNAP transactions patterns which are indicative of trafficking:

- There were multiple transactions made from the accounts of individual SNAP households in unusually short timeframes; and
- There were excessively large EBT purchase transactions made from SNAP 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 and in the administrative review request, the Appellant, through counsel, stated the following summarized contentions, in relevant part:

- With regard to the SNAP transactions documented in charge letter Attachment 1, the Appellant cannot prevent an individual from using his or her benefits at any time of his or her choosing or in the manner of his or her choosing. There are times when one member of the family lends his account to another member of the family, which results in multiple short term withdrawals. Also, there are customers who have life issues and are not as organized and skilled as the average individual. The owner has personally observed situations where that person will complete a transaction and shortly thereafter engage in another transaction or a series of transactions because of the person's inability to conceptualize in a clear and rational manner what is needed to sustain him or her through a longer time period. There is nothing out of the ordinary in that scenario.

- With regard to the SNAP transactions documented in charge letter Attachment 2, there are several explanations for these. First, the Appellant is mostly a bakery which sells a variety of quality items that can be expensive. For example, the most inexpensive cheesecake in the bakery costs \$6.00. From that price point the cost of one cheesecake can rise to \$45.00. The smallest pastry tray sells for \$35.00 and custom orders of pastry trays could run up to \$100.00. Therefore, it is no surprise that some of the transactions that seemed excessively large were in fact ordinary payments for quality bakery confections. In addition to the bakery the Appellant has a deli which is well stocked with a substantial variety of goods that in some cases are relatively costly. Salami sells for \$8.00 per pound, mortadella goes for \$10.00 per pound, and cheese is \$5.00 per pound. A pound of salami, a pound of cheese, and a pound of mortadella results in a tab of \$23.00. Add a large bag of chips, a two-liter bottle of soda, and a loaf of bread and the final cost to the customer is in excess of \$30.00. Secondly, the pricing structure in a small grocery store/bakery is very different from the pricing in a very large supermarket. The large market counts on volume to make a reasonable return on capital. The small grocery store/bakery's business model requires a substantial mark-up on its inventory in order to justify the investment in the store. According to a well-respected study, the National Association of Convenience Stores (NACS) State of the Industry Annual Report, 2022 Data, the typical mark-up for SNAP eligible items in a small store is 65 percent. The owner estimates that the local New Britain market supports a mark-up of 100 percent. A mark-up of that size will result in a series of larger than expected sales. A higher price point necessarily produces seemingly excessively large purchases. Finally, a review of the transactions in this Attachment reveals that the large sales generally occur in the first few days of the month. Most SNAP recipients will deplete 90 percent of their benefits within three weeks of receiving them. The end result is that during the last week of each month the family is forced to live on 10 percent of its benefits or go hungry. Not surprisingly, upon his or her benefits at the beginning of the next month the recipient stocks up on his or her larder for the next period of want. That process of replenishing the pantry must of course engender larger than normal purchases.
- The relevant Federal regulations, 7 CFR 271-282, allow a disqualification of the Appellant where there is a . . . clear and repetitive pattern of unusual, irregular, and inexplicable activity. It is black letter law that a vendor ". . . has a property interest in continued participation in the food stamp program and cannot be deprived of this interest without due process." Ibrahim v. US Through Dept. of Agriculture, 650 F. Supp. 163, (Dist. Court, ND New York 1987). It is further undisputed law that an administrative penalty imposed by USDA FNS must be set aside if it is arbitrary or capricious. McGlory v. United States, 763 F.2d 309 (1985); Ramirez v. United States 514 F. supp. 759, 763 (1981).
- The factual predicate for a finding of trafficking does not exist and a permanent disqualification is both unwarranted and a violation of the regulations and case law. A careful review of the evidence and rationale provided by the Appellant demonstrates by a preponderance of the evidence that the disqualification should be reversed. The allegedly unusual, irregular and inexplicable activity is in fact regular, usual and has been appropriately explained.

In support of these contentions, the Appellant, through counsel, submitted for review seven (7) sales receipts for bakery items purchased during the six month review period.

## **ANALYSIS AND FINDINGS**

### **SNAP Authorization**

FNS authorized Marisol Bakery for participation in the SNAP on September 16, 2016. During the review period of February 2017 through July 2017, Marisol Bakery was classified as a bakery specialty store. The owner signed a SNAP application for the store and acknowledged he was aware of the SNAP regulations and understood those regulations. That application included a certification and confirmation that the owner would “accept responsibility on behalf of the firm for violations of the SNAP regulations, including those committed by any of the firm’s employees, paid or unpaid, new, full-time or part-time.” The violations listed on this certification include accepting SNAP benefits in exchange for cash, otherwise known as trafficking, and other violations such as accepting SNAP benefits as repayment on credit accounts or in exchange for ineligible items.

### **Store Visit Observations**

The case file indicates that in reaching a disqualification determination, the Retailer Operations Division considered information obtained during a July 12, 2017 store visit conducted by a FNS contractor to observe the nature and scope of the firm’s operation, stock, and facilities. This information obtained from the store visit was also used to ascertain if there were justifiable explanations for the firm’s irregular SNAP transactions. The store visit report and photographs documented the following store size, description, and characteristics:

- Approximately 1,000 square feet in size with no storage outside of public view;
- Had a small chest freezer which stocked ice cream, pre-packaged meat and shrimp;
- 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;
- One small checkout counter area with limited check-out counter space;
- No optical scanners;
- No signs posted or flyers available advertising the availability of bulk foods offered at a discounted rate to include meats in bulk, foods sold by the case, and grocery package deals;
- No meat/seafood specials or bundles or fruit/vegetable boxes that might sell for high prices;
- No evidence of a wholesale business such as posted prices or separate entrances for wholesale customers;
- Did not have an unusual price structure, such as ending most product prices with \$x.00 cents;
- Transaction totals were not rounded up or down at the checkout counter;
- Telephone and on-line orders were not taken and delivery was not offered;

- Only three expensive (priced at \$5.00 or more) SNAP-eligible food items in stock which were large prepared cakes at \$20.00 per 1 large cake; beef steaks at \$9.03 per 1.81 pounds; and Folgers coffee at \$8.99 per 31.1 ounces;
- No fresh meats, poultry, or seafood;
- A limited variety and amount of frozen meats (2 varieties) and seafood (1 variety); No frozen poultry;
- No additional frozen foods in stock;
- Had a kitchen and hot foods were sold;
- Had a deli and prepared, made-to-order sandwiches were sold; No signage indicating that deli meats and cheeses were sold by the pound;
- Meat items included units of canned fish, canned/potted meat, and eggs;
- Dairy included milk, butter/margarine, yogurt, and cheese;
- Fresh produce stock consisted of a few tomatoes and heads of lettuce;
- Other staple foods available for purchase included such items as juice, pasta, rice, cereal, loaf bread, and canned goods;
- Much of the remaining food stock consisted of accessory foods such as candy, carbonated and non-carbonated drinks, sugar, vegetable oil, and coffee; and
- No significant amounts of ineligible nonfood items.

The available inventory of SNAP eligible food at the time of the store visit showed food stock that would be typical of a bakery specialty 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.

The Retailer Operations Division presented a case that the Appellant trafficked SNAP benefits. Each Attachment furnished with the charge letter represents the questionable and unusual patterns of SNAP transactions indicative of trafficking which were conducted at the Appellant during the review period. A singular transaction could appear in more than one Attachment as it can meet the criteria for several different types of flags. 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 62 sets of transactions (168 total transactions) **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** in SNAP benefits to meet the parameters of this scan. These

transactions were conducted by numerous different SNAP households. 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 contends that it cannot prevent an individual from using his or her benefits at any time of his or her choosing or in the manner of his or her choosing. There are times when one member of the family lends his account to another member of the family, which results in multiple short term withdrawals. Also, there are customers who have life issues and are not as organized and skilled as the average individual. The owner has personally observed situations where that person will complete a transaction and shortly thereafter engage in another transaction or a series of transactions because of the person's inability to conceptualize in a clear and rational manner what is needed to sustain him or her through a longer time period. There is nothing out of the ordinary in that scenario.

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.

**5 U.S.C. § 552 (b)(7)(E).**

The report and photographs from the store visit offer no explanation as to why SNAP customers would routinely shop at Marisol Bakery 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. In addition, there was a small checkout area with one cash register and one EBT POS device for ringing-up SNAP transactions. There were no shopping carts or hand-held baskets at the time of the store visit available to customers for transporting food within the store. There were no optical scanners or conveyor belts to expedite high dollar or rapid consecutive purchases.

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 in New Britain, Connecticut. If co-shopping truly impacted Marisol Bakery, 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.

It is recognized that sometimes a firm may have unusual transaction patterns due to a recipient's lack of access to other SNAP authorized stores. However, there are 20 SNAP authorized retailers, including 4 supermarkets and 3 super stores, located within a 2.0 mile radius of Marisol Bakery that can meet the nutritional needs of SNAP customers. Some of these authorized SNAP



stores are larger than Marisol Bakery and offer a greater quantity and variety of food products at comparable or better prices as compared to the subject store. Included in these 20 noted SNAP authorized retailers are two (2) bakery specialty stores which sell a comparable or greater quantity and variety of food products and baked goods as compared to Marisol Bakery.

The record indicates that SNAP customers who shopped at Marisol Bakery 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.

Unfortunately, the Appellant has not provided any evidence to show that the transactions listed in this Attachment were legitimate purchases of eligible foods. The Appellant provided no arguments or evidence to substantiate its claim that trafficking did not occur. The Appellant has the burden to provide relevant evidence to rebut the trafficking charges. This burden has not been met.

### **Excessively Large Transactions (Charge Letter Attachment 2)**

This charge letter Attachment documents 304 SNAP transactions, **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. These large transaction amounts are not consistent with the store's observed characteristics and food inventory. The frequency of high dollar purchases in the review period calls into question the legitimacy of these transactions.

The Appellant has provided several contentions with regard to the transactions documented in Attachment 2, including a claim that the firm is mostly a bakery which sells a variety of quality items that can be expensive. For example, cheesecakes are priced at \$6.00 to \$45.00 and pastry trays sell for \$35.00 to \$100.00. In addition, the Appellant has a deli which is well stocked with a substantial variety of goods that in some cases are relatively costly. Salami sells for \$8.00 per pound, mortadella goes for \$10.00 per pound, and cheese is \$5.00 per pound. A pound of salami, a pound of cheese, and a pound of mortadella results in a tab of \$23.00. Add a large bag of chips, a two-liter bottle of soda, and a loaf of bread and the final cost to the customer is in excess of \$30.00. In support thereof, the Appellant submitted seven (7) sales receipts for bakery items purchased during the six month review period.

The store visit report and photos indicate that the Appellant's staple food inventory is minimal and the firm sells mostly baked goods and prepared, made-to-order sandwiches. The kitchen and dining area for on-site food consumption takes up most of the floor space of the store. Marisol Bakery is not set up to provide for all of one's food needs with no fresh meats, poultry, or seafood, a minimal variety and amount of frozen meats and seafood, no frozen poultry or other additional frozen foods, a minimal variety and amount of fresh produce, and a lack of 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.

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. The store visit report and photos indicate that Marisol Bakery is approximately 1,000 square feet in size with no additional storage area outside of public view. It is irregular for bakery specialty stores to have purchases such as those cited, especially when Marisol Bakery stocks only a few high priced food items so the majority of the food items stocked at the store are low priced items.

The store visit observations indicate that the firm did not have prices posted for bakery or deli items/meats. There were only three expensive (priced at \$5.00 or more) SNAP-eligible food items in stock which were large prepared cakes at \$20.00 per 1 large cake; beef steaks at \$9.03 per 1.81 pounds; and Folgers coffee at \$8.99 per 31.1 ounces. While SNAP customers may, on a rare occasion, purchase expensive baked goods and/or deli meats at the Appellant, it is highly suspicious that SNAP households would conduct repeated, large transactions at the store on a regular basis, especially when there are larger well-stocked stores with superior inventory located nearby. When one considers that SNAP benefit allotments are calculated to provide households with a bare minimum of food security, it is unreasonable to believe that households would spend a large majority of their monthly benefit allotments at a bakery specialty store that sells primarily baked goods and sandwiches.

The Retailer Operations Division requested that the Appellant submit receipts for cake and pastry orders dated during the review period, to confirm the pricing and volume of sales. In response, the Appellant submitted seven (7) sales receipts for bakery item purchases (Note: The Appellant submitted eight (8) receipts; however, one (1) was a duplicate receipt). A search of FNS ALERT data determined that two of these bakery purchases were paid for with SNAP benefits. However, the remaining five purchases could not be verified as SNAP purchases based on the information provided by the Appellant.

The Appellant contends that the pricing structure in a small grocery store/bakery is very different from the pricing in a very large supermarket. The small grocery store/bakery's business model requires a substantial mark-up on its inventory in order to justify the investment in the store. According to a well-respected study, the typical mark-up for SNAP eligible items in a small store is 65 percent. The owner estimates that the local New Britain market supports a mark-up of 100 percent. A mark-up of that size will result in a series of larger than expected sales.

#### 5 U.S.C. § 552 (b)(7)(E).

The Appellant contends that large sales generally occur in the first few days of the month. Most SNAP recipients will deplete 90 percent of their benefits within three weeks of receiving them. The end result is that during the last week of each month the family is forced to live on 10 percent of its benefits or go hungry. Not surprisingly, upon his or her benefits at the beginning of the next month the recipient stocks up on his or her larder for the next period of want. That process of replenishing the pantry must of course engender larger than normal purchases.

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 bakery specialty store like the Appellant firm that has a minimal food stock, little fresh produce and does not carry fresh meats, poultry, or seafood. A February 2011 Final Report entitled “Benefit Redemption Patterns in the Supplemental Nutrition Assistance Program”, USDA FNS, revealed that households most often redeemed their benefits at supermarkets and super stores with only 4% of all households never shopping in a supermarket or super store. Thus, when a supermarket or super store is available, it is highly unlikely that a SNAP recipient would conduct multiple transactions within a limited period of time or excessively large SNAP transactions at a bakery specialty store like Marisol Bakery with a minimal selection of staple foods.

While the Appellant firm may be located in a neighborhood with households that qualify for SNAP benefits, 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 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.

**5 U.S.C. § 552 (b)(7)(E).**

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.

The USDA employs a computerized fraud detection tool to identify EBT transactions that form patterns that have characteristics indicative of trafficking. However, this tool does not, by itself, determine or conclude that trafficking has occurred. The Retailer Operations Division analyzes the transaction data and patterns along with other documentation such as, information from the onsite store visit report including photographs of stock and the store layout, an analysis of recipient shopping behavior, and comparisons with similar store types in local area, to render a determination as to whether or not the questionable transaction patterns were, more likely than not, the result of trafficking. The regulations at 7 CFR § 278.6(a) state that FNS may disqualify any authorized retail food store if the firm fails to comply with the Food and Nutrition Act of 2008, as amended, and that such disqualification shall result from a finding of a violation on the basis of evidence that may include facts established through, inconsistent redemption data, and evidence obtained through a transaction report under an electronic benefit transfer system.

Based on the discussion above 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. As noted herein, the Appellant has the burden of providing credible, relevant evidence, which a reasonable mind, considering the record as a whole, would accept as sufficient to support a conclusion that the argument asserted is more likely to be true than not true. This burden has not been met.

### **Due Process/Case Laws**

The Appellant contends that relevant Federal regulations, 7 CFR 271-282, allow a disqualification of the Appellant where there is a . . . clear and repetitive pattern of unusual, irregular, and inexplicable activity. It is black letter law that a vendor ". . . has a property interest in continued participation in the food stamp program and cannot be deprived of this interest without due process." Ibrahim v. US Through Dept. of Agriculture, 650 F. Supp. 163, (Dist. Court, ND New York 1987). It is further undisputed law that an administrative penalty imposed by USDA FNS must be set aside if it is arbitrary or capricious. McGlory v. United States, 763 F.2d 309 (1985); Ramirez v. United States 514 F. supp. 759, 763 (1981).

The Appellant replied to the charges in writing, denying the charge of trafficking and offering various explanations and evidences for the questionable transactions. After considering the evidence of the case and the Appellant's replies, the Retailer Operations Division determined that a permanent disqualification was warranted. The action was not arbitrary or capricious as it followed the agency's due process procedures which are two-fold in nature. First, the retailer is afforded an opportunity to reply to the charges as specified by the Retailer Operations Division; the Appellant, through counsel, has availed itself of this first aspect of the due process procedures in the form of written replies to the Retailer Operations Division. The second level of due process involves an administrative review, of which the Appellant, through counsel, has likewise availed itself and in the process of which the Appellant was granted an additional three (3) weeks within which additional information may be provided in support of the request for review.

The purpose of the administrative review process is to ensure that firms aggrieved by FNS's adverse actions have the opportunity to have their position fairly considered by an impartial reviewing authority prior to that adverse action becoming final. The Appellant has been duly given, and has taken, the opportunity to present to USDA through the administrative review process whatever evidence and information it deems as pertinent in support of its position that the Retailer Operations Division's adverse action should be reversed. Therefore, any evidence and information that the Appellant presented to the Retailer Operations Division, as well as any such information submitted subsequently, have now been considered in this administrative review in rendering the final agency administrative decision in this case. The record does not indicate any departure from established policy or procedures with regard to the Appellant's right to a fair and thorough review. The Appellant has exercised its opportunity to reply to the charge

letter and its administrative review rights, and by doing so has availed itself of the full complement of the agency's statutory obligations with regard to due process.

With regard to the case laws cited by the Appellant, it is beyond the scope and authority of this review to determine the applicability of same. This review is limited to consideration of whether or not the Retailer Operations Division duly adhered to the Food and Nutrition Act of 2008, as amended, and the implementing regulations, and whether or not the action taken is sustainable by a preponderance of the evidence. Therefore, the application of any judicial precedent is better addressed via judicial review. Accordingly, no further findings or conclusions are rendered in this regard.

### **CIVIL MONEY PENALTY**

As previously indicated, the November 13, 2020 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 October 18, 2017 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 Marisol Bakery 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

January 19, 2021