

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

Max Mart 1 Llc #1,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0218244

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 Max Mart 1 Llc #1 (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 Max Mart 1 Llc #1 on August 27, 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 July 16, 2019, the Retailer Operations Division informed the Appellant that Max Mart 1 Llc #1 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).

In responses to the Retailer Operations Division of July 19, 2019, July 22, 2019, July 25, 2019, and August 26, 2019, the Appellant, through counsel, replied to the charges therein denying the trafficking allegations. The Appellant has never received any prior warnings from USDA nor has it ever been found to be in violation of the SNAP regulations. Attempting to dispute the allegations of trafficking is difficult for the Appellant as video evidence of activities in the store is only kept for 30 days and then it is automatically expunged. Therefore, video tape from the review period has been expunged. Also, recorded information on transactions is generalized in nature ("groceries" for example) and offers little, if any, support for what our client believes actually occurred with respect to purchases by customers from the nearby neighborhood. In May, 2019, the owner began negotiating for the sale of the business. On July 31, 2019, Max Mart 1 Llc entered into an arms-length Asset Purchase Agreement with another store owner/limited liability corporation. The closing on this sale of all assets of the Appellant firm occurred on August 15, 2019. The Appellant will be entering into dissolution proceedings in the near future.

After considering the Appellant's replies and the evidence in the case, the Retailer Operations Division issued a Determination Letter dated August 27, 2019, informing the Appellant that Max Mart 1 Llc #1 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 September 9, 2019, 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 October 3, 2019. In letters dated October 7, 2019 and November 5, 2019, the Appellant, through counsel, provided additional information in support of its request for administrative review.

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 August 2018 through January 2019. This involved the following SNAP transactions patterns which are indicative of trafficking:

- There were multiple transactions made from one or more SNAP households within a short timeframe;
- There were multiple transactions made from the accounts of individual SNAP households within a set time period; and
- There were EBT transactions conducted 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 replies to the Charge Letter, in the administrative review request, and in subsequent correspondence, the Appellant, through counsel, stated the following summarized contentions, in relevant part:

- The Appellant denies the trafficking allegations.
- The Appellant has never received any prior warnings from USDA.
- The Appellant has never been found to be in violation of the SNAP regulations.
- On or about March, 2017, the store owner purchased the inventory and good will of the store located at the Appellant firm address. Prior to March, 2017, the store owner was in the automated teller machine and credit card processing business and from this business, knew the former store owner. Despite having no experience in the grocery business, the

owner purchased the inventory and good will of the former store. The owner counted on the experienced employees of the former store to help him effectively run the business. The owner became aware of the significance of the SNAP and WIC programs and requested each employee at the Appellant store to sign an Employee Ethical Business Practices Acknowledgement.

- In May, 2017, the owner also purchased a second store, a convenience store/gas station (“5 U.S.C. § 552 (b)(6) & (b)(7)(C)”), but ultimately sold it in February, 2018. In October, 2017, the owner purchased another store which became 5 U.S.C. § 552 (b)(6) & (b)(7)(C). 5 U.S.C. § 552 (b)(6) & (b)(7)(C) had a significant meat market business and customers purchased substantial quantities of meat packs whenever they first received their monthly SNAP benefits. Meat packs at 5 U.S.C. § 552 (b)(6) & (b)(7)(C) ranged from \$39.99 to \$149.99 and it was not uncommon for SNAP customers to buy multiple meat packs.
- Sales of meat packs were so successful at 5 U.S.C. § 552 (b)(6) & (b)(7)(C) that in approximately July or August 2018, the owner also began offering the sale of meat cases out of coolers at the Appellant firm. SNAP customers were also requesting that the Appellant sell meat packs because it was difficult for many residents to secure transportation to shop at 5 U.S.C. § 552 (b)(6) & (b)(7)(C). It was discovered over time, however, that the display cases for the Appellant were inadequate compared to 5 U.S.C. § 552 (b)(6) & (b)(7)(C) and there was a great deal of waste of product which led to the ceasing of meat sales in approximately January, 2019.
- Attempting to dispute the allegations of trafficking is difficult for the Appellant as video evidence of activities in the store is only kept for 30 days and then it is automatically expunged. Therefore, video tape from the review period has been expunged. Also, recorded information on transactions is generalized in nature ("groceries" for example) and offers little, if any, support for what our client believes actually occurred with respect to purchases by customers from the nearby neighborhood.
- With regard to the transactions documented in Charge Letter Attachment 1, the randomly selected purchase receipts provided for transactions 7, 8, 21, 22, 23, 24, 27, 28, 43, and 44 represent legitimate transactions where the SNAP customer was likely purchasing meat packs or potentially Similac infant formula. The Appellant had no "meat counter" category at the register for meat packs so meat pack purchases fall under a “grocery” designation.
- With regard to the transactions documented in Charge Letter Attachment 2, the randomly selected purchase receipts provided for transactions 62, 63, 68, 69, 72, 73 and 74 clearly identify the items purchased by SNAP consumers and total exactly the amounts shown in the Charge Letter. These items set forth in the Charge Letter were meant to be illustrative of multiple purchases on the same day that caused USDA to conclude this was evidence of trafficking. These transactions prove nothing of the sort and instead represent clearly that a person or persons on the SNAP program made multiple legitimate purchases on the same day.
- With regard to the transactions documented in Charge Letter Attachment 3, the purchase receipts provided for transactions 148, 149, 173, 175, 190, 194, 210, 218, 242, 243, 261, 266, and 270 support the factual conclusion that people with SNAP benefits were using those benefits exactly as intended and there is no evidence of fraud or trafficking.

- In May, 2019, the owner began negotiating for the sale of the business. On July 31, 2019, which closing occurred on August 15, 2019, Max Mart 1 Llc entered into an arms-length Asset Purchase Agreement with another store owner/limited liability corporation. The owner is therefore not involved with the SNAP Program in any form or fashion.

In support of these contentions, the Appellant submitted the following documents for review:

- Affidavit of store owner;
- Employee Ethical Business Practices Acknowledgement signed by one employee on February 8, 2018;
- Photos of outside of store and food stock;
- Three cash register receipts from 5 U.S.C. § 552 (b)(6) & (b)(7)(C) dated June 11, 2019; and
- 30 sample cash register receipts from the subject firm.

ANALYSIS AND FINDINGS

Store Characteristics

FNS authorized Max Mart 1 Llc #1 as a convenience store on June 12, 2017. The case file indicates that in reaching a disqualification determination, the Retailer Operations Division considered information obtained during an April 25, 2019 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 1,500 square feet in size and approximately 375 square feet of additional storage outside of public view that stocked predominantly drinks;
- No shopping carts and one hand-held basket available for customer use;
- One cash register and two EBT point-of-sale (POS) devices 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;

- A WIC Program vendor and sold infant foods and formula;
- The four most expensive food items in stock were Similac Advanced infant formula at \$21.86 per 12.4 ounces; Similac Neosure infant formula at \$21.53 per 13.1 ounces; Neoport Pacific whiting at \$13.99 per 80 ounces (2 units in stock); and Banquet fried chicken at \$11.99 per 29 ounces (5 units in stock);
- No fresh meats, poultry, or seafood;
- Frozen meats, poultry, and seafood included a few units (each) of beef patties, sausage, whiting, and processed chicken;
- Frozen foods included such items as pizza, hamburgers, taco puffs, Hot Pockets, meals, and a minimal variety and amount of vegetables;
- No kitchen and hot foods were not sold;
- Deli meats and cheeses were not sold by the pound;
- Meat items included units of canned/potted meat, canned fish, packaged lunch meat, turkey bacon, sausage, and meat jerky;
- Dairy included milk, butter, cheese, sour cream, and yogurt;
- Fresh produce included a few (each) of tomatoes, oranges, lemons, lettuce, green peppers, avocados, potatoes, and onions;
- Other staple foods available for purchase include such items as juice, pasta, cereal, baking mix, loaf bread, corn meal, flour, tortillas, buns/rolls, and canned goods;
- Much of the remaining food stock consists of accessory foods such as candy, carbonated and non-carbonated drinks, snack foods, sugar, coffee, and condiments; and
- Ineligible nonfood items included tobacco products, health and beauty aids, paper products, household cleaning supplies, automotive supplies, jewelry, clothing, cell phone accessories, lottery tickets, and pet food.

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.

Stores caught in trafficking violations consistently display particular characteristics or patterns of transactions, including 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.

Multiple Transactions from One or More Households (Charge Letter Attachment 1)

There are 42 SNAP transactions (21 transaction sets) 5 U.S.C. § 552 (b)(6) & (b)(7)(C) that met the parameters of this Charge Letter Attachment. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). These types of rapid transactions at a firm with only one register and limited counter space are indicative of trafficking in EBT benefits.

The Retailer Operations Division considered these transactions to be a strong indicator of trafficking because the second purchase of items would have to be transported to the counter area without shopping carts and only one hand-held basket available for customer use. When considering the time required to process a legitimate purchase and the numerous steps involved, to include the cashier's handling of individual items to determine the price which can involve manual keying of amounts, bagging the items for carry out, and processing the transaction, these multiple purchase transactions appear to have been made too rapidly to be credible and are indicative of trafficking. The Appellant has one cash register in which to process SNAP transactions.

It is reasonable to expect the subsequent purchase to be for a nominal amount because it is quite rare to find very expensive items positioned at the checkout area, especially in smaller stores. However, in each of the Exhibits, the subsequent transaction was for amounts that exceed any nominal, afterthought purchase. In 20 of the 21 transaction sets, the amounts of subsequent transactions exceeded (5 U.S.C. § 552 (b)(6) & (b)(7)(C)) the preceding transaction amount. Additionally, while it is possible that customers shop together, it is improbable that they would use just one card if they were both SNAP recipients. If forgotten items are not added into the total, it is implausible that they would merely swipe the EBT card a second time to include those items without totaling them, which would take more than a few seconds to complete the entire transaction. However, many of the violations listed in this Attachment followed a transaction by a different household. The second transaction in 14 of the 21 sets of violations were conducted by a household different from that which made the first transaction in each set.

The Appellant contends that in approximately July or August 2018, the owner began offering the sale of meat packs at the Appellant firm. SNAP customers were also requesting that the Appellant sell meat packs because it was difficult for many residents to secure transportation to shop at 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The randomly selected purchase receipts provided for transactions 7, 8, 21, 22, 23, 24, 27, 28, 43, and 44 represent legitimate transactions where the SNAP customer was likely purchasing meat packs or potentially Similac infant formula. The

Appellant had no "meat counter" category at the register for meat packs so meat pack purchases fall under a "grocery" designation.

The receipts provided for review represent 10 of the SNAP transactions documented in Attachment 1. However, there are 42 suspicious SNAP transactions flagged in the Attachment which were conducted at the Appellant firm during the review period. In addition, the submitted receipts generically label many high priced items purchased as "grocery" and do not include a detailed description of the items purchased. Therefore, they do not validate the transactions were the result of legitimate purchases of foods and not the result of trafficking of SNAP benefits.

Each receipt provided for review indicates that one (1) "grocery" item was purchased, 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The Appellant contends that these purchases are likely for meat packs or Similac infant formula. With regard to the Appellant's contentions with regard to meat pack purchases, the store visit report and photos 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. 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. It is also important to note that every price documented on the submitted receipts is different which is not characteristic of meat pack purchases. The three cash register receipts provided from 5 U.S.C. § 552 (b)(6) & (b)(7)(C) dated June 11, 2019 are outside of the review period and they are for a different store than the Appellant firm. Therefore, they have no bearing on this case.

With regard to the Appellant's contentions with regard to infant formula purchases, during the review period the Appellant firm was a WIC Program vendor. The majority of households who qualify for SNAP benefits also qualify for WIC Program benefits. As such, it is likely that these households are utilizing their WIC Program benefits to purchase infant formula and foods in lieu of their SNAP benefits so that they can utilize their SNAP benefits to purchase other needed food items.

Moreover, it may be possible to conduct rapid transactions for SNAP recipients who may have one or two small inexpensive items however, given that there were no promotional, special, bulk or package deals offered or advertised, it is unlikely that the transaction in this Attachment are legitimate SNAP transactions. The firm's checkout counter area offered minimal surface space on which to place items for large purchases and it did not offer equipment required for rapid processing of large amounts of eligible food items. It also precluded the processing of more than one customer at a time, as there is only one register. 5 U.S.C. § 552 (b)(7)(E).

While such transactions may well be done in succession, performing these processes on large transactions generally are not done rapidly. The amount of time required is, largely, proportional to the dollar amount of the transaction; typically, the larger the dollar amount transacted the longer the time period between transactions. The Appellant firm processed orders considerable faster than supermarkets typically process them, yet the firm has only one small checkout counter and none of the logistical tools such as conveyor belts, rotating bagging platforms or order separators that are routinely used in rapid throughput operations. As the Appellant has offered no rational explanation or supporting documentation for why such patterns might exist, it is reasonable to conclude that the SNAP transactions included in this Charge Letter Attachment are the result of trafficking.

Repeat Transactions by the Same Household (Charge Letter Attachment 2)

This Charge Letter Attachment documents 21 sets of transactions (49 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 completed by 17 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.

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 randomly selected purchase receipts provided for transactions 62, 63, 68, 69, 72, 73 and 74 clearly identify the items purchased by SNAP consumers and total exactly the amounts shown in the Charge Letter. These items set forth in the Charge Letter were meant to be illustrative of multiple purchases on the same day that caused USDA to conclude this was evidence of trafficking. These transactions prove nothing of the sort and instead represent clearly that a person or persons on the SNAP program made multiple legitimate purchases on the same day.

However, the receipts provided for review represent only 7 of 49 suspicious transactions noted in the Charge Letter Attachment. **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. The receipts failed to address the most egregious SNAP transactions noted in the Attachment and are not sufficient to refute the trafficking charges at issue.

The report and photographs from the store visit offer no explanation as to why SNAP customers would routinely shop at Max Mart 1 Llc #1 multiple times during a short period or purchase such a large volume of items, there being no great variety of products, price advantage, profusion of large packages, or significant bulk items or food cases for sale. The second, third, and subsequent 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, Max Mart 1 Llc #1 has no shopping carts and only one hand-held basket available to customers for transporting food within the store.

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 28 SNAP authorized retailers, including four super stores and one supermarket, located within a 1.0 mile radius of Max Mart 1 Llc #1 that can meet the nutritional needs of SNAP customers. Some of these authorized SNAP stores are larger than Max Mart 1 Llc #1 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 Max Mart 1 Llc #1 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 2 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 Transactions (Charge Letter Attachment 3)

This Charge Letter Attachment lists 198 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 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 Max Mart 1 Llc #1 to have purchases like those included in this Attachment to the Charge Letter.

The Appellant contends that the purchase receipts provided for transactions 148, 149, 173, 175, 190, 194, 210, 218, 242, 243, 261, 266, and 270 support the factual conclusion that people with SNAP benefits were using those benefits exactly as intended and there is no evidence of fraud or trafficking. However, the receipts provided for review represent only 13 of 198 suspicious transactions noted in this Charge Letter Attachment. In addition, the submitted receipts generically label many high priced items purchased as "grocery" and do not include a detailed description of the item purchased. The Appellant did not provide any receipts for transactions #92-147, **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. The receipts failed to address the most egregious

SNAP transactions noted in the Attachment and are not sufficient to refute the trafficking charges at issue.

The FNS store visit report and photos of April 25, 2019 show that Max Mart 1 Llc #1 offers a moderate stock of SNAP eligible foods with no fresh meats, poultry, or seafood, a minimal variety and amount of frozen meats, poultry, and seafood, a minimal variety and amount of 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 and only one hand-held basket 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 photos submitted by the Appellant of food stock and the outside of the store do not provide any evidence to the contrary.

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. 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.

5 U.S.C. § 552 (b)(7)(E).

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.

As noted previously, there are 28 SNAP authorized retailers, including four super stores and one supermarket, located within a 1.0 mile radius of Max Mart 1 Llc #1 that can meet the nutritional needs of SNAP customers. Some of these authorized SNAP stores are larger than Max Mart 1 Llc #1 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 Max Mart 1 Llc #1 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 Max Mart 1 Llc #1 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).

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.

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 a sufficient number of 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 this Attachment are more likely than not the result of trafficking in SNAP benefits.

Affidavit/Acknowledgment

The Appellant submitted a signed affidavit of the store owner and an Employee Ethical Business Practices Acknowledgement signed by one employee on February 8, 2018 as evidence that the questionable SNAP transactions were legitimate and that no trafficking occurred.

With regard to the affidavit/employee ethical business practices acknowledgment which purport to establish that the questionable SNAP transactions were legitimate and that no trafficking occurred, the truth of such declarations can neither be confirmed nor denied. Although such documents/affidavits may be sworn to and notarized, the truth of such declarations cannot be verified and does not mean that they are necessarily truthful. One would not expect a store owner/employee to admit that questionable transactions were not legitimate, were it really so. On the contrary, one would expect that any employee/owner statements provided would attest to questionable transactions being legitimate.

No Warning

The Appellant contends that it has never received any prior warnings from USDA. 7 CFR § 278.6(d)(2) and (3) of the SNAP regulations provides that “The FNS office making a disqualification or penalty determination ... shall consider ... any prior action ... to warn the firm about the possibility that violations are occurring...” The citation simply requires FNS to consider any prior warnings when determining a sanction. It does not require FNS to give such warnings. FNS did not consider prior actions to warn Max Mart 1 Llc #1 about the possibility that violations were occurring because there were no prior warnings during the review period. The evidence considered by the Retailer Operations Division included the raw data of questionable transactions and information obtained during the aforementioned store visit conducted on April 25, 2019.

No Prior Violations

The Appellant contends that it has never been found to be in violation of the SNAP regulations. However, a record of participation in the SNAP with no previously documented instance of violations does not constitute valid grounds for dismissal of the current charges of violations or for mitigating the impact of those charges.

Owner Sold Store

The Appellant contends that in May, 2019, the owner began negotiating for the sale of the business. On July 31, 2019, which closing occurred on August 15, 2019, Max Mart 1 Llc entered into an arms-length Asset Purchase Agreement with another store owner/limited liability corporation. The owner is therefore not involved with the SNAP Program in any form or fashion.

As owner of the store, the Appellant is liable for all violative transactions that occur at Max Mart 1 Llc #1. Regardless of whom the ownership of a store may utilize to handle store business, ownership is accountable for the proper handling of SNAP benefit transactions. Prior to becoming authorized to participate in the SNAP on June 12, 2017, the owner completed and submitted a SNAP Application for Retail Stores. The SNAP Application contained a section indicating that the person(s) signing the Application understood and agreed to ensure that store employees follow the SNAP rules and regulations and that the person(s) accepts responsibility for any SNAP violations that may occur at the store that were committed by any of the store’s employees. The SNAP Application also included a section that contained a statement which acknowledged that the person(s) signing the Application was aware that violations of program rules could result in fines, legal sanctions, withdrawal, or disqualification of the store. In addition, the Appellant was provided with program training and reference materials which reinforced the statements included in the SNAP Application.

The Appellant was charged and determined to be trafficking based on an analysis of EBT transaction data from August 2018 through January 2019. **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** signed the SNAP application as “owner” on March 10, 2017. The owner did not provide any evidence, such as a bill of sale, indicating that he sold the store on July 31, 2019, which closing

occurred on August 15, 2019. Regardless, as 5 U.S.C. § 552 (b)(6) & (b)(7)(C) was the store owner of the Appellant firm during the review period, he is responsible for the violative SNAP transactions cited in the Charge Letter.

CIVIL MONEY PENALTY

As previously indicated, the August 27, 2019 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 July 16, 2019 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 Max Mart 1 Llc #1 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

February 18, 2020