

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

Mollison Market,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0222570

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS) that a permanent disqualification of Mollison Market (hereinafter “Appellant”) from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP) was properly imposed by FNS’s Retailer Operations Division.

ISSUE

The issue accepted for review is whether or not the Retailer Operations Division, in its administration of SNAP, took appropriate action, consistent with Title 7 Code of Federal Regulations (CFR) Part 278, when it imposed a permanent disqualification against Mollison Market.

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.”

SUMMARY OF CHARGES

The Appellant was charged with trafficking and subsequently permanently disqualified from SNAP based on an analysis of EBT transaction data from March 2019 through August 2019. This involved the following three transaction patterns which are common trafficking indicators:

- There were multiple transactions made from the accounts of individual SNAP households within a set time period.
- The bulk of SNAP households’ remaining benefits were depleted within short timeframes.

- The firm conducted EBT transactions that were large based on observed store characteristics and recorded food stock.

CASE CHRONOLOGY

The agency's record shows that FNS initially authorized Mollison Market for SNAP participation as a medium grocery store on August 19, 2003. In a letter dated November 22, 2019, and delivered to the firm on November 27, 2019, the Retailer Operations Division charged the Appellant with trafficking, as defined in Section 271.2 of the SNAP regulations, based on a series of irregular SNAP transaction patterns that occurred between the months of March 2019 and August 2019. The letter noted that the penalty for trafficking is permanent disqualification as provided by 7 CFR § 278.6(e)(1). The letter also stated that the Appellant could request a civil money penalty (CMP) in lieu of permanent disqualification for trafficking, but noted that such a request must be made and supporting documentation submitted within 10 days of receipt of the charge letter under the conditions specified in 7 CFR § 278.6(i).

In a letter dated December 9, 2019, the Appellant, through counsel, responded to the charge letter with 10 pages of formal contentions and approximately 50 pages of supporting documents. In its written reply, the Appellant denied that the firm had engaged in trafficking and provided a brief history of the market along with an explanation of some of its unique characteristics. For instance, the Appellant stated that the store caters to Middle Eastern ethnic groups and refugees. As such, much of the firm's inventory is imported from the Middle East. A large portion of the firm's inventory is also sold in bulk, akin to a wholesale firm such as Costco, and can be expensive. For example, one popular dish is "Pacha," which is tripe, or cow stomach, stuffed with meat and rice. The tripe alone costs \$39.99 per 10-pound box. A family typically purchases one or two boxes of tripe at a time. The Appellant argued that the store is in no way comparable to a convenience store or mini mart. It has a large customer base because of its variety of fresh foods, dairy products, and in-house bakery. The firm also has shopping carts, which allows customers to purchase many items during a single trip to the store.

According to the Appellant, most of the firm's customers have at least three children and some have as many as 12. Families also live with extended family, such as grandparents. In Middle Eastern culture, homemade food is the center of all gatherings, and such gatherings occur very frequently, which necessitates that customers purchase food in bulk from the store. Additionally, the store is located across the street from Saint Michael Chaldean Catholic Church. It is common for households to visit the store after church as often as two or three days in a row.

The Appellant argued that Mollison Market is a family-owned business and the owners' livelihood depends on EBT transactions. According to the Appellant, the store has been in operation for 15 years and this is the first time it has ever been charged with trafficking. The Appellant claimed that it would not make any sense to make a few extra dollars by trafficking and risk losing the owners' livelihood. The prospect of having the firm's authorization revoked would be beyond detrimental to the business. The market would be shut down and the family's finances would be utterly destroyed.

The following are summaries of the Appellant's explanations to the charge letter attachments:

Attachment 1: Multiple transactions from the accounts of individual SNAP households within a set time period.

A customer may be indecisive about making a purchase. Because products at Mollison Market tend to be larger in quantity and price than in a typical store, customers may be more hesitant in deciding whether or not to buy a product. After completing an initial transaction, the customer may, a short time later, decide to purchase the item it had been contemplating, resulting in a second transaction within a short period of time. Sometimes items are simply forgotten in an initial transaction and are later purchased in a subsequent transaction. Additionally, Middle Eastern customers will often try to bargain with a shop owner in an effort to obtain discounts for large purchases. After attempting to bargain with a shopkeeper, the customer may not purchase the item in an attempt to make the shopkeeper believe he is losing a sale. However, a short time later, the customer will return and make the purchase.

Customers from the same household may shop together and engage in separate transactions one after the other. The items selected by each customer may be tabulated separately and rung up separately within a short timeframe. In such instances, one family member may have shopped quickly while the other was more deliberate. Perhaps while one person waits to be served at the bakery, the other person may have already completed the shopping for meat and cheese and has already checked out.

Some of the transactions may have been made for different purposes or at the request of the customer. The Appellant argued that it has not had sufficient time to investigate whether the transactions in question were from different benefit programs. For example, a customer may make a purchase using SNAP benefits and then moments later request that the store process a cash benefit from the same EBT card. Both of these types of benefits appear as a “sale” on the firm’s receipts. Customers may also simply request that their purchase be split into separate transactions.

Some of the transactions occurred over two consecutive days. Many of the firm’s customers live in close proximity to the store or attend church across the street and consequently make multiple trips because of the convenience factor. It is also generally common for people to shop two days in a row.

Some of the transactions were made in error. While the Appellant claimed to not have sufficient time to fully investigate, at least one of the transactions – 5 U.S.C. § 552 (b)(6) & (b)(7)(C) – was actually reversed.

Pursuant to SNAP rules and regulations, the firm cannot restrict SNAP customers to shop at certain times. What and when the customer purchases is completely out of the hands of the Appellant. The market is simply obligated to ensure that an EBT purchase is for eligible items. The Appellant carefully monitors this aspect of sales.

Attachment 2: The bulk of SNAP households’ remaining benefits were depleted within short timeframes.

After making an initial purchase with SNAP benefits, customers are provided with a receipt which shows their remaining balance. Once some customers realize they have additional funds, they will choose to make additional purchases and deplete their accounts. When and what the customer purchases at the store is completely out of the hands of the store so long as they are purchasing eligible items.

Carpooling is common in Middle Eastern culture amongst those with limited transportation. Because not all customers have regular transportation, many find it necessary to stock up on groceries when they have access to a motor vehicle. When households realize they have additional funds on their EBT card, they take advantage of the use of a car and purchase additional items with their remaining balance.

There is no restriction as to how much money an EBT customer can spend at any given time. The store is not required to ration EBT benefits and should not be penalized due to the spending habits of its customers.

Attachment 3: The firm conducted EBT transactions that were large based on observed store characteristics and recorded food stock.

Mollison Market's products are often sold in bulk, and it is common for its largely Middle Eastern clientele to buy expensive items such as meat, cheese, nuts, olives, rice, and other items in packages as large as 30 pounds or more. In many Middle Eastern cultures, some foods are so labor intensive to make that it is common to buy large amounts of food, prepare the food, and then freeze it in multiple freezers for future use. This, in turn, creates large purchases at the Appellant store. Of course, not all customers buy in bulk all the time. Many customers use their benefits to make small purchases. As with the argument for Attachment 2, many customers carpool to the store and make large purchases.

The charge letter suggests that the firm's inventory does not support the large transactions. However, it is quite the opposite. The firm has a tremendous amount of inventory on hand at any given time. For the first three quarters of 2019, the firm expended more than 5 U.S.C. § 552 (b)(6) & (b)(7)(C) on inventory. Even without analyzing the monthly inventory expenditure figures, the photographs of the store's inventory, pricing, shopping carts, and business operations on their face demonstrate that Mollison Market carries a significant amount of inventory.

Many customers who do not have EBT benefits make large purchases at the store – sometimes even larger than those with EBT cards. For example, 5 U.S.C. § 552 (b)(6) & (b)(7)(C). These examples show that customers who use non-EBT forms of payment also make large bulk purchases consistent with the firm's business model.

The Appellant further contended that it invested approximately 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in a sophisticated point-of-sale system after the end of the review period but prior to receiving the charge letter and argued that if the firm was engaging in unlawful behavior, it would not have implemented such a system which itemizes each transaction and creates a paper trail. At the time

of the transactions in question, the firm did not have a point-of-sale system that itemized all purchases.

After receiving the charge letter, the Appellant had only a short time to review a portion of the transactions from the old POS system, but will continue to investigate. In that short amount of time, the Appellant was able to identify discrepancies in the charge letter. For example, 5 U.S.C. § 552 (b)(6) & (b)(7)(C). But statements generated by Fortis Card Processing shows that the firm only processed 5 U.S.C. § 552 (b)(6) & (b)(7)(C) worth of transactions for all forms of electronic payment, including credit cards, debit cards, prepaid debit cards, SNAP benefits, and EBT cash benefits. This is a significant discrepancy. This example suggests that there may be an error with FNS's trafficking recognition process which warrants additional evidence from FNS and additional time to investigate the matter.

The Appellant argued that the firm is entitled to due process protections, citing *Mr. Smoky's BBQ, LLC v. United States* (2014), in which the court held that providing only 10 days to respond to five-year-old SNAP violations violated the firm's due process rights. In the present case, there are 1,062 transactions in question. In order to respond, the firm would have to collect evidence and properly review all transactions in a short timeframe while still operating the business. This would be a burdensome task for the Appellant.

According to the Appellant, if the firm is disqualified, USDA would be taking away the owners' property rights and the firm will suffer irreparable harm. Disqualifying the firm is essentially shutting the business down and will lead to its insolvency. As such, it is absolutely essential that USDA's allegations of trafficking be supported by sufficient evidence and not mere inference, speculation, or guesswork.

According to the Appellant, the firm does not give customers cash or eligible items in exchange for SNAP benefits. No witnesses have stated that the Appellant has engaged in unlawful behavior. As such, the Appellant requested that USDA dismiss the charges.

Finally, the Appellant requested if FNS does not dismiss the charges that the agency impose a civil money penalty in lieu of permanent disqualification. The Appellant argued that it has satisfied all CMP requirements under 7 CFR § 278.6(i). To support this argument, the Appellant submitted a copy of the January 2019 version of the *SNAP Training Guide for Retailers*, which comes directly from FNS, along with a shorter, two-page summary of the rules. Employees are asked to review these guidelines and watch a SNAP training video from USDA. The Appellant also conducted a training session at the beginning of the year and submitted seven signed acknowledgments by the employees who completed the training. These acknowledgments were signed between January 17 and 20, 2019. According to the Appellant, these materials demonstrate that the firm takes SNAP compliance seriously and documents its procedures. Lastly, the Appellant stated that its owners did not approve or benefit from any alleged trafficking violations. Because EBT sales constitute a majority of sales for the firm, the owners have no incentive to engage in such risky behavior.

After reviewing the Appellant's response and documentation and further considering the evidence in the case, the Retailer Operations Division concluded that trafficking had occurred as charged

and issued a determination letter dated January 28, 2020. This letter informed the Appellant that it would be permanently disqualified from SNAP upon receipt of the letter in accordance with 7 CFR § 278.6(c) and § 278.6(e)(1). The letter also stated that the Retailer Operations Division considered the Appellant's eligibility for a trafficking CMP according to the terms of Section 278.6(i) of the SNAP regulations, but found that a CMP was not appropriate in this case 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.

In a letter postmarked February 10, 2019, the Appellant, through counsel, appealed the Retailer Operations Division's determination by requesting an administrative review. The request was granted.

STANDARD OF REVIEW

In an appeal of adverse action, such as disqualification from SNAP participation, an appellant bears the burden of proving by a preponderance of the evidence that the administrative action should be reversed. This means that an 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 AND REGULATIONS

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

7 U.S.C. § 2021(b)(3)(B) states, in part:

...[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, in part:

FNS may disqualify any authorized retail food store...if the firm fails to comply with the Food and Nutrition Act of 2008, as amended, or this part. Such disqualification shall result from a finding of a violation on the basis of evidence that may include facts established through on-site investigations, inconsistent redemption data, [or] evidence obtained through a transaction report under an electronic benefit transfer system....

7 CFR § 278.6(e)(1)(i) states:

FNS shall disqualify a firm permanently if personnel of the firm have trafficked as defined in § 271.2.

7 CFR § 271.2 states, in part:

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 § 271.2 states, in part:

Eligible foods means: Any food or food product intended for human consumption except alcoholic beverages, tobacco and hot food and hot food products prepared for immediate consumption...

7 CFR § 278.6(b)(1) states, in part:

Any firm considered for disqualification...under paragraph (a) of this section...shall have full opportunity to submit to FNS information, explanation, or evidence concerning any instances of noncompliance before FNS makes a final administrative determination. The FNS regional office shall send the firm a letter of charges before making such determination. The letter shall specify the violations or actions which FNS believes constitute a basis for disqualification.... The letter shall inform the firm that it may respond either orally or in writing to the charges contained in the letter within 10 days of receiving the letter...

7 CFR § 278.6(c) states, in part:

The letter of charges, the response, and any other information available to FNS shall be reviewed and considered by the appropriate FNS regional office, which shall then issue the determination. In the case of a firm subject to permanent disqualification under paragraph (e)(1) of this section, the determination shall inform such a firm that action to permanently disqualify the firm shall be effective immediately upon the date of receipt of the notice of determination from FNS, regardless of whether a request for review is filed in accordance with part 279 of this chapter.

7 CFR § 278.6(b)(2)(ii) states, in part:

Firms that request consideration of a civil money penalty in lieu of a permanent disqualification for trafficking shall have the opportunity to submit to FNS information and evidence... that establishes the firm's eligibility for a civil money penalty in lieu of a permanent disqualification in accordance with the criteria included in § 278.6(i). This information and evidence shall be submitted within 10 days, as specified in § 278.6(b)(1).

7 CFR § 278.6(b)(2)(iii) states:

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 a penalty.

7 CFR § 278.6(i) states, in part:

FNS may impose a civil money penalty in lieu of a permanent disqualification for trafficking ... if the firm timely submits to FNS substantial evidence which demonstrates that the firm had established and implemented an effective compliance policy and program to prevent violations of the Program... In determining the minimum standards of eligibility of a firm for a civil money

penalty in lieu of permanent disqualification for trafficking, the firm shall, at a minimum, establish by substantial evidence its fulfillment of each of the following criteria:

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

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 the violations cited in the charge letter sent to the firm; and

Criterion 3. The firm had developed and instituted an effective personnel training program as specified in § 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...

APPELLANT'S CONTENTIONS

The Appellant, through counsel, did not offer any new contentions in support of its request for administrative review, but directed the review officer to all of its arguments and documentation submitted in response to the charge letter. The Appellant also offered the following:

- Appellant cannot fathom how FNS could find that the firm did not meet the criteria for a civil money penalty in lieu of permanent disqualification.
- Appellant requests an in-person meeting to discuss FNS's decision as set forth in the determination letter. The Appellant is willing to incur all travel expenses to conduct such a meeting. Appellant believes the review officer will immediately see that the store owners are honest and hardworking and will be convinced that they would never commit a trafficking offense. Appellant is also willing to have a telephonic conference on this matter if that is more appropriate than an in-person meeting.
- Appellant is hopeful to come to a resolution on this matter as soon as possible, as the firm is located in a low-income area and its revenues depend heavily on EBT transactions. The owners are on the verge of shutting their doors as a result of the disqualification. They would never jeopardize their livelihood simply to gain a few extra dollars by trafficking.

The preceding may represent only a brief summary of the Appellant's contentions presented in this matter. However, in reaching a decision, full attention was given to all evidence and contentions presented, including any not specifically summarized or explicitly referenced herein.

ANALYSIS AND FINDINGS

The primary issue for consideration in a case based on suspicious SNAP redemption data is whether or not the Retailer Operations Division adequately established that the Appellant firm engaged in the violation of trafficking. In other words, did the Retailer Operations Division, through a preponderance of the evidence, establish that it is more likely true than not true that the irregular and unusual transactions cited in the charge letter were the result of trafficking?

Contractor Store Visit

The case file indicates that in reaching a disqualification determination, the Retailer Operations Division considered not only the Appellant firm's EBT transactions, but also information obtained from a September 27, 2019, store visit which was conducted by an FNS contractor to observe the nature and scope of the firm's operation, stock, and facilities. This store visit information was used to ascertain if there were justifiable explanations for the firm's irregular SNAP transaction patterns. The store visit report and photographs documented the following store size, description, and characteristics:

- Mollison Market is a medium grocery store, roughly 3,000 square feet in size, operating in the city of El Cajon, San Diego County, California.
- The store visit photographs show one cash register and agency records reflect the use of one EBT point-of-sale terminal for SNAP purchases. It appears that the firm uses an optical scanner to ring up items on the cash register.
- A small number of shopping carts and shopping baskets are available for customer use.
- The store's staple food stock is typical of a medium grocery store, and the firm has a number of unique, sometimes expensive food items that cater to a Middle Eastern population. The store is amply stocked for SNAP eligibility.
- In addition to staple food items, Mollison Market sells a variety of accessory food items, including snack foods, sweets, and carbonated and uncarbonated beverages. The store also sells nonfood items such as tobacco products, lottery tickets, paper goods, cleaning supplies, and other miscellaneous household merchandise.
- At the time of the contractor's visit, the firm was an authorized retail store in the Special Supplemental Nutrition Program for Women, Infants, and Children (WIC). This is reflected in the food items available for purchase with WIC benefits, including fresh produce, canned tuna, fruit juice, bread, milk, cheese, eggs, breakfast cereal, infant formula, etc. It should be noted that the vast majority of SNAP households that contain infants and children under the age of five are also eligible for WIC participation. Therefore, it is uncommon for such households to purchase items from the WIC food package with their SNAP benefits; rather, they use WIC vouchers to make such purchases.
- The checkout area consists of a single lane checkout, but with a conveyor belt similar to that found in a supermarket.
- There is no indication from the store visit report that the firm has an unusual pricing structure, such as even-dollar prices. As with most stores, the prices of most items appear to end with a cents-value of 9, such as \$1.99, \$2.49, \$4.59, etc. The report also states that the firm does not round transaction totals up or down at checkout.
- There is evidence that the firm has special food packages for sale and that items are sold in bulk. According to the report, the most expensive food items available for purchase at the time of the store visit were a 10-pound box of beef tripe for \$39.99; a 3.96-pound can of Nido dry milk for \$34.99; a five-pound box of dates for \$29.99; and a seven-pound package of Middle Eastern candies for \$22.99. The report showed that a number of dried and fresh items were sold by the pound.

The available inventory of SNAP-eligible food at the time of the store visit showed stock that would be typical of a medium grocery store, but it was also clear that the availability of

expensive cultural items might result in occasional large transaction totals. It is noted that within a one-mile radius of Mollison Market are several much larger stores, including three superstores and two supermarkets, where the overall inventory and variety are substantially greater than Mollison Market. There are also at least two other nearby medium-sized grocery stores that cater to Middle Eastern households and carry very similar inventory to the Appellant store. Both of these stores had more SNAP redemptions than Mollison Market during the review period. 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.

SNAP Transaction Analysis

Charge Letter Attachment 1: Multiple transactions were made from the accounts of individual SNAP households within a set time period. This attachment lists 42 sets of transactions (88 transactions in all) 5 U.S.C. § 552 (b)(6) & (b)(7)(C). 5 U.S.C. § 552 (b)(7)(E).

For example, 5 U.S.C. § 552 (b)(6) & (b)(7)(C), an extraordinary amount for any store, let alone a medium-sized grocery store. 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

Such transactions at a medium grocery store like Mollison Market are highly irregular and are often an indication of trafficking. As such, these transactions warrant further explanation.

The Appellant has offered a number of contentions related to Attachment 1. These are listed in detail on page 3 of this document. These arguments include indecisiveness or forgetfulness on the part of the customer, resulting in a customer returning to the store to make subsequent purchases. Customers may also try to bargain for lower prices, and when that is unsuccessful, they may return later to purchase the item anyway. Different household members using the same EBT card may also shop simultaneously for different food items, but reach the checkout counter at separate times, resulting in multiple transactions in a short timeframe. Customers may also request that the purchases be split into separate transactions. Additionally, the Appellant argues that it is not uncommon for households to visit Mollison Market on consecutive days for a variety of reasons, including the store's convenient location.

All of these contentions may be true to some degree, but all are anecdotal and were offered without any supporting evidence. Although the Appellant was given a specific list of questionable transactions, it did not offer any evidence, such as itemized cash register receipts, to show what actually took place between the customer and the clerk at the point of sale.

The Appellant did identify one set of transactions that was listed in error. 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

The Retailer Operations Division acknowledges that lines 11-12 were listed in error in Attachment 1, but further research by the agency shows that no other transactions in the charge letter involved a refund. As such, this review finds that this single error in the charge letter is not sufficient reason to dismiss the allegations.

Finally, the Appellant argues that some transactions may have been a purchase with SNAP benefits followed by a cash transaction from the household's cash portion of the EBT card. With regard to this claim, it must be noted that FNS does not keep track of any cash transactions, which are typically TANF benefits issued by a state agency. TANF, or Temporary Assistance for Needy Families, is a needs-based cash benefit program administered through the Federal Department of Health and Human Services. USDA is not affiliated with TANF benefits in any way except that such benefits are frequently found on EBT cards that also house SNAP benefits. Accordingly, none of the transactions listed in the charge letter are TANF transactions; rather, all involve SNAP benefits only.

Without evidence from the Appellant to prove that the transactions in question were legitimate purchases of eligible food, it is reasonable for this review to conclude that the patterns found in Attachment 1 were likely the result of trafficking.

Charge Letter Attachment 2: In a series of transactions, the bulk of SNAP households' remaining benefits were depleted within short time frames. This attachment lists 72 sets of SNAP transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**.

It is not unusual for violating retailers to conduct trafficking transactions in which a household spends the vast majority of its remaining allotment at one store in a short period of time or in a single transaction.

The Appellant has argued that customers are given a receipt when conducting transactions using EBT cards. The receipt shows the customer the total amount spent and the remaining benefit balance on the card. According to the Appellant, once a customer realizes that he or she has additional funds to spend, they will sometimes choose to shop more and deplete their accounts. The Appellant claims that this often happens with customers who have limited transportation and choose to take advantage of those occasions when they have the use of a car.

While the Appellant's contentions may be true, they are nonetheless anecdotal and do not persuade this review that a reversal of the disqualification determination is warranted. Absent from the Appellant's argument is compelling evidence, such as itemized cash register receipts, to show that the specific transactions in question were legitimate purchases of eligible food. Without such evidence, this review has little option but to conclude that the patterns found in this attachment were likely the result of trafficking.

Charge Letter Attachment 3: The store conducted EBT transactions that were large based on observed store characteristics and recorded food stock. This attachment lists 893 SNAP transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. These large transactions are not consistent with a medium grocery store in the state of California. The Retailer Operations Division has determined that during the review period, the average SNAP transaction for a medium grocery store in California was \$17.94. In San Diego County, the average was a bit higher, at \$18.81 per transaction, but the average transaction in Attachment 3 is more than eight times larger than the average purchase amount for this store type.

Given that the Appellant firm has a substantial inventory of staple foods as well as other SNAP-eligible items, including snacks and drinks, and considering that the firm sells a variety of ethnic foods – some of which can be quite expensive – it is probable that there would be an occasional purchase where the transaction amount is high, 5 U.S.C. § 552 (b)(6) & (b)(7)(C). As such, it is likely that there are some legitimate SNAP transactions sprinkled among the transactions listed in Attachment 3. However, as noted earlier, there is no evidence that the firm would be likely to have SNAP redemption patterns that differ significantly from nearby, similar-sized competitors. The substantial number of high-dollar transactions in a six-month period calls into question the legitimacy of these transactions.

Attachment 3 lists 23 transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C) during the review period, including a high of 5 U.S.C. § 552 (b)(6) & (b)(7)(C). 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Considering how many food items it would typically take to add up 5 U.S.C. § 552 (b)(6) & (b)(7)(C) and considering the characteristics of the store, this review finds it difficult to believe that every large transaction in Attachment 3 was a legitimate purchase of eligible food.

5 U.S.C. § 552 (b)(6) & (b)(7)(C). Such repetition is extraordinarily unusual.

It bears repeating that Mollison Market has a large amount of inventory available for purchase along with a wide range of prices. It stands to reason that a large transaction, 5 U.S.C. § 552 (b)(6) & (b)(7)(C), would generally include large numbers of food items. That large numbers of randomly-selected food items would so frequently result in one of these six cents-values is very unlikely. Instead, these transactions strongly suggest that a store clerk is attempting to conceal trafficking by avoiding suspicious-looking, even-dollar transaction amounts. It is not at all unusual to discover that cashiers fall into a habit of repeating the same cents-values in an effort to appear random. Unfortunately, the transaction patterns in Attachment 3 are far too repetitive to be truly random. These patterns strongly suggest that trafficking violations were taking place.

Unfortunately, the Appellant has not offered any compelling evidence to show that the individual transactions listed in Attachment 3 were legitimate purchases of eligible food. Such evidence might have included copies of itemized cash register receipts to demonstrate what actually occurred between the customer and the cashier at the point of sale.

As to the Appellant's contentions related to Attachment 3 (see page 4 of this document), these do not persuade this review that the determination made by the Retailer Operations Division should be reversed. For example, this review concedes that the firm has a lot of inventory. Although the Appellant did not submit any inventory invoices or receipts, it did submit financial documents which show expenditures made by the firm during the review period. As such, it is possible that the firm had sufficient inventory to cover the amount of SNAP redemptions during the same period. However, inventory records alone do not identify what occurred between a customer and the store at the point of sale.

The Appellant also stated that customers who did not use an EBT card to make purchases also spent large amounts at the store. This could have been a convincing argument had the Appellant

offered compelling supporting evidence. The evidence provided by the Appellant does not indicate what was purchased by those using other forms of payment. Did they purchase only SNAP-eligible food items? Did they also purchase nonfood items, such as tobacco products, cleaning supplies or lottery tickets? It is impossible to determine from the Appellant's evidence.

This review does not doubt that Mollison Market sells eligible food items and conducts legitimate SNAP business. But when unusually large transactions form patterns that are substantially different from comparable stores in the area, further evidence from the Appellant is warranted to verify that there is not something more, such as trafficking or other program violations, taking place. In this case, the Appellant's evidence does not adequately explain what occurred between the customer and store personnel at the point of sale. Accordingly, it is the finding of this review that trafficking was a likely cause of the unusual transaction patterns found in Attachment 3.

Except for the rule that SNAP benefits are to be used only for the purchase of eligible food, the regulations do not govern or mandate how a SNAP household should spend its benefit allotment, including how many times a household may use its EBT card at a particular location or how large an individual transaction can be. However, the transactions noted in the charge letter are questionable not because they exceed any limits for use, but because they display patterns of use that are inconsistent with the store's documented physical characteristics and food inventory. It should be further noted that the transactions identified in the charge letter are not marginally abnormal, but decidedly so, especially in comparison with other nearby SNAP-authorized stores with similar characteristics. This review does not contend that repetitive or large EBT transactions are overtly suspicious when they occur on an occasional or intermittent basis, but when such transactions form questionable patterns on a consistent basis over a substantial period of time, such activity is considered highly irregular, and a firm's intent to comply with program regulations is called into question.

In an appeal of adverse action, the onus is on the Appellant to prove, by a preponderance of the evidence, that the administrative action should be reversed. This means submitting sufficient and compelling evidence that would lead a reviewer to conclude that trafficking did not occur. Unfortunately the Appellant's contentions and evidence do not meet this standard.

Discrepancies in Charge Letter

The Appellant contends that during the review period, the firm did not have a sophisticated point-of-sale system, but still managed to prove that there were discrepancies in the charge letter. For example, 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The Appellant contends that this is a significant discrepancy which suggests that there may be an error with FNS's trafficking recognition process.

To support this contention, the Appellant submitted a card processing statement from Fortis Payment Systems from the period March 1, 2019 to March 31, 2019. In a section of the statement entitled "Amounts Funded by Batch," it shows 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

Unfortunately, the Appellant's evidence is not entirely straightforward. While the statement certainly represents 5 U.S.C. § 552 (b)(6) & (b)(7)(C), there is no other clear indication as to what the batches actually include. The Appellant's claims become especially problematic when comparing the data from the Fortis statement to the agency's transaction record. For instance, 5 U.S.C. § 552 (b)(6) & (b)(7)(C). This figure is substantially larger than what the Appellant claimed for all electronic payment types on that date. The agency's records also clearly list the time of the transaction, the household who made the purchase, and whether or not the EBT card number was swiped or manually entered into the point-of-sale system.

When considering this evidence, this review finds the Appellant's claims regarding potential discrepancies in the charge letter to be inaccurate and insufficiently substantiated. As such, they offer no basis for a reversal or modification of the agency's disqualification determination.

Due Process

The Appellant contends that the firm is entitled to due process protections and contends that collecting evidence and properly reviewing more than 1,000 transactions in a short timeframe, while still trying to operate a family-owned business is a burdensome task. To support this argument, the Appellant cited a court decision, *Mr. Smoky's BBQ, LLC v. United States* (2014), which held that providing only 10 days for the store to respond to five-year old SNAP violations violated the firm's due process rights.

With regard to this contention, this review cannot find any evidence to suggest that Mollison Market was not fully afforded its due process rights. SNAP regulations at 7 CFR § 278.6(b)(1) state that, "any firm considered for disqualification or imposition of civil money penalty... shall have full opportunity to submit to FNS information, explanation, or evidence concerning any instances of noncompliance before FNS makes a final administrative determination." This regulation further explains that a firm must respond either orally or in writing within 10 days of receiving the charge letter. The 10-day response timeframe is the same for all retailers. Due to the complexity of some cases, it is common for some retailers to believe that they need more than 10 days to gather and submit all the evidence they need to present their cases. In such instances, reasonable extensions of time are frequently granted – upon request – to ensure that the firm has "full opportunity" to formulate a response. This review cannot find any evidence that the Appellant requested such an extension. Accordingly, it is the finding of this review that the Appellant's due process rights were not violated.

As to the case citation, this review can find little resemblance between Mollison Market and the *Mr. Smoky's* case, as the charge letter in the present case was issued less than three months after the end of the review period, as opposed to five years in *Mr. Smoky's*. However, it should be noted that it is beyond the scope of this review to determine whether any legal cases cited by counsel are applicable. Any application of a supposed judicial precedent would best be addressed in a judicial review in a court of law. Accordingly, no further findings or conclusions are rendered in this regard.

Hardship to Appellant / Trafficking Case Based on EBT Data

The Appellant contends that if the firm is disqualified, USDA will be taking away the owners' property rights and the firm will suffer irreparable harm. According to the Appellant, disqualifying the firm is essentially shutting the business down and will lead to its insolvency. As such, it is absolutely essential that USDA's allegations of trafficking be supported by sufficient evidence and not mere inference, speculation or guesswork.

With regard to this contention, Federal statute at 7 U.S.C. § 2021(b)(3)(B) makes it clear that disqualification for trafficking shall be permanent, even on the first occasion. It is recognized that some degree of economic hardship is a likely consequence whenever a store is disqualified from participation in SNAP; however, there is no provision in the statute or regulations for a waiver or reduction of an administrative penalty on the basis of possible economic hardship to either the ownership personally or to the firm resulting from the imposition of such a penalty.

It is also the finding of this review that the allegations of trafficking are not the result of "mere inference, speculation or guesswork." It is noted that USDA employs a computerized fraud detection tool to identify EBT transactions that form patterns having characteristics indicative of trafficking. However, this tool does not, by itself, determine or conclude that trafficking has occurred. FNS's Retailer Operations Division must still analyze the transaction data and patterns with other factors, such as observations from a store visit, an analysis of customer shopping behavior, and a comparison with similar stores in the area, and then render a determination as to whether or not the questionable transactions were, more likely than not, the result of trafficking. The legality of this method is identified in 7 CFR § 278.6(a), which states, in part, "FNS may disqualify any authorized retail food store ... if the firm fails to comply with the Food and Nutrition Act of 2008, as amended, or this part. **Such disqualification shall result from a finding of a violation on the basis of evidence that may include facts established through on-site investigations, inconsistent redemption data, [or] evidence obtained through a transaction report under an electronic benefit transfer system**" [Emphasis added.]

Prior to a disqualification determination, the accused firm is given an opportunity to reply to the charges and provide any information it deems appropriate in justifying as legitimate the transaction activity detailed in the charge letter.

It should be noted that this review has thoroughly examined the documentation and information provided by the Retailer Operations Division and has found no evidence to suggest that the agency simply manufactured numerical data and declared it to be trafficking. From all indications, the Retailer Operations Division obtained the EBT data, found it to be suspicious in comparison to other area stores of similar size, and then undertook a thorough analysis before concluding that trafficking was likely occurring.

Accordingly, the Appellant's claim of hardship does not provide a valid basis for this review to reverse or modify the agency's disqualification determination.

Request for In-Person Meeting

In its request for administrative review, the Appellant requested an in-person or telephonic meeting to discuss FNS's decision. The Appellant believed that the review officer would immediately see that the store owners are honest and hardworking and would be convinced that they would never commit a trafficking offense.

With regard to this request, it should be noted that in September 2003, revisions to parts 278 and 279 of the SNAP regulations eliminated in-person hearings as part of the administrative review process. Administrative reviews conducted in accordance with regulation are done in writing. Neither the Food and Nutrition Act of 2008 nor SNAP regulations contemplate formal discovery procedures or an adversary hearing as part of the administrative review process. Thus, there is no provision for confrontation with Department witnesses and cross-examination of any such witnesses during an administrative review. However, due process rights are protected by the provision within the Act which provides for judicial review. Once an administrative review decision has been made, if the Appellant is dissatisfied with the determination, 7 U.S.C. § 2023 provides for the right to a judicial review and a trial de novo.

Civil Money Penalty

In its request for administrative review, the Appellant stated that it cannot fathom how the Retailer Operations Division could find that the firm did not meet the criteria for a civil money penalty in lieu of permanent disqualification for trafficking. As noted earlier, the Retailer Operations Division determined that the Appellant was not eligible for a CMP because it did not submit sufficient evidence to demonstrate that it had established and implemented an effective compliance policy and program to prevent SNAP violations.

In accordance with regulations at 7 CFR § 278.6(b)(2), in order for a CMP to be considered, a firm must not only notify FNS that it desires the agency to consider a trafficking CMP in lieu of permanent disqualification, but it must also submit appropriate documentation within designated timeframes. The case record shows that the Appellant submitted a timely request for a CMP along with supporting documentation in an effort to demonstrate that the firm had established and implemented an effective compliance policy and program to prevent SNAP violations in accordance with the regulation at 7 CFR § 278.6(i). Documentation provided by the Appellant included a copy of the *SNAP Training Guide for Retailers* and a shorter, two-page summary and compliance policy. The Appellant also submitted seven signed acknowledgments by the employees who completed the store's SNAP training program. These acknowledgments were signed between January 17 and 20, 2019, which is roughly a month and a half before the first transactions listed in the charge letter. Finally, the Appellant stated that its owners did not approve or benefit from any alleged trafficking violations.

The primary issue regarding the imposition of a trafficking CMP is whether or not the Appellant meets each of the four established eligibility criteria for this alternative penalty (see page 8 of this document for a listing of the four criteria). All four criteria must be met in order for a firm to be eligible for a CMP.

In accordance with 7 CFR § 278.6(i), fulfillment of each of the four criteria must be established by “substantial evidence.” Standards of evidence regarding a firm’s compliance policy and training program are found in 7 CFR § 278.6(i)(1) and (2). According to the case record, the Retailer Operations Division determined that the evidence provided by the Appellant was insufficient to meet any of the four criteria. This review does not agree. It is the determination of this review that the Appellant’s evidence was sufficient to prove that the firm’s compliance policy and training program were in effect prior to the review period, and that the policy and training program properly reflected a commitment to ensure that the firm was operated in a manner consistent with current SNAP regulations and policy on the proper acceptance and handling of SNAP benefits. Accordingly, it is the finding of this review that the Appellant likely meets Criteria 1, 2, and 3 as specified in § 278.6(i).

Where the Appellant falls short of CMP eligibility is in Criterion 4, which states that firm ownership must not be aware of, approve, benefit from, or be involved in the trafficking violations in any way. The Appellant has strenuously stated that it did not approve or benefit from any alleged SNAP violations, but a declaration alone is not sufficient to prove that the firm meets Criterion 4. **5 U.S.C. § 552 (b)(7)(E)**. In this instance, the Appellant has offered no evidence to prove that such benefit did not occur.

This review acknowledges that the evidentiary standard required for a CMP in lieu of permanent disqualification for trafficking is difficult to meet. Nevertheless, if a firm fails to meet the minimum requirements as required by regulation, this review has no alternative but to conclude that the firm is not eligible for a CMP. Therefore, in accordance with 7 CFR § 278.6(i), a civil money penalty in lieu of permanent disqualification for trafficking cannot be granted in this case.

CONCLUSION

An analysis of the Appellant’s EBT transaction record was the primary basis for the decision by the Retailer Operations Division to permanently disqualify Mollison Market from SNAP participation. This data provided sufficient evidence for this review to conclude that the questionable transactions and patterns listed in the charge letter were more likely than not the result of trafficking violations committed by the Appellant. Likewise, the Appellant has not proven, by a preponderance of the evidence, that the administrative action should be reversed.

Based on a review of all available information in this case, the decision to impose a permanent disqualification against the Appellant, Mollison Market, under the ownership **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**, is sustained.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and in Section 279.7 of the SNAP regulations. 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 the Appellant owner resides or is engaged in business, or in any court of record of the State having competent jurisdiction. If a complaint is filed, it must be filed within 30 days of receipt of this decision.

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

JON YORGASON
Administrative Review Officer

April 9, 2020