

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

Nunez Kuret Market Corp,

Appellant,

v.

Case Number: C0203599

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

The U.S. Department of Agriculture, Food and Nutrition Service (FNS), finds that there is sufficient evidence to support the determination by the Retailer Operations Division to impose a permanent disqualification against Nunez Kuret Market Corp (hereinafter Appellant) from participating as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with Title 7 of the Code of Federal Regulations (CFR) § 278.6(a), (c) and (e)(1)(i), when it imposed a permanent disqualification against Appellant on April 25, 2018.

AUTHORITY

According to 7 U.S.C. § 2023 and its implementing regulations at 7 CFR § 279.1, “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

By letter dated February 8, 2018, the Retailer Operations Division charged Appellant with trafficking based on a series of irregular SNAP transaction patterns that occurred in June 2017 through December 2017. The letter noted that the penalty for trafficking is permanent disqualification as provided by 7 CFR § 278.6(e)(1). The letter also noted that the Appellant could request a trafficking civil money penalty (CMP) in lieu of a permanent disqualification within ten days of receipt under the conditions specified in 7 CFR § 278.6(i).

Appellant responded to the charges in a letter dated February 22, 2018, that requested a CMP and included training documentation as evidence to be considered in support of the CMP. The Retailer Operations Division notified Appellant by letter dated April 25, 2018, that the firm was permanently disqualified from participation as a SNAP retailer in accordance with 7 CFR § 278.6(c) and 278.6(e)(1) for trafficking violations. This letter also stated that Appellant was not eligible for the CMP because insufficient evidence was submitted to demonstrate that it had established and implemented an effective compliance policy and program to prevent SNAP violations.

By letter dated May 4, 2018, Appellant appealed the Retailer Operations Division's assessment and requested administrative review. The appeal was granted. No subsequent correspondence was received from Appellant.

STANDARD OF REVIEW

In an appeal of an adverse action, Appellant bears the burden of proving by a preponderance of evidence that the administrative action should be reversed. That means Appellant has the burden of providing relevant evidence that a reasonable mind, considering the record as a whole, would accept as sufficient to support a conclusion that the argument asserted is more likely to be true than untrue.

CONTROLLING LAW

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

7 CFR § 278.6(a) states: "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."

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." Trafficking is defined in part as, "The buying, selling, stealing, or otherwise effecting an exchange of SNAP benefits for cash or consideration other than eligible food". Trafficking includes "Intentionally purchasing products originally purchased with SNAP benefits in exchange for cash or consideration other than eligible food".

7 CFR §278.6(i) states: “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.”

7 CFR §278.6(b)(2)(ii) states: “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).” Part 278.6(b)(2)(ii) further states that if a firm fails to request a civil money penalty in lieu of a permanent disqualification for trafficking and submit documentation and evidence of its eligibility within the specified 10 days, the firm shall not be eligible for such a penalty.

SUMMARY OF THE CHARGES

The issue in this review is whether, through a preponderance of evidence, it is more likely true than not true that the questionable transactions were the result of trafficking. The charges on review were based on an analysis of SNAP EBT transaction data during the seven month period of June 2017 through December 2017. This involved four patterns of EBT transaction characteristics indicative of trafficking:

1. There were an unusual number of transactions ending in a same cents value.
2. Multiple purchase transactions were made too rapidly to be credible.
3. Multiple transactions were made from individual benefit accounts in unusually short time frames.
4. Excessively large purchase transactions were made from recipient accounts.

APPELLANT’S CONTENTIONS

The following may represent a summary of Appellant’s contentions in this matter; however, in reaching a decision, full attention and consideration has been given to all contentions presented, including any not specifically recapitulated or specifically referenced herein:

- The business was charged with the same four allegations in June 2013 and due to the information provided, the type of business, and the neighborhood around the store, the case was closed. Appellant requests review as it is not satisfied with the results of the EBT transaction analysis. The store offers a large variety of grocery items, deli, and produce and based on the freshness, participants could easily expend their benefits here. The store also sells items used on a daily basis such as bread, eggs, milk, cold cuts, fruit, and vegetables. Appellant previously sent receipts for purchases and photo of the inside of the store to show the variety of items available;
- Many products are sold by whole dollar amounts such as plantains at three for \$1.00, other fruits and vegetables priced at \$1.00-\$2.00 per pound or piece, juices and drinks

at \$1.00-\$4.50, in addition to snacks priced at \$0.75-\$2.00. Cold cuts are usually requested by dollar amount and sandwiches are \$1.00-\$5.00 so a purchase of several different cold cuts or sandwiches can easily add up. There are many other items that cost \$0.75, two for \$5.00, three for \$1.00, and two for \$1.25 which can make it easy for purchases to end in a whole dollar amount. After a careful review of the same cents report, the store sells cold sandwiches for \$1.00, \$3.00, \$4.00 through \$6.00. The purchase of any two or three sandwiches and sodas make-up the majority of these purchases. On occasion, large sandwiches that feed several individuals are prepared that cost \$13.00 each. Because of the relationship the business has with its customers, when they ask for discounts, the total is rounded down to an even number to keep them satisfied;

- The rapid multiple purchases are because many families will share their benefits with other family members. A customer will make their purchases and then charge the items for another family member separately to obtain a separate invoice and then the other family member will reciprocate when they receive their benefits;
- The multiple transactions in a short period of time are due to family members sharing their benefits as stated above. Also because per the attached pictures, the business offers a wide variety of groceries that customers need to sustain their families so it would be easy for a customer to expend their monthly benefits in the store. Also, due to the store's location, extensive daily and weekly purchases are made to maintain inventory and to keep the neighborhood families satisfied per the attached invoices;
- The large transactions are because food prices are higher than ever and only a few items are needed to accrue a large bill. Egg and milk prices have gone up exponentially and are \$3.99 for a gallon of milk and \$2.49 for eggs. Cold cuts are priced at \$6.99-\$9.49 per pound. The store also sells cases of Ensure at \$48.00 per case. The store offers an extensive variety of food products, a full range of groceries, deli, produce, and meats so it would be easy for a customer to expend their monthly benefits in the store. The store also sells large sizes of items. The photos show the large volume of food products carried in the store;
- When the investigator came to take pictures, there were problems with the refrigeration system and most of the refrigerators were empty due to these issues. They have since been repaired and replaced and are now filled to capacity;
- The owner holds quarterly training sessions for all employees as shown by the attached documentation;
- There are very few businesses in the neighborhood redeeming SNAP benefits either due to the business closing, in process of applying, or have had a change in owners. Because of these, Appellant's redemptions have increased significantly; and,
- The store has always been a rule abiding business and observed SNAP rules and regulations and under no circumstances would they violate them. The owner knows how reliant the business is on SNAP and would never jeopardize their standing for such a minimal profit, especially after having had a good outcome previously. The business would not survive a disqualification and may be forced to close because the income generated by SNAP determines the stability of the store and its continued operations. Should USDA decide to permanently disqualify the business, a CMP is requested.

Appellant submitted 16 pages of photos; a copy of the FNS letter dated May 27, 2015, closing the previous EBT investigation; 211 pages of inventory invoices/receipts; seven SNAP customer statements; and two pages of SNAP training documents in support of these contentions.

ANALYSIS AND FINDINGS

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 firm during the review period. As patterns of unusual transactions appear across multiple Attachments, the case of trafficking becomes more convincing.

Store Background and FNS Store Visit

FNS authorized the firm as a medium grocery store on December 30, 2016. The case file indicates that in reaching a disqualification determination, the Retailer Operations Division considered information obtained during an August 24, 2017, store visit conducted by a FNS contractor to observe the nature and scope of the firm's operation, stock, and facilities. This information was then used to ascertain if there were justifiable explanations for the firm's suspicious SNAP transactions. The store visit documented the following store size, description, and characteristics:

- The firm was a moderately sized store offering a minimal quantity and variety of staple foods and carrying no unique items or offering any distinctive services.
- Signage shows the store name as 5 U.S.C. § 552 (b)(6) & (b)(7)(C).
- The firm primarily stocked traditional American brands, but also had a limited stock of Hispanic (e.g. Goya) products typically found in New York City groceries.
- Interior signage advertised hot breakfast, hot sandwiches, steak sandwiches, chicken fingers, beef burgers, and hot dogs, but no prices were posted.
- The store visit report and photos showed no shopping carts or hand baskets for use by customers making it difficult for them to carry large amounts of food to the checkout.
- No food packages, bundles, case sales, bulk items, or other sales were evident that would explain the unusual transactions and no cased items were available for purchase.
- The store visit report specifically notes that the firm was not a specialty store and that there were no meat bundles or fruit and vegetable boxes for sale.
- The larger of the two checkout areas was on the top of a deli-type display case and was approximately 1.5 feet deep x 4.0 feet wide while the smaller checkout was set into a plastic display wall and was approximately 1.5 foot deep x 2.0 feet wide with displays on both sides limiting the available space for purchases. There also was a large ice cream freezer directly in front of the smaller checkout area that customers must reach over in order to place their purchases onto the checkout counter that would make it problematic to process large orders. Only the smaller checkout counter had a cashier present during the store visit. The checkout counters had cash registers, no optical scanner, and a POS terminal as confirmed by a store employee/owner.

- The firm had a minimal stock of staple foods that also included many single serving and pre-packaged items with a significant portion of inventory in accessory foods (primarily soda, candy, snacks, and other drinks) and many ineligible items.
- There was a large commercial kitchen/food prep area with a wide range of equipment that included a cooktop grill, commercial exhaust hood, heavy duty slicer, deep fat fryer, prep tables, microwave oven, four slice toaster, etc. Per a store employee/owner, store staple food stock such as deli meats, deli cheeses, etc. are being used in the preparation of the hot/cold ready-to-eat prepared foods.
- The store had no fresh unprocessed meat/seafood except for one package of Goya fish, no frozen unprocessed meat/seafood, a very limited quantity and variety of processed meats and seafood (deli meats, canned meat/poultry/fish, sausages, hot dogs, and jerky), no packaged lunch meats, no bacon, no frozen entrees, no frozen dinners, a moderate supply of eggs, a limited selection of fresh fruits and vegetables, no frozen fruits and vegetables, no 100 percent vegetable juices, a limited stock of canned soups, a minimal quantity and variety of canned and packaged staple food items, no large containers of fresh milk (only single serving milk drinks), no packaged cheeses, no yogurt, no sour cream, no butter (only margarine), a limited stock of baby cereals/foods/juices, no infant formula, no corn meal, no tamales, no tortillas, no pitas, no macaroni & cheese, no frozen staple foods of any kind, no tea, no coffee, cocoa, and very few expensive staple food items.
- Ineligible items included: tobacco, tobacco accessories, alcohol, lottery, hot foods, household products, paper products, auto products, health and beauty items, ATM/money orders, gloves, cell phones/accessories/cards, and novelty items while accessory foods included: candy, spices, condiments, snacks, baked goods, cocoa, cooking oil, sugar, single serving ice cream, un/carbonated drinks, and cold ready-to-eat prepared foods.
- Signage was in English and there were no SNAP posters (anti-fraud, eligible items, reporting trafficking, etc.) visible in the store except for a handwritten sign stating that hot foods could not be purchased using EBT.
- The firm's hours of operation were 8:00 AM-11:00 PM daily as confirmed by a store employee/owner. The individual also stated that the firm did not take telephone or online grocery orders, did not delivery groceries, and did not round prices up/down.
- Many food items were priced with all visible food prices ending in .x9 cents except for a very few items priced differently such as some drinks priced at \$1.00, \$1.50, and two for \$3.00. Comments on the FNS store visit report specifically stated that most food prices end in .x9 cents. A price ending in .x9 cents is the most common pricing structure for stores of this type. The FNS store visit report also listed the four most expensive items costing more than \$5.00 for sale in the store as being deli meat at \$9.49 and \$8.99 per pound, deli cheese at \$6.99 per pound, and a 10 pound bag of rice at \$6.99. This listing of the most expensive items was provided by a store employee/owner during the store visit. No prices were posted for the hot/cold prepared foods.
- While the firm did stock a limited selection of baby foods, most SNAP households with infants or small children are WIC participants and therefore would be purchasing these products using WIC vouchers, not SNAP EBT.

- The store visit photos and report showed many empty or marginally stocked shelves, display racks, and coolers with stock fronted to give the appearance of greater inventory. No freezers or coolers were empty or noted as being broken.
- The quantity and variety of the store's staple food inventory was less than that seen during the previous FNS store visit on September 25, 2016.

Unusual numbers of transactions ending in a same cents value

This attachment lists 1,257 transactions with 814 transactions ending in the same cents value of .00 cents and 443 transactions ending in the same cents value of .50 cents.

5 U.S.C. § 552 (b)(6) & (b)(7)(C). 5 U.S.C. § 552 (b)(6) & (b)(7)(C). When such repetitive patterns are unsupported by special pricing structures they are a strong indicator of trafficking in SNAP benefits. The FNS store report and photos revealed no signs posted to indicate special food packages, bundles, case sales, or other sales that would explain the unusual number of transactions ending in these same cents values and no bulk items were available for purchase. The high percentage of same cent transactions combined with the large number of same cents high dollar transactions is irregular and suspicious for this type store.

Appellant contends many products are sold by whole dollar amounts such as plantains at three for \$1.00, other fruits and vegetables priced at \$1.00-\$2.00 per pound or piece, juices and drinks at \$1.00-\$4.50, in addition to snacks priced at \$0.75-\$2.00. Cold cuts are usually requested by dollar amount and sandwiches are \$1.00-\$5.00 so a purchase of several different cold cuts or sandwiches can easily add up. There are many other items that cost \$0.75, two for \$5.00, three for \$1.00, and two for \$1.25 which can make it easy for purchases to end in a whole dollar amount. After a careful review of the same cents report, the store sells cold sandwiches for \$1.00, \$3.00, \$4.00 through \$6.00. The purchase of any two or three sandwiches and sodas make-up the majority of these purchases. On occasion, large sandwiches that feed several are prepared that cost \$13.00 each. Because of the relationship the business has with its customers, when they ask for discounts, the total is rounded down to an even number to keep them satisfied.

The inventory report and photos from the 2017 FNS store visit show the Appellant firm offered a minimal stock of staple foods that included a limited selection of fresh fruits and vegetables. Additionally, the firm was noted as carrying few expensive eligible food items making it questionable that such a large number of high dollar SNAP transactions could be for legitimate food purchases. Contrary to Appellant's claim, the firm had no plantains or large sandwich rolls that would feed several people on the day of the store visit and none were present during the September 2016 store visit making it unlikely that they are regularly stocked. Additionally, no prices were posted for the hot/cold prepared ready-to-eat foods or for the fresh fruits and vegetables so Appellant's claims regarding them cannot be confirmed; however, the purchase of even three or four cold sandwiches and the same quantities of fruit and drinks

5 U.S.C. § 552 (b)(6) & (b)(7)(C). Appellant also offered no explanation for the 443 transaction totals ending in .50 cents.

The store visit report also specifically notes that Appellant's pricing structure has food prices ending in .x9 cents which was confirmed by the many photos included with the report. The purchase of several items with prices ending in .x9 cents would most likely not result in a total ending in a same cents value of .00 or .50 cents as multiples of nine seldom have a value ending in these amounts making it statistically impossible that this many store transactions would end in these amounts with legitimate food purchases. Lastly, FNS store visit reports contain specific questions that are asked of store employees during store visits. These include questions such as whether transaction totals are ever rounded up or down. The August 24, 2017, store visit report explicitly states that the firm does not round transaction totals thereby refuting Appellant's claim that totals are rounded down to whole dollar amounts.

While some of the transactions in this Attachment may have been for legitimate staple food purchases, particularly those in the lower dollar amounts, there is insufficient evidence that these repeating same cent transactions are legitimate. When many transactions end in a same cents amount, it appears that these transaction amounts are contrived and therefore, in the absence of compelling evidence to the contrary, are suggestive of trafficking. As such, the transactions in this Attachment have not been adequately documented as legitimate.

Rapid Transactions

This Attachment documents 34 sets of back-to-back transactions made in rapid order at the same POS terminal. The irregular transaction data cited in this Attachment shows all of the transaction sets were conducted **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. Six of the 34 sets occurred on or after the 15th day of each month and the same household conducted both of the transactions in only one of the 34 sets. The dollar amount of the second transaction **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** and only one of the second transactions involved a manually keyed 19 digit EBT card number that would have to be entered in the POS terminal manually and therefore would require additional time.

Appellant contends the rapid purchases are because many families will share their benefits with other family members. A customer will make their purchases and then charge the items for another family member separately to obtain a separate invoice.

Appellant provided no evidence in support of its claim that the rapid transactions are the result of families sharing their benefits. A review of the transactions listed in this Attachment shows that the same household conducted both transactions in only one of the 34 sets thereby disproving Appellant's explanation.

5 U.S.C. § 552 (b)(6) & (b)(7)(C). SNAP benefit transactions involving legitimate food purchases require many steps: 1) the customer waiting for the previous customer to pick-up their purchases and leave the checkout area; 2) the customer making multiple trips bringing items to the checkout counter for large purchases since the firm has no shopping carts or hand baskets; 3) the cashier separating eligible from ineligible items; 4) the cashier handling individual items to determine the price, which in this case involves manual keying of amounts since there is no scanner; 5) the cashier weighing individual items if sold by weight; 6) the cashier entering prices

into a register or adding machine, once for eligible foods and once for ineligible items, which is typical for larger purchases; 7) the cashier handling manufacturers cents-off coupons, if applicable; 8) the cashier bagging the items for carry-out; 9) the cashier informing the customer of the totals (one for eligible foods and one for non-eligible items, if applicable, which for large purchases includes most transactions); 10) the cashier pressing the “SNAP transaction key” on the POS device/card reader; 11) the customer swiping their EBT card; 12) the customer entering their required PIN; 13) the cashier entry of the purchase amount; 14) the cashier confirming the customer has a sufficient benefit balance; 15) the transaction being processed by the system and receiving approval; 16) the cashier printing the EBT and cash register receipts; 17) the cashier accepting an alternate form of payment for nonfoods and possibly handling cash change; and 18) the customer removing products from the checkout area so the next customer in line can begin the next transaction. All or most of these steps are inherent in legitimate large SNAP purchases. One can readily surmise that while such transactions may be completed in succession, performing these processes on large transactions is not done rapidly. The amount of time required is generally proportional to the dollar amount of the transaction; typically, the larger the dollar amount the longer the time period between transactions. The extremely limited counter space as well as manually key-entering lengthy EBT card numbers adds additional time to transactions.

The Appellant firm processed transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**, markedly faster than supermarkets typically process purchases, yet the Appellant firm does not have an optical scanner or any of the logistical tools such as conveyor belts, rotating bagging platforms, or order separators that are routinely used in rapid throughput operations. It is therefore improbable that large dollar value transactions for the purchase of legitimate food items which would consist of a substantial number of lower priced items based on Appellant’s stock could be processed in the times listed in this Attachment given the facilities at the firm. The large transaction dollar amounts and the short interval between transactions in this Attachment demonstrate the improbability of these being legitimate eligible food purchases and suggest trafficking as the most likely explanation.

Based on this discussion, as well as the stock and facilities present at the Appellant firm, it is unbelievable that these large dollar value transaction sets could occur in the short periods of time listed if they involved legitimate eligible food purchases. It is therefore more likely that the transactions listed in this Attachment are attributable to trafficking.

Multiple transactions in unusually short time frames

This Attachment documents 66 individual transactions in 28 sets of two or more transactions conducted by 16 different households in a short period of time.

5 U.S.C. § 552 (b)(6) & (b)(7)(C). One set is comprised of four individual transactions, eight sets are comprised of three individual transactions and the remaining 19 sets are comprised of two individual transactions. It is not a usual shopping pattern to see so many purchases, in a short period of time, by the same recipients as documented in this Attachment.

5 U.S.C. § 552 (b)(6) & (b)(7)(C). These sets of transactions appear to be in amounts which are indicative of trafficking.

Appellant contends the suspicious multiple transactions are due to family members sharing their benefits as previously stated for the rapid transactions. Also, per the attached pictures, the firm offers a wide variety of groceries that customers need to sustain their families so it would be easy for them to expend their monthly benefits in the store. Also, due to the store's location, extensive daily and weekly purchases are made to maintain inventory and to keep the neighborhood families satisfied per the attached invoices.

SNAP households have no limit on the number of times they may use their benefits or the dollar value of eligible food they may purchase. The SNAP transactions listed in this Attachment 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 a medium grocery store's stock and facilities and are thus indicative of trafficking. These transaction sets do not contain the characteristics associated with a household purchasing a forgotten item right after checking-out or of household members/friends shopping together and making separate purchases as claimed by Appellant as all of the 28 transaction sets occur over a period of nearly two hours with 20 sets occurring over two consecutive days. These transaction sets also do not contain the characteristics of a household returning later in the day to purchase a forgotten item or two as all 28 sets have subsequent transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**, far more than the cost of a forgotten item or two.

It is certainly not unusual for a small number of SNAP households to conduct multiple transactions in a short period of time. However, it is unusual that subsequent transaction dollar amounts are substantial in these transaction sets and that all of the sets in this Attachment total **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** when the comparable average medium grocery store SNAP transaction amount in Bronx County during the review period was \$12.80. These multiple transactions indicate that the amounts were contrived in an attempt to avoid suspiciously high transactions that would be indicative of trafficking by breaking them into multiple, smaller amounts. FNS transaction data shows that this same pattern of multiple transactions in unusually short time frames is not evident at other nearby like type grocery stores further supporting that trafficking was occurring at the Appellant firm during the period under review.

The Retailer Operation Division's analysis of the shopping patterns for households listed in this Attachment shows that they have ready access to transportation as evidenced by their shopping at a variety of larger food stores located nearby and at a distance from Appellant's location, including a variety of super stores and supermarkets. One of the larger stores frequently patronized by these households is the full-line chain supermarket located only a block from Appellant's location. Appellant's contentions fail to offer any explanation or rationale as to why households who are shopping and spending large dollar amounts at many larger and better stocked stores would conduct multiple purchases totaling to high dollar values at a minimally stocked store. Common sense dictates that it is improbable that households would choose to spend large dollar amounts at the Appellant firm if their purchases consisted solely of eligible food items that could be purchased at any of the super stores and/or supermarkets they were already regularly shopping at and therefore more likely than not that these households were trafficking SNAP benefits at the Appellant firm.

The Retailer Operations Division's analysis of activity at the Appellant firm also notes that the numbers of both rapid transactions and multiple transactions in the month of March 2018 dropped to one and to zero, respectively. The only explanation for this sudden drop is that the firm received the charge letter on February 12, 2018. A pronounced decrease in the numbers of suspicious SNAP transactions following receipt of the charge letter is a clear indication of trafficking since, if trafficking were not occurring, there would be no decrease.

There may be legitimate reasons why a SNAP household might return to a store during a short period of time, but the examples in this Attachment indicate a series of SNAP purchases that total to large dollar amounts. Multiple transactions over a short period of time, especially those of high dollar values, are indicative of attempts to obscure trafficking by dividing a large dollar value transaction into a series of smaller dollar value transactions and are a method which violating stores use to avoid high dollar transactions that cannot be supported.

High Dollar Value Transactions

This Attachment lists 103 individual EBT transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. The substantial number of high dollar transactions is uncharacteristic for a grocery store of this size offering a minimal stock of staple foods and calls into question the legitimacy of these transactions. The SNAP transactions listed are also substantially higher than the average SNAP transaction amount of \$12.80 for this store type in Bronx County. This is unusual and indicative of trafficking.

The evidence under review shows that SNAP households shopping at the Appellant firm are also shopping at many full-line supermarkets and super stores, located nearby as well as at a distance from Appellant's location that offer a greater quantity and variety of SNAP eligible foods items for better prices than customers can find at the Appellant firm. The FNS retail store database shows 10 SNAP retailers located within 0.25 miles/440 yards that includes two supermarkets with the closest supermarket located one block away disputing Appellant's claim of there being few SNAP retailers in the neighborhood. The large dollar transactions remain questionable when considering the proximity of these other stores that would be better shopping options for consumers. Based on their shopping patterns, transportation does not appear to be an issue for these households. Yet, these recipients continue to shop and spend suspicious high dollar amounts at the Appellant firm, where the eligible food stock is limited, often on the same day, or within 24-48 hours of their purchases at larger food stores.

The difference in the average SNAP transaction dollar amount, the total SNAP transaction dollar volume, and the total SNAP transaction count for Bronx County medium grocery stores during the review months and at the Appellant firm is significant. Appellant's total SNAP transaction dollar volume is 31.63 percent larger than the amount for Bronx County medium grocery stores and its average SNAP transaction dollar amount is 5.70 percent smaller than the County average while its average SNAP transaction count is 39.62 percent larger than that of like type stores. The unusually high number of SNAP transactions is an indication that the firm may be dividing larger transactions into multiple smaller transactions in an effort to circumvent detection as previously discussed and would therefore also account for the slightly lower average transaction

amount. A comparison by the Retailer Operations Division of Appellant's SNAP redemptions to that of nearby medium grocery stores that had redemptions for the review period shows similar differences. Additionally, none of these nearby stores exhibit the same suspicious transaction patterns listed in the charge letter for the Appellant firm even though all are located in proximity to Appellant's location and would therefore be expected to share the same SNAP customer base and shopping patterns. This is a further indication that the SNAP transactions in this Attachment and the others do not represent legitimate food purchases. The Retailer Operations Division considered all of these to be indicators of unusual and suspicious activity.

The firm also had irregular SNAP transaction data as compared to like type stores in Bronx County. A comparison of Appellant's redemption data to Bronx County medium grocery stores using ten dollar increments shows that Appellant's transaction count and dollar volume are significantly higher (more than double in some ranges) than those of like type Bronx County stores in all ranges 5 U.S.C. § 552 (b)(6) & (b)(7)(C) at which point they significantly decrease 5 U.S.C. § 552 (b)(6) & (b)(7)(C). 5 U.S.C. § 552 (b)(6) & (b)(7)(C). While there are normally few transactions in these higher ranges, the data shows that most stores of this type do still have a small number of them further supporting the charges that the Appellant firm may be dividing larger trafficking transactions into smaller ones as previously discussed. Dividing large transactions into a series of smaller transactions has long been a technique used by retailers to avoid suspicion when trafficking SNAP benefits. None of Appellant's contentions explain these unusual and suspicious differences.

Appellant contends the large transactions are because food prices are higher than ever and only a few items are needed to accrue a large bill. Egg and milk prices have gone up exponentially and are \$3.99 for a gallon of milk and \$2.49 for eggs. Cold cuts are priced at \$6.99-\$9.49 per pound. The store also sells cases of Ensure at \$48.00 per case. The store offers an extensive variety of food products, a full range of groceries, deli, produce, and meats so it would be easy for a customer to expend their monthly benefits in the store. The store also sells large sizes of items. The photos show the large volume of food products carried in the store. Appellant also contends that when the investigator came to take pictures, there were problems with the refrigeration system and most of the refrigerators were empty due to these issues. They have since been repaired and replaced and are now filled to capacity

The SNAP transactions noted in this Attachment are not presumed to be trafficking because they exceed a set dollar amount; they are questionable because they are inconsistent for this type of store and the store's stock. An analysis of shopping patterns by the Retailer Operations Division shows that households in this Attachment are regularly shopping at much larger stores, and conducting transactions of large dollar amounts, yet are conducting comparable or higher dollar value transactions at the Appellant business. It makes no sense for a household that regularly shops at larger stores and apparently has no transportation limitations to spend large dollar amounts at the Appellant firm since its cost of goods is higher than that of larger stores such as supermarkets or super stores.

Information obtained during the FNS store visit on August 24, 2017, shows that the Appellant firm offers a minimal quantity and variety of SNAP eligible staple food items, many accessory foods, and many ineligible items. Much of the inventory for sale consists of inexpensive snacks, candy, condiments, drinks, and single serving foods as well as many ineligible items. Since the firm offers no fresh unprocessed meat/seafood except for one package of Goya fish, no frozen unprocessed meat/seafood, a very limited quantity and variety of processed meats and seafood (deli meats, canned meat/poultry/fish, sausages, hot dogs, and jerky), no packaged lunch meats, no bacon, no frozen entrees, no frozen dinners, a moderate supply of eggs, a limited selection of fresh fruits and vegetables, no frozen fruits and vegetables, no 100 percent vegetable juices, a limited stock of canned soups, a minimal quantity and variety of canned and packaged staple food items, no large containers of fresh milk (only single serving milk drinks), no packaged cheeses, no yogurt, no sour cream, no butter (only margarine), a limited stock of baby cereals/foods/juices, no infant formula, no corn meal, no tamales, no tortillas, no pitas, no macaroni & cheese, no frozen staple foods of any kind, no tea, no coffee, cocoa, and very few expensive staple food items, these patterns are deemed to be suspicious. The fact that tobacco, tobacco accessories, alcohol, lottery, hot foods, household products, paper products, auto products, health and beauty items, ATM/money orders, gloves, cell phones/accessories/cards, and novelty items are not eligible for purchase with SNAP benefits also provides no justification for the high transaction amounts. The store visit report and photos also show that contrary to Appellant's contentions, the firm does not offer case sales or bulk/large items. A review of the September 25, 2016, store visit photos further shows that the prices for deli meats and cheese as well as for gallons of milk at the firm were the same then as they are now thereby disproving Appellant's examples of higher food prices. The August 24, 2017, store visit photos show only single cans of Ensure in stock while the report's listing of the highest priced items provided by a store employee/owner does not list cases of Ensure at \$48.00 further contradicting Appellant's claims. The Retailer Operations Division also notes that the invoices for inventory purchases provided by Appellant show no purchases of cases of Ensure.

Higher food prices make it even more unlikely that SNAP recipients, with very limited food benefits, would want to spend a considerable part of their benefits in a medium grocery store that does not address all of their food shopping needs when they are already shopping at larger, fully-stocked stores that would offer a greater variety of foods at lower prices. Many of these stores would also offer store brand products at lower prices, offer weekly specials, and have shopping carts and checkouts with built-in scanners and conveyor belts to facilitate processing purchases quickly. Additionally, Appellant furnished no itemized cash register and EBT receipts for the period under review to document the legitimacy of these excessively large transactions. The firm has a small checkout area and no shopping carts thereby making it difficult to facilitate the great quantities of eligible food items required to make up these large dollar transactions. Therefore, it is improbable that the food items purchased in these high dollar amounts could be carried to the register without the use of carts and more likely that the amounts were contrived.

A detailed analysis of the invoices submitted for inventory purchases was conducted by the Retailer Operations Division and the dollar amount of eligible food purchases compared to SNAP redemptions at the firm for the period October 2017-December 2017.

5 U.S.C. § 552 (b)(6) & (b)(7)(C). It is also noted that, during the FNS store visit, the firm stated that eligible food stock is used in the preparation of hot foods that are not eligible for purchase

using SNAP benefits. Based on the size of the kitchen area and the installed equipment, it is likely that hot food sales account for a significant portion of the firm's sales revenue. When the hot food sales and non-SNAP sales using cash/credit/debit are factored, the invoices provided by Appellant are insufficient to account for all sales at the firm.

Appellant's photos do not provide any valid basis for dismissing the charges or for mitigating the penalty imposed as they were taken after the review period and appear to show fully stocked shelves, coolers, and display racks. These photos were likely staged to support Appellant's contentions of the firm being well stocked since the photos taken during the FNS store visit showed many empty or marginally stocked shelves, display racks, and coolers with stock fronted to give the appearance of greater inventory. Appellant's claim that there were problems with the refrigeration system and most of the refrigerators were empty when the investigator came to take pictures is baseless as the store visit photos do not show any freezers or coolers that were empty or noted as being broken. The seven customer statements are also without merit as they provide no evidence related to the suspicious transactions at the Appellant firm. One of the statements admits to receiving store credit at the firm, but subsequent investigation showed that this customer, in fact, conducted no transactions at the firm during the review period casting doubt on the truthfulness of any of the statements provided.

Based on this discussion, Appellant did not provide adequate evidence to support the legitimacy of the excessively large transactions in this Attachment.

Other Contentions

In an appeal of an adverse action, the Appellant bears the burden of proving by a preponderance of evidence that the administrative action should be reversed. That means the Appellant has the burden of providing relevant evidence that a reasonable mind, considering the record as a whole, would accept as sufficient to support a conclusion that the argument asserted is more likely to be true than untrue. Assertions that the firm has not violated program rules, by themselves and without supporting evidence and rationale, do not constitute valid grounds for dismissal of the current charges of violations or for mitigating their impact.

The owner and the firm were charged with trafficking based on a computer analysis of the store's transactions for the months of June 2017 through December 2017. The charges do not derive from the use of a confidential informant or independent investigator who visited the store and made illegal purchases to support findings of trafficking, but by a computer program used by SNAP Administrators. While traditional undercover operations are still in use by USDA, for many years federal regulations have also authorized the use of evidence consisting of EBT transaction data in investigations of SNAP retail stores to determine if trafficking is occurring and U.S. District Courts have long upheld the validity of EBT transaction data.

The issue under review involves a charge of trafficking SNAP benefits based on EBT transaction data. EBT transaction data is covered in SNAP regulations at 7 CFR § 278.6(a) and is addressed below. Trafficking is always considered to be the most serious violation even if it is a first offense therefore a temporary suspension or lesser penalty would not be applicable. SNAP

regulations at 278.6(e)(1) clearly state that, “FNS shall disqualify a firm permanently if personnel of the firm have trafficked as defined in § 271.2.” SNAP regulations at 7 CFR § 271.2, define trafficking as, “The buying, selling, stealing, or otherwise effecting an exchange of SNAP benefits for cash or consideration other than eligible food”. SNAP regulations at 7 CFR § 278.6(a) clearly state that “FNS may disqualify any authorized retail food store if the firm fails to comply with the Food and Nutrition Act of 2008, as amended, 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”. In the present case, the data presented in the Attachments is solely based on the SNAP EBT transactions conducted at the Appellant firm during the review period. This firm was selected as a result of a series of complex algorithms that make numerous data comparisons with other like type firms during the review period. All of the transactions were then reviewed and analyzed by the Retailer Operations Division staff before the decision was made to issue a charge letter. This investigative process included a detailed examination of information obtained from various sources, including, but not limited to the inventory report and photos from the FNS store visit, a transaction comparison and analysis of like type and larger stores, and analysis of shopping patterns for recipient households conducting transactions at the Appellant firm during the review period. This analysis also included a review of the firm to ensure its store classification was correct and the data comparisons with like type firms valid. Additionally, there are nearby like type stores whose transaction data does not form these suspicious patterns and are therefore not at risk of disqualification for trafficking. There is also no regulatory requirement that trafficking disqualifications be based solely on on-site undercover operations.

Based on this empirical data, and in the absence of sufficient evidence for the legitimacy of 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 charge letter evidence trafficking as the most likely explanation for the questionable transactions listed in the charge letter Attachments. It is herein determined that Appellant did not provide a preponderance of evidence demonstrating that the transactions contained in the charge letter were more likely due to eligible food sales than not. Under review, the evidence more substantially supports a conclusion that the transaction activity in the charge letter Attachments is due primarily to trafficking in SNAP benefits.

Neither the Food and Nutrition Act of 2008, as amended, nor the regulations issued pursuant thereto cite any minimum dollar amount of cash or SNAP benefits, or number of occurrences, for such exchanges to be defined as trafficking. Nor do they cite any degrees of seriousness pertaining to trafficking of SNAP benefits. Trafficking is always considered to be the most serious violation, even when the exchange of SNAP benefits for cash is dollar-for-dollar or is conducted by a non-managerial store clerk. This is reflected in the Food and Nutrition Act, which reads, in part, that disqualification “shall be permanent upon the first occasion of a disqualification based on trafficking by a retail food store.” In keeping with this legislative mandate, Section 278.6(e)(1)(i) of the SNAP regulations states that FNS shall disqualify a firm permanently if personnel of the firm have trafficked. There is no agency discretion in the matter of what sanction is to be imposed when trafficking is involved and second chances are not an authorized option under existing regulations.

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 SNAP regulations for waiver or reduction of an administrative penalty assessment on the basis of possible economic hardship to the firm or to ownership resulting from imposition of such penalty. To allow ownership to be excused from an assessed administrative penalty based on purported economic hardship to the firm would render virtually meaningless the enforcement provisions of the Food and Nutrition Act of 2008, as amended, and the enforcement efforts of the USDA. Furthermore, giving special consideration to economic hardship to the firm would forsake fairness and equity, not only to competing stores and other participating retailers who are complying fully with program regulations, but also to those retailers who have been disqualified from the program in the past for similar violations. Therefore, ownership's contention that the firm may incur economic hardship based on the assessment of an administrative penalty does not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

CIVIL MONEY PENALTY

A CMP for hardship to SNAP households may not be imposed in lieu of a permanent disqualification as specified in SNAP regulations at 7 CFR § 278.6(f). Trafficking is a permanent disqualification so Appellant is not eligible for a hardship CMP.

The Retailer Operations Division determined that the Appellant was not eligible for a trafficking CMP in lieu of a disqualification under 7 CFR 278.6(i) because 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 within the specified timeframe. As such, the Retailer Operations Division determined that Appellant was not eligible for a trafficking CMP in lieu of permanent disqualification.

SNAP regulations are explicit in what constitutes substantial evidence. Specifically, 7 CFR § 278.6(i)(2) states in relevant part, "As specified in Criterion 3 above, in determining whether a firm has established an effective policy to prevent violations, FNS shall consider **written and dated statements of firm policy** which reflect a commitment to ensure that the firm is operated in a manner consistent with part 278 of current FNS regulations and current FSP policy on the proper acceptance and handling of food coupons." This section goes on to state, "As required by Criterion 2, such policy statements shall be considered only if documentation is supplied which establishes that the policy statements were provided to the violating employee(s) prior to the commission of the violation." This section further states, "A firm which seeks a civil money penalty in lieu of permanent disqualification **shall document** its training activity by submitting to FNS its **dated training curricula and records of dates training sessions were conducted...**" (Emphasis added).

Appellant did not submit a copy of the firm's SNAP compliance policy or training program. The only documentation submitted were two signature sheets for mandatory SNAP meetings conducted on April 10, 2017, and on October 9, 2017. Both trainings were led by the store owner and the forms listed five and four employees, respectively, as being in attendance. It is noted that the format and wording are nearly verbatim to those used by other SNAP retailers located in the Bronx.

Based on the above discussion and the evidence under review, Appellant failed to meet the regulatory standard for a trafficking CMP as it did not provide substantial evidence that it met all four criteria required by 7 CFR §278.6(i). Based on the above, the Retailer Operations Division's decision not to impose a CMP in lieu of disqualification is sustained as appropriate pursuant to 7 CFR §278.6(i).

CONCLUSION

The Retailer Operations Division presented a case that Appellant has likely trafficked in SNAP benefits. Their analysis of Appellant's EBT transaction record was the primary basis for its determination to permanently disqualify Appellant. This data provided substantial evidence that the questionable transactions during the review period had characteristics consistent with trafficking violations in SNAP benefits. This is evidenced by: the suspicious patterns in four Attachments of EBT transaction data, the inadequacy of the store's staple food stock as observed during the store visit to support large transactions in short time frames, the lack of adequate evidence for customer spending habits given that there are other SNAP authorized stores located within proximity to Appellant that likely offer a greater selection of eligible food items at competitive prices, and the irregular SNAP transaction data of Appellant as compared to other like type and larger stores in the county and state.

The retailer has not provided sufficient evidence to rebut the case that Appellant most likely trafficked in SNAP benefits. Therefore, based on a review of all of the evidence in this case, it is more likely true than not true that program violations did, in fact, occur as charged. Based on the discussion above, the determination to impose a permanent disqualification against Appellant is sustained. Furthermore, the Retailer Operations Division properly determined that Appellant was not eligible for a trafficking CMP according to Section 278.6(i) of the SNAP regulations.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in 7 U.S.C. § 2023 and 7 CFR § 279.7. If a judicial review is desired, the complaint must be filed in the U.S. District Court for the district in which Appellant's owner resides, is engaged in business, or in any court of record of the State having competent jurisdiction. This complaint, naming the United States as the defendant, must be filed within thirty (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.

ROBERT T. DEEGAN
Administrative Review Officer

August 16, 2018