

**U.S. Department of Agriculture  
Food and Nutrition Service  
Administrative Review Branch  
Alexandria, VA 22302**

**Red Sun Food Market,**

**Appellant,**

**v.**

**Retailer Operations Division,**

**Respondent.**

**Case Number: C0200448**

**FINAL AGENCY DECISION**

The record indicates that Red Sun Food Market (Appellant) committed violations of the Supplemental Nutrition Assistance Program (SNAP). It is the decision of the USDA that there is sufficient evidence to support a finding that the permanent disqualification from participation in the program as an authorized retail food store, as imposed by the Retailer Operations Division, (Retailer Operations) was appropriate.

**ISSUE**

The issue accepted for review is whether Retailer Operations took appropriate action, consistent with 7 CFR § 278.6(a), (c) and (e)(1) in its administration of the SNAP, when it assessed a permanent disqualification against Appellant.

**AUTHORITY**

7 U.S.C. § 2023 and its implementing regulations at 7 CFR § 279.1 provide that “A food retailer or wholesale food concern aggrieved by administrative action under § 278.1, § 278.6 or § 278.7 . . . may file a written request for review of the administrative action with FNS.”

**CASE CHRONOLOGY**

By Charge letter dated July 6, 2017, Retailer Operations informed the owner that it had compiled evidence that Appellant had violated the SNAP regulations based on electronic benefit transfer (EBT) transactions that “establish clear and repetitive patterns of unusual, irregular, and inexplicable SNAP activity for your type of firm.” The sanction for trafficking is permanent

disqualification. The record shows that Appellant replied to the Charge letter July 15 and 17, 2017, and August 4, 8, 10 and 14, 2017.

Retailer Operations issued a Determination letter dated August 18, 2017. This letter informed Appellant that it was permanently disqualified from the SNAP in accordance with Sections 278.6(c) and 278.6(e)(1) of the regulations. Retailer Operations considered Appellant's eligibility for a civil money penalty (CMP) according to the terms of Section 278.6(i) of the regulations. Appellant was not eligible for the CMP because insufficient evidence was submitted timely to demonstrate that the firm had established and implemented an effective compliance policy and program to prevent violations of the SNAP regulations.

By letter dated August 24, 2017, the owner, via counsel, appealed Retailer Operations' determination and requested administrative review. The appeal was granted by letter dated August 31, 2017. Counsel provided additional information postmarked September 26, 2017.

### **STANDARD OF REVIEW**

In an appeal of an adverse action, the Appellant bears the burden of proving, by a preponderance of the evidence, that the administrative action should be reversed. That means the Appellant has the burden of providing relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to support a conclusion that the argument asserted is more likely to be true than not true.

### **CONTROLLING LAW AND REGULATIONS**

The controlling statute in this matter is contained in the Food and Nutrition Act of 2008, as amended, 7 U.S.C. § 2021 and § 278 of Title 7 of the Code of Federal Regulations (CFR). Sections 278.6(a) and (e)(1) 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(e)(1) reads: "FNS shall disqualify a firm permanently if personnel of the firm have trafficked as defined in § 271.2." Trafficking is defined, in part, in 7 CFR § 271.2, as "the buying or selling of SNAP benefits for cash or consideration other than eligible food."

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 products prepared for immediate consumption."

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(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).”

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.”

### **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 data during the period of November 2016 through April 2017. This involved two patterns of transaction characteristics which are indicative of trafficking:

1. Multiple transactions made from individual benefit accounts within unusually short time frames.
2. Excessively large purchase transactions were made from recipient accounts.

### **APPELLANT’S CONTENTIONS AND EVIDENCE**

In reaching a decision, attention has been given to all contentions presented, including any not specifically referenced.

- There is no basis for a finding of trafficking.
- A significant number of customers walk to the store and live in close proximity.
- The store serves about 100 customers per day, the majority use EBT.
- In Pennsylvania benefits are added beginning on the 1<sup>st</sup> of the month through the 10<sup>th</sup>.
- Suspect sales representing approximately 2% of total sales can reasonably be seen as statistically insignificant and not indicative of trafficking.
- The charge letter does not indicate an on-site investigation, inconsistent redemption data, or disqualification from WIC.
- The market has not been previously charged with any EBT violation or been previously sanctioned.

Appellant submitted a ten page response, 42 store photos, 2015 and 2016 federal tax returns, inventory invoices and receipts, a flyer from a vendor showing the type of products sold, Bank of America business statements, customer statements, Pennsylvania’s SNAP benefits distribution schedule, a U.S. Department of Interior bulletin on markups at national park stores, and a hand

written list of the food items and prices. Two faxes of additional information were provided including detailed receipts for Jetro and K-T Wholesale and markup percentages used by the firm. Counsel also submitted six pages of Discover Card statements for October 2016 through May 2017.

## ANALYSIS AND FINDINGS

### Store Description

Appellant is an approximately 730 square foot moderately stocked convenience store. The staple food stock included canned and packaged goods, bread, pasta, eggs, fresh produce, frozen foods, and dairy items. Appellant has a deli counter with a limited variety of deli meats and cheeses sold in both prepared meals and by the pound. The firm did not offer fresh meats or seafood specials or bundles or fruit/vegetable boxes. The onsite store visit report and photos indicate:

- The checkout area is small with a display on one side and a scale on the other.
- Appellant carries a robust non-food, not SNAP eligible inventory including: tobacco products, mobile phones/phone cards, health and beauty aids, paper goods, and cleaning products.
- There were no shopping baskets or shopping carts available.

### Charge Letter Attachments

Government analyses of stores caught in trafficking violations during actual on-site investigations have found that transactions involving trafficking consistently display particular characteristics or patterns. These patterns include, in part, those cited in the Charges letter. Retailer Operations presented a case that Appellant trafficked SNAP benefits. Each Attachment furnished with the Charge letter represents the questionable and unusual patterns of SNAP transactions indicative of trafficking which were conducted at Appellant during the review period. As patterns of unusual transactions appear across multiple Attachments the case of trafficking becomes more convincing.

**Attachment 1: Multiple SNAP purchase transactions were made from individual benefit accounts in unusually short time frames.** This Attachment lists 33 sets of two or more transactions, conducted by 20 different households (HHs), **5 U.S.C. § 552 (b)(6) & (b)(7)(C).**

Contentions:

- Some customers frequent the store several times per day depending on availability of desired merchandise, sudden food needs, impulse purchasing, and difficulty of making it home with larger purchases in a single visit.
- The store sells numerous EBT eligible products.
- There is a bus stop directly in front of the market.
- 15 of the multiple transactions took place within one week of the funds being added.
- Some come for competitive prices and loyalty to a local merchant.
- There is no exhaustion of benefits in one or a few transactions in a short period of time.

- The long hours of operation, location, bus stop in front of the store, the varied eligible food, and the purchase practices of some customers all help reasonably explain multiple transactions from individual accounts.
- While there are 46 other stores within one mile of Market there are three gas stations, two pharmacies, two Wawa's convenience stores, two 7/11 stores, two dollar stores, and a single major grocery store. The dollar stores, gas stations and pharmacies are not well known for selling a variety of nutritious foods. Larger chain convenience stores focus on pre-packaged foods and sell a good deal of ineligible cooked foods.
- Only six stores in close proximity have a bus stop directly in front. The convenience of public transit is convenient to lower income individuals who frequently do not have a car.
- The transactions fall within well recognized purchase habits identified by USDA studies.
- The time periods between transactions were of sufficient duration that legitimate sales could have been made at the single register.
- Transactions 1 and 2 occurred closest in time and could have been a household that returned for the rest of the products desired. **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**

According to the record there at least 42 authorized stores within a one mile radius of Appellant including: 19 additional convenience stores, five combination stores, 14 small grocery stores, two medium grocery stores, a supermarket and a super store. The data shows that 14 of the 20 households flagged at Appellant on the Attachment, **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**, made a SNAP transaction at a large grocery, a supermarket or super store within one day of conducting a transaction at Appellant. For example, one household transacted benefits at three different supermarkets and one super store, a 2.94 mile distance from Appellant, within one day of conducting a transaction at Appellant. Within one day of conducting a transaction at Appellant, another household transacted benefits at one super store and one supermarket at a distance of 2.25 miles. A household transacted benefits at one super store and one supermarket at a distance of 6.24 miles from Appellant within one day of conducting a transaction at Appellant. Thus, households did access other larger stores to meet their grocery needs.

**5 U.S.C. § 552 (b)(6) & (b)(7)(C).**

It is not uncommon to see back-to-back purchases in the case of a forgotten item or impulse item of a nominal amount, yet seven of the 33 data sets, **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** show the second transaction exceeded the prior transaction amount. As noted in 7 U.S.C. § 2021(b)(3)(B), when trafficking occurs, permanent disqualification is the required penalty, even on the first occasion. No itemized cash register tapes were provided by Appellant as evidence of eligible food sales. While some households may have conducted legitimate transactions at Appellant, insufficient evidence was presented to explain the transactions listed were for eligible items.

### **Transaction Times**

Retailer Operations found transactions #1 and #2 suspicious. **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**  
The record documents that the medium grocery was superior in eligible food stock to Appellant. The record states that the household has an address that is more than three miles

from Appellant. This distance makes it less likely that the HH may have walked the first purchase home then returned for additional items.

Retailer Operations found other transactions listed to be suspicious and indicative of trafficking. 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

### **Customer Statements**

Appellant provided pre-printed customer statements. The format allowed customers to provide reasons for multiple visits to Appellant. Retailer Operations determined customers stated that Appellant offered great service, they were nice, family-owned, and/or they were located close by. Retailer Operations determined that many of the customers' addresses were in close proximity to Appellant. However, there are numerous other shopping options located within a reasonable distance from Appellant and the recipients. No statements offered reasons for return visits to Appellant such as: superior eligible food stock, food stock unavailable elsewhere, lack of transportation, or delivery of previously unavailable products. Thus, though a number of transactions listed on the Attachments may be explained by the customer statements, the majority of the unusual transactions listed on the Attachments remain unexplained.

Retailer Operations searched the SNAP state administrative terminal to determine the households' SNAP numbers and addresses. Household 5 U.S.C. § 552 (b)(6) & (b)(7)(C) indicated the store was close by and "they have the food that I need." This HH did not have any flagged transactions at Appellant during the review period. Thus, the statement does not help to support or explain the unusual transactions on the Attachments. Household 5 U.S.C. § 552 (b)(6) & (b)(7)(C) stated "they are awesome people and very friendly and courteous to everyone. They always accommodate you and because they are convenient as well, I don't go anywhere else unless they are closed." This household did not have any flagged transactions at Appellant on either Attachment during the review period. As such, the statement does not provide evidence to support the unusual transactions in the Charge letter.

No transactions at Appellant by household 5 U.S.C. § 552 (b)(6) & (b)(7)(C) matched the HH number, card number, or the four digits listed on the customer statement. As such this customer statement does not explain the transactions listed on the Charge letter. Household 5 U.S.C. § 552 (b)(6) & (b)(7)(C) did not have any flagged transactions at Appellant during the review period. Household 5 U.S.C. § 552 (b)(6) & (b)(7)(C) stated it visited the store more than one time in the same day because "it's convenient and it's a store close by to our home. They are a family business. They treat us very nice." This HH did not have any flagged transactions at Appellant during the review period.

5 U.S.C. § 552 (b)(6) & (b)(7)(C) listed his address and gave the last digits of his EBT account/card number. The statement indicated the HH visited the store more than one time in the same day because "I got great customer service and they are really nice people. Very great family." According to the state terminal there are two individuals with this name; neither has a card number ending in the numbers listed, and neither has a recorded address as the one given. There was one EBT card number that ended in the digits provided which is assigned 5 U.S.C. § 552 (b)(6) & (b)(7)(C) who has an address matching the statement address. The

address appears to be a 4 to 5 minute walk from Appellant. One flagged transaction was completed by this household.

Household 5 U.S.C. § 552 (b)(6) & (b)(7)(C) indicated it visited the store more than one time in the same day because “food is not a lot of money.” The HH made four transactions on Attachment 1 and seven listed on Attachment 2. The household completed a total of 43 SNAP transactions during the review period and only the transactions at Appellant resulted in flags. The household conducted SNAP transactions at a nearby medium grocery, none of which resulted in flags. Retailer Operations found it suspicious that the household traveled past the medium grocery to complete transactions at Appellant. Household 5 U.S.C. § 552 (b)(6) & (b)(7)(C) completed three Attachment 2 transactions at Appellant, each for less 5 U.S.C. § 552 (b)(6) & (b)(7)(C). These could have been transactions for eligible foods. The statement offers no explanation for Attachment 1 transactions.

The customer statements identified some beneficiaries who frequented the store however, most did not have transactions that were flagged at Appellant during the review months. While some households listed on the Attachments may have made eligible food transactions at Appellant, customer affidavits are anecdotal and do not prove that the transactions were for eligible foods. Customers engaging in trafficking transactions would be unlikely to admit to trafficking. Customer statements would be expected to attest to the legitimacy of questionable transactions regardless of whether they were, in fact, legitimate.

**Attachment 2: Excessively large purchase transactions were made from recipient accounts.**

This Attachment lists SNAP transactions conducted by 76 different households 5 U.S.C. § 552 (b)(6) & (b)(7)(C). 5 U.S.C. § 552 (b)(6) & (b)(7)(C). When compared to three nearby convenience stores Appellant had 307 transactions flagged on this Attachment while at the other stores’ flagged transactions that met the parameters of this Attachment numbered 29, 75 and 12. This is irregular.

Appellant does not have shopping carts or hand baskets to facilitate large quantities of eligible items to make up the large dollar transactions listed. These items would need to be handled on a limited counter space in small checkout area. The large dollar transactions remain questionable when considering the proximity of other larger authorized stores located within a mile from Appellant’s location. A shopping analysis shows that recipients who frequented Appellant also shopped at larger stores, yet spent large dollar amounts at Appellant.

**Contentions:**

- 102 or 33% of the transactions took place within 7 calendar days of funds being added to accounts.
- A total of 38 transactions were less 5 U.S.C. § 552 (b)(6) & (b)(7)(C).
- Recipients can reasonably be expected to make larger purchases with the first 7 to 14 days of funds being added to an account.
- FNS has not made the allegation of the exhaustion of the majority or all of the beneficiary’s monthly EBT allotment in one or a few transactions within a short time period.
- The cost of goods sold for tax year 2016 5 U.S.C. § 552 (b)(6) & (b)(7)(C)

- The bank statements show expenses 5 U.S.C. § 552 (b)(6) & (b)(7)(C) Vendor receipts from wholesalers and distributors show that the store has a well-stocked supply of food. The profit realized above inventory costs is not excessive and unexplainable rather it is entirely consistent with reasonable and competitive markup price.
- In the typical trafficking scenario there is profit that significantly exceeds the cost of materials purchased which cannot be hidden or disguised in any manner.
- Here are some more expensive popular eligible foods: baby food: \$29.00; coffee: \$6.99; iced tea: \$6.50; oil: \$8.99; deli meats: \$4.99; buffalo chicken: \$6.99; cheese: \$5.99; chicken wings and breasts: \$9.99; steak: \$9.99, and fish filet: \$7.50. Evidence of substantial purchases has been provided.
- The Discovery Card documentation shows the market making purchases at food wholesalers and larger supermarkets for resale at the market.

### Vendor Invoices

Appellant provided faxed and mailed vendor receipts. The record supports that 148 receipts were submitted; six receipts 5 U.S.C. § 552 (b)(6) & (b)(7)(C) were dated outside of the review period and were not considered by Retailer Operations in its analysis. Unless a receipt was clearly for a SNAP ineligible item such as tobacco, pet products, and household/cleaning goods, it was counted as eligible. Retailer Operations' determined eligible inventory receipts for the review period 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Retailer Operations applied a markup of 40% to estimate eligible inventory at Appellant 5 U.S.C. § 552 (b)(6) & (b)(7)(C). SNAP redemptions for the review months 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Appellant had cash customers who likely acquired eligible foods, as well as SNAP customers who also likely used cash when their benefits were insufficient. A SNAP redemption total exceeding documented eligible food inventory for the review period is suspicious and indicative of trafficking. The 2016 Schedule C tax information indicates that Appellant had stock estimated 5 U.S.C. § 552 (b)(6) & (b)(7)(C) at the beginning of the tax year. While rolling inventory may have bridged the gap in eligible food documentation noted by Retailer Operations, there is no way to confirm what portion of the inventory listed on the tax form was in eligible SNAP items.

Retailer Operations' review of the vendor receipts/invoices showed no documented units of infant formula purchased during the review period. While the store photos support that infant formula was on hand in small quantities, there are no supporting invoices to support the firm replenished its stock. This indicates that the firm was not selling infant formula, 5 U.S.C. § 552 (b)(6) & (b)(7)(C), in large volume. Also, since SNAP recipients also qualify for WIC, it is more likely that an expensive item such as formula would be acquired at a WIC-authorized store using WIC benefits rather than SNAP benefits. Most of the items on the handwritten price list advanced by Appellant are for less 5 U.S.C. § 552 (b)(6) & (b)(7)(C), including an array of low priced candies and beverages, typical of a convenience store.

### No Documented Violations

A record of participation in the SNAP with no previously documented instance of violations does not constitute valid grounds for dismissal of the current charges of violations or mitigate the impact of the violations upon which they are based. There is no provision in the Act, or



regulations that reverses or reduces a sanction based upon a lack of prior violations by a firm and its owners, managers and/or employees.

### **Court Cases**

As to the court cases cited by counsel, the administrative review process should determine whether Retailer Operations followed the Food and Nutrition Act and the regulations issued under the Act when it took action against Appellant. The administrative review officer is not responsible for determining whether any legal cases cited by counsel apply to Appellant's situation. If the final agency decision is appealed to the federal district court, the judge is responsible for determining whether case law cited by counsel is on point and applicable to Appellant's case.

### **CIVIL MONEY PENALTY**

Retailer Operations determined that Appellant was not eligible for a trafficking civil money penalty according to the terms of Section 278.6(i) of the SNAP regulations. The owner did not submit documentation to prove that Appellant met the trafficking CMP requirements as stipulated in the regulations at 7 CFR Section 278.6(i). These regulations specify the criteria for a firm's eligibility for a civil money penalty in lieu of permanent disqualification for trafficking. The criteria, as a whole, are the minimum standard that firms must meet in order to be eligible for such a penalty. Accordingly, Retailer Operations determined that Appellant did not qualify for a civil money penalty in lieu of a permanent disqualification.

### **CONCLUSION**

Retailer Operations' analysis of Appellant's SNAP transaction record was the primary basis for its determination to permanently disqualify Appellant. This data provided evidence that the questionable transactions during the review period had characteristics that are consistent with trafficking violations in SNAP benefits. Based on empirical data and reports, the lack of veracity of the customer statements, the onsite store inventory report, the proximity of many other authorized stores, the gap in documented eligible inventory and the SNAP redemption total for the review months, and recipient shopping histories, among many factors considered, Retailer Operations determined that the "unusual, irregular, and inexplicable" transactions and patterns cited in the letter of charges evidence trafficking as the most likely explanation.

Upon review, a conclusion can be drawn, through a preponderance of evidence, that Appellant's contentions did not outweigh the evidence of trafficking, and it is more likely true than not true that violations did occur as charged by Retailer Operations. Therefore, the decision to impose a permanent disqualification against Appellant is sustained. Retailer Operations' determination that Appellant was not eligible for a trafficking civil money penalty according to the terms of 7 CFR Section 278.6(i) of the SNAP regulations is also sustained.

## **RIGHTS AND REMEDIES**

Please see Section 14 of the Food and Nutrition Act of 2008, and Section 279.7 of the regulations (7 CFR § 279.7) with respect to applicable rights to a judicial review of this determination. 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's owner resides or is engaged in business, or in any court of record of the State having competent jurisdiction. If any Complaint is filed, it must be filed within thirty (30) days of receipt of this Decision.

Under the Freedom of Information Act, 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.

M. Viens  
Administrative Review Officer

November 8, 2017