

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

Simple Love Corp,

Appellant,

v.

Case Number: C0209527

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 Simple Love 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 September 21, 2018.

AUTHORITY

According to 7 U.S.C. § 2023 and the 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 June 21, 2018, the Retailer Operations Division charged Appellant with trafficking based on a series of irregular SNAP transaction patterns that occurred in November 2017 through April 2018. 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, through counsel, responded to the charges in letters dated June 26, June 28, and July 2, 2018, that did not request or provide any documentation in support of a CMP. The Retailer Operations Division notified Appellant by letter dated September 21, 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 October 1, 2018, Appellant, through counsel, appealed the Retailer Operations Division's assessment and requested administrative review. The appeal was granted. Subsequent correspondence dated November 23, 2018, was received.

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 six month period of November 2017 through April 2018. This involved three patterns of EBT transaction characteristics indicative of trafficking:

1. There were an unusual number of transactions ending in a same cents value.
2. Multiple transactions were made from individual benefit accounts in unusually short time frames.
3. 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 owners, who do not speak English, deny the violations and submit affidavits;
- The charge letter includes only factual allegations and a legal conclusion that the firm engaged in “trafficking”, but it does not cite any laws, rules or regulations which it might have violated;
- The prices for popular items are rounded as shown in the attached price list making it easier for the cashier to quickly complete transactions by reducing the need for change;
- The multiple transactions are not understood. Almost all were conducted during the firm’s business hours. The owners cannot refuse service and have no control over customers who can make as many purchases as they wish. It is common knowledge that customers will shop at the firm multiple times per day since they may have forgotten something or have decided to buy something on the spur of the moment;

- USDA does not state what amount would not be excessively large so this charge is impermissibly vague. Photos of items purchased by customers along with a receipt are attached proving that customers, usually from the nearby shelter, buy lots of merchandise. Appellant also gave examples of two households, one of which has two SNAP account numbers, and compares their weekly purchases against those listed in the U. S. Bureau of Labor Statistic’s 2015-2016 Consumer Expenditure Survey for the New York metropolitan area by the showing that their weekly expenditures are not unreasonable or suspicious;
- The same transactions are listed twice in the charge letter and it is not explained if they are added twice in determining the CMP penalty amount. The letter also does not cite the regulation that allows USDA to use such violations twice;
- Even if the charges listed in the charge letter are true and accurate, they do not rise to the level of trafficking as defined by 7 CFR 271.2; and,
- Appellant offers a \$1,000.00 settlement for the sake of a quick and amicable resolution without any admission of liability or wrongdoing and without any disqualification.

Appellant submitted affidavits from the owners as well as excerpts from the BLS Consumer Expenditure Survey, a handwritten price list, three photos of merchandise purchased by customers; one photo of a cash register receipt in the amount of 5 U.S.C. § 552 (b)(6) & (b)(7)(C); one photo of a daily sales summary report for February 12, 2018, showing total sales of 5 U.S.C. § 552 (b)(6) & (b)(7)(C); and two letters attesting to the owners’ reputation in support of these contentions.

ANALYSIS AND FINDINGS

Government analyses of stores caught in trafficking violations during on-site investigations have found that transactions involving trafficking consistently display particular characteristics or patterns. These patterns include, in part, those cited in the letter of charges. Nevertheless, transactions having such characteristics are sometimes valid and sufficient evidence that support that they were the result of legitimate purchases of eligible food items is provided. This is why opportunities are afforded to charged retailers to explain the questionable transactions cited and to provide evidence that they are legitimate.

The Retailer Operations Division presented a case that Appellant trafficked SNAP benefits. Each Attachment furnished with the letter of charges represents the questionable and unusual patterns of SNAP transactions indicative of trafficking which were conducted at Appellant’s store 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 initially authorized the firm on November 30, 2015. The case file indicates that in reaching a disqualification determination, the Retailer Operations Division considered information obtained during a February 5, 2018, 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 very small convenience store with narrow aisles offering a very limited quantity and variety of staple foods and carrying no other unique items or offering any distinctive services.
- The store stocked traditional American brands as well as a limited variety of canned and packaged Hispanic foods, primarily Goya products. There were no other ethnic or specialty food items.
- The store visit report and photos showed no shopping carts and only five small hand baskets for customer use thus severely limiting the amounts of food that could be moved to the checkout.
- No case sales, bulk items, or other sales were evident that would explain the unusual transactions and no cased items were available for purchase except for beer.
- The store visit report specifically noted that the firm was not a specialty store and that there were no meat packages or fruit and vegetable boxes for sale.
- The firm had a small kitchen/food prep area containing a sandwich prep table with refrigerated storage under, a cooktop grill, microwave oven, four slice toaster, rice cooker, commercial slicer, stainless steel prep table, three-part sink, and a commercial exhaust hood. The firm offered hot breakfast items, hot/cold sandwiches, and hot drinks. The report notes that the firm uses store stock (milk, eggs, bread, vegetables, etc.) to prepare these food items. There was also a counter with three stools for eat-in customers.
- There was a one checkout area approximately 2.0 feet wide and 1.5 feet deep with displays and a PIN pad taking up space on both sides leaving a very limited area for customers to place their purchases. The very small checkout area would make it problematic to process large orders. The checkout area had one cash register, one lottery specialty register, a POS device, and no optical scanner as confirmed by the store 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 soda, candy, snacks, and other drinks as well as many ineligible items.
- The firm had no fresh unprocessed meat/seafood, no frozen unprocessed meat/seafood, a limited quantity and variety of processed meats (canned meat, poultry, fish; hot dogs; bacon; and jerky), no deli meats for sale by the pound, no sausages, no frozen entrees, no frozen dinners, many cartons of eggs, a very limited selection of fresh fruit and vegetables, no frozen fruits or vegetables, packaged nuts, single serving nuts, a limited selection of canned soups, a limited quantity and variety of canned and packaged staple food items, no deli cheese for sale by the pound, no packaged cheese, yogurt, single serving yogurt, butter, no margarine, canned milk, fresh milk, coconut milk, soy milk, Lactaid milk, one powdered milk, single serving milk drinks, cream cheese, bread, no rolls, no pitas, several packages of tortillas, no tostadas, no corn meal, flour, sugar, rice, dried beans, dried fruit (raisins), cold cereal, single serving cold cereal, hot cereal, many single serving Ramen noodle soups, canned pasta, dry pasta, no dry noodles, pancake mixes, baking mixes, mac&cheese, cooking oil, coffee, tea, cocoa, a limited

selection of baby foods, one container of infant formula, and few expensive staple food items.

- Ineligible items included: tobacco, alcohol, lottery, hot food, hot drinks, household products, paper products, pet products, auto products, health and beauty items, ATM, clothing, hats, shovels, phone cards/phone accessories, newspapers, diapers, school supplies, toys, and rock salt while accessory foods included: candy, spices, condiments, cooking oil, sugar, snacks, baked goods, single serving ice cream, baking mixes, coffee, tea, cocoa, and un/carbonated drinks.
- The firm's hours of operation were open 7:00 AM-10:00 PM daily per the store owner. The owner also stated that the firm did take phone orders, did not take online grocery orders, did not deliver groceries, did not round price totals up/down, and had a pricing structure with most product prices ending in .x9 cents.
- Signage was primarily in English and there were no SNAP posters (anti-fraud, eligible items, reporting trafficking, etc.) visible in the store.
- Most food items were priced and comments on the FNS store visit report, completed in conjunction with the owner, 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 listed the four most expensive food items costing more than \$5.00 for sale in the store as being 629 gram container of infant formula priced at \$29.50, a 10 pound bag of rice priced at \$13.99, a one gallon container of corn oil priced at \$12.99, and an 800 gram container of powdered milk priced at \$12.49. The firm had only one container of infant formula and one container of powdered milk in stock. This listing of the most expensive items was provided by the store owner during the store visit.
- While the firm did stock a very limited selection of baby foods and infant formula, most SNAP households with infants or small children are WIC participants and therefore would be purchasing these products at a WIC vendor using WIC vouchers, not SNAP EBT at the Appellant firm.

Unusual numbers of transactions ending in a same cents value

This attachment lists 368 transactions with 260 transactions ending in the same cents value of .00 cents and 108 transactions ending in the same cents value of .50 cents.

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 photographs 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 the prices for popular items are rounded, as shown in the attached price list, making it easier for the cashier to quickly complete transactions by reducing the need for change.

The inventory report and photos from the 2018 FNS store visit show the firm offered a very limited stock of staple foods that included few expensive staple food items on the day of the visit making it questionable that such a large number of high dollar SNAP transactions could be for legitimate food purchases. The visit report, completed in conjunction with the store owner, specifically notes that the firm's pricing structure has the majority of food prices ending in .x9 cents and that the firm does not round price totals up or down. The firm's pricing structure is further supported by store visit photos showing foods with prices ending in .x9 cents. 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.

A review of Appellant's price list shows that five of the eight pages contain accessory foods such as drinks and candy. Another page lists only prices for deli meats/cheeses and for cold, ready-to-eat sandwiches even though the store visit report specifically notes the owner stating that deli meats/cheeses were not available for purchase by the pound. The price list also includes many case prices for drinks ranging from \$13.99 to \$38.00. During the store visit, the store owner provided a listing of the four most expensive items offered for sale that did not include any of these cased drinks making it likely that they were not actually available for purchase. It is further noted that only one of the four most expensive items provided by the owner during the store visit was included in the price list. Most of the items in the price list sell for \$5.00 or less and have prices ending in .00, .25, .50, .75, and .x9 cents. Only 80 of the more than 260 items listed have prices ending in .00 cents with the majority of the 80 items priced at \$1.00. This pricing structure completely contradicts and refutes Appellant's statement that prices for popular items have been rounded to .00 cents to facilitate the ability of cashiers to quickly process transactions by reducing the need to make change. The inclusion of numerous items not available for purchase and the omission of most staple food items in the price list greatly diminish its evidentiary value. As the Appellant firm stocks very few expensive food items, it would require many food items to equal the large dollar transactions listed in this Attachment. The purchase of numerous items with prices ending in .00, .25, .50, .75, and .x9 cents would not result in the large numbers of transactions ending in .00 and .50 cents found in this Attachment.

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.

Multiple transactions in unusually short time frames

This Attachment documents 46 individual transactions in 20 sets of two or more transactions conducted by 15 different households in a short period of time.

5 U.S.C. § 552 (b)(6) & (b)(7)(C). One of the 20 transaction sets contains a swiped and a manually key entered transaction made using the same EBT card.

5 U.S.C. § 552 (b)(6) & (b)(7)(C). The dollar amounts of subsequent transactions in each set are substantial and nearly equal or exceed the dollar amount of the initial transaction in 17 of the 20 sets. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Six sets are comprised of three individual transactions while the remaining 14 sets are comprised of two 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. Multiple transactions conducted by the same household within a short period of time is a method which violating stores use to avoid single high dollar transactions that cannot be supported by store inventory and structure. These sets of transactions appear to be in amounts which are indicative of trafficking.

Appellant contends the multiple transactions are not understood by store ownership. Almost all were conducted during the firm's business hours. The owners cannot refuse service and have no control over customers who can make as many purchases as they wish. It is common knowledge that customers will shop at the firm multiple times per day since they may have forgotten something or have decided to buy something on the spur of the moment.

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 convenience 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 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The transaction sets also do not contain the characteristics of a household returning later in the day or sending their child to purchase a forgotten item or two as all of the sets have subsequent transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

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 5 U.S.C. § 552 (b)(6) & (b)(7)(C) when the comparable average convenience store SNAP transaction amount in Queens County during the review period was \$10.07. These multiple transactions indicate the amounts were contrived in an attempt to avoid suspiciously high dollar 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.

Given the very limited staple food stock at the Appellant firm, it is unlikely that any SNAP household would use the firm as their primary grocery store. This was confirmed by the Retailer Operation Division's analysis of the shopping patterns for households listed in this Attachment. Their analysis shows that households 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. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Other households had similar shopping patterns which brings-up the question of why would households who are regularly shopping at larger and better stocked stores, both nearby and at a

distance, elect to conduct multiple purchases at a very minimally stocked convenience store that carries no unique foods or offers any special services. Appellant's contentions fail to offer any explanation or rationale for these unusual and suspicious shopping patterns. Common sense dictates that it is improbable that households with limited cash resources would choose to travel these distances if their purchases consisted solely of eligible food items that could be purchased at any of the super stores, supermarkets, or other larger stores they were regularly shopping at and therefore more likely than not that these households were trafficking SNAP benefits at the Appellant firm and the multiple transactions were attempts by to obscure trafficking by dividing a large dollar value transaction into a series of smaller dollar value transactions. This is a method used by stores to avoid high dollar transactions that cannot be supported.

As previously mentioned, this Attachment contains one transaction set consisting of a swiped and a manually key entered transaction made using the same EBT card. Manually keyed transactions are those in which the magnetic strip on the back of the EBT card is not being read by the store's POS device and the clerk must manually key enter the lengthy EBT card number. When the magnetic strip on an EBT card fails, it can no longer be swiped and replacement cards contain different identification numbers. On-site investigations into trafficking have found it is not uncommon for retailers to have a SNAP recipient's PIN and EBT card number in order to facilitate trafficking SNAP benefits in exchange for cash without the need for the recipient to be physically present. The retailer enters the card number manually as the recipient has the actual EBT card and then enters the PIN. A review of EBT transactions on the date of this manual transaction shows that the Appellant firm's POS device was functioning properly as there were swipe transactions before and after the manual transaction. Since this household had both swiped and manually keyed transactions, their EBT card does not have a worn or malfunctioning strip leaving trafficking as the only other possible reason for the manually keyed transactions.

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 218 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 offering a very limited stock of staple foods and calls into question the legitimacy of these transactions. The transactions are also substantially higher than the average SNAP transaction amount of \$10.07 for this store type in Queens 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. These high dollar transactions

remain questionable when considering the proximity of 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, 5 U.S.C. § 552 (b)(6) & (b)(7)(C) of their purchases at larger food stores.

While households residing in areas with extremely limited grocery options may conduct high dollar transactions at small grocery or convenience stores out of necessity, this is not the case when they have better alternatives. FNS records show there are 60 comparably sized or larger SNAP retailers located within a one mile radius of the Appellant firm that includes four super stores, a supermarket, two large grocery stores, and 10 medium grocery stores with the closest super store only 0.27 miles or approximately five blocks away. There is also a small grocery store offering traditional and ethnic foods, including Halal meats, located on the same block as the Appellant firm. All of the larger stores would offer greater quantities and varieties of staple foods at lower prices than would be found at a poorly stocked convenience store offering no fresh or frozen unprocessed meats/seafood, very limited fresh produce, and no frozen produce.

The difference in the average SNAP transaction amount, the total SNAP transaction dollar volume, and the total SNAP transaction count for Queens County convenience stores during the review months and at the Appellant firm is significant. 5 U.S.C. § 552 (b)(7)(E). The extraordinarily high number of SNAP transactions combined with the relatively low average SNAP transaction dollar amount is an indication the firm may be dividing larger transactions into multiple smaller transactions in an effort to circumvent detection as previously discussed. A comparison of Appellant's SNAP redemptions to that of nearby like type stores with redemptions for the review period shows that none 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 further indication that the transactions in this Attachment 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 compared to like type stores in Queens County. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). This transaction pattern and the unusual spikes in both transaction numbers and dollar volume do not appear in the transaction patterns or in the transaction count and dollar volume averages for other like type stores. These large dollar transactions are considered to be irregular and suspicious based on the firm's food inventory. The Retailer Operations Division determined there was no credible reason for the firm to have transactions at these dollar levels given the very limited stock of staple foods and the lack of any specialty, bulk, or ethnic foods that might sell for large dollar amounts and also considered this to be a strong indication of trafficking. None of Appellant's contentions explain these unusual and suspicious differences.

During the first 12 months of operations, the Appellant firm had less than 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in SNAP redemptions. Redemptions almost tripled during the firm's second year in business. During the first five months of the firm's third year in business, SNAP redemptions had already exceeded the previous years by 65 percent. It is highly

suspicious that the redemptions in a very minimally stocked convenience store should be increasing at such a rapid rate when the firm's SNAP eligible food stock does not support the increased sales volume. A comparison between the FNS store visit report and photos for the November 27, 2015, visit and the February 5, 2018, visit show there was no drastic change in the available food items stocked by the firm. The only significant change was that the firm stopped selling deli meats and cheeses by the pound in 2018.

Appellant contends that USDA does not state what amount would not be excessively large so this charge is impermissibly vague. Photos of items purchased by customers along with a receipt are attached proving that customers, usually from the nearby shelter, buy lots of merchandise. Appellant also gave examples of two households, one of which has two SNAP account numbers, and compares their weekly purchases against those listed in the U. S. Bureau of Labor Statistics (BLS) 2015-2016 Consumer Expenditure Survey for the New York metropolitan area showing that their weekly expenditures are not unreasonable or suspicious. Appellant submitted excerpts from the BLS Consumer Expenditure Survey; three photos of merchandise purchased by customers; one photo of a cash register receipt 5 U.S.C. § 552 (b)(6) & (b)(7)(C) with a caption stating it was from March 4, 2018; and one photo of a daily sales summary report for February 12, 2018, showing total sales 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in support of these contentions.

Regarding Appellant's contentions, while there are several homeless shelters in Queens, a search found none located near the Appellant firm. It would make no sense for shelter residents to travel any distance to shop at the Appellant firm when there are numerous SNAP retailers located much closer to the shelters. The Retailer Operations Division examined the shopping patterns and other information regarding the two SNAP households given as examples by the Appellant. The first household initially used benefits under a SNAP account in the U. S. Virgin Islands and subsequently received a New York State SNAP card. State SNAP records show this household resides more than 20 miles away in New Jersey. The second household has an address of record in Jamaica, Queens more than eight miles from the Appellant firm. It would make no sense for either household to travel to the Appellant firm if they were actually making legitimate purchases of eligible foods when there are numerous larger stores much closer to their homes therefore supporting that the firm was trafficking SNAP benefits. An analysis of the shopping patterns for both households found patterns indicative of trafficking. The BLS Consumer Expenditure Survey is not relevant as it provides no explanation for the suspicious shopping patterns exhibited by these households. No itemized cash register and POS terminal receipts were provided for the transactions in the three photos allegedly depicting merchandise purchased by customers and the quantities and types of food items visible in the photos are insufficient to account for the large dollar transactions in this Attachment. The daily sales summary report does not identify individual transactions and does not even breakdown transactions by SNAP, cash, etc. It also provides no explanation for the suspicious transactions listed in this Attachment and therefore has no evidentiary value. A review of SNAP transactions at the Appellant firm found only one SNAP transaction 5 U.S.C. § 552 (b)(6) & (b)(7)(C), but it did not occur on March 4, 2018, as claimed by Appellant. The receipt provides no itemization of the items purchased and does not identify the household making the purchase. The submission of this photo therefore provides no evidence that SNAP households are making large purchases of legitimate food items at the Appellant firm.

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 store stock. A shopping pattern analysis by the Retailer Operations Division shows that households in this Attachment are regularly shopping at much larger stores, and conducting high dollar value transactions, yet are conducting comparable or higher dollar value transactions at the Appellant firm. 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 February 5, 2018, store visit on shows that the firm offers a very limited 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. The fact that SNAP benefits cannot be used for tobacco, alcohol, lottery, hot food, hot drinks, household products, paper products, pet products, auto products, health and beauty items, ATM, clothing, hats, shovels, phone cards/phone accessories, newspapers, diapers, school supplies, toys, and rock salt also provides no justification for the high transaction amounts.

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 store that does not address all of their food 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 also offer store brand products at lower prices, 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 and no evidence was provided of SNAP eligible store stock via receipts of products taken into inventory for the relevant months. The firm has a very 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. SNAP redemptions at the Appellant firm fluctuated unusually following receipt of the charge letter on June 25, 2018. The average SNAP transaction dollar amount decreased 22.48 percent from June 2018 to July 2018 while the volume of SNAP redemptions decreased 23.37 percent during the same period. A pronounced decrease in SNAP redemptions following receipt of the charge letter is a clear indication of trafficking since, if trafficking were not occurring, there would be no abnormal fluctuations in redemption amounts.

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

Other Contentions

Regarding Appellant's denial of trafficking, the purpose of this review is to either validate or to invalidate the earlier decision of the Retailer Operations Division and is limited to what

circumstances were at the basis of the action at the time such action was made. 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. When the store owners signed the certification page of the SNAP retailer authorization application to become a SNAP retailer, they confirmed they understood and agreed to abide by program rules and regulatory provisions. They also agreed to accept responsibility on behalf of the firm for violations of the SNAP including those committed by any of the firm's employees, paid or unpaid, new, full-time or part-time. The certification is clear that store ownership understood by signing the document that violations of program rules can result in administrative actions such as fines, sanctions, withdrawal, or disqualification from the SNAP. Additionally, a record of participation in SNAP with no previously documented instance of violations does not constitute valid grounds for dismissal of the current charges of violations or for mitigating the impact of those charges.

While Appellant claims that both owners do not speak English, there is no evidence to support this claim. In fact, the record shows a phone call from one of the owners to the Retailer Operations Division on March 7, 2018, during which she explains that she was calling since her husband does not speak English very well.

Although the two character reference letters commend store ownership for its high standards and support of the church, they provide no evidence to support the legitimacy of the charge letter transactions.

Appellant contends the same transaction is listed twice in the charge letter and it is not explained if it's added twice in determining the CMP amount. The charge letter also does not cite the regulation that allows USDA to use such violations twice. The charge letter Attachments are intended to provide to store owners or store counsel what the agency considers inexplicable transaction activity. The activity need not be mutually exclusive and transactions can appear in more than one Attachment as any indication of trafficking is grounds for permanent disqualification. The inclusion of a transaction in more than one Attachment does not have any effect on the dollar amount of the trafficking CMP per SNAP regulations at 7 CFR §278.6(j) that clearly explain the formula used for determining this amount.

The owners and the firm were charged with trafficking based on a computer analysis of the store's transactions for the review period. 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. 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.

The Food and Nutrition Act of 2008, as amended, and the regulations issued pursuant thereto do not 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.

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 any 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.

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). That store ownership claims to have conducted employee training months after the violative transactions fails to meet the regulatory standard.

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 three 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

May 6, 2019