

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

Speedy Mart,

Appellant,

v.

Case Number: C0202385

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

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

ISSUE

The purpose of this review is to determine whether the ROD 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 March 28, 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

In a letter dated November 9, 2017, the ROD charged Appellant with trafficking, as defined in Section 271.2 of the SNAP regulations. This charge was based on a series of SNAP transaction patterns that “establish clear and repetitive patterns of unusual, irregular, and inexplicable activity for your type of firm.” This letter of charges states: “As provided by Section 278.6(e)(1) of the SNAP regulations, the sanction for trafficking is permanent disqualification.” The letter also states that “. . . under certain conditions, FNS may impose a civil money penalty (CMP) . . . in lieu of a permanent disqualification of a firm for trafficking.”

Appellant replied to the ROD's charges in writing. The record reflects that the ROD received and considered the information provided prior to making a determination. The ROD determined that Appellant's contentions did not outweigh the evidence that the store was trafficking. Based on the preponderance of evidence, the ROD concluded that trafficking is the most probable explanation for the questionable transactions listed in the charge letter attachments.

The ROD issued a determination letter dated March 28, 2018. This letter informed Appellant that it was permanently disqualified from participation as an authorized retailer in SNAP in accordance with Section 278.6 (c) and 278.6(e)(1) for trafficking violations. The letter also states the ROD considered Appellant's eligibility for a trafficking civil money penalty (CMP) according to the terms of Section 278.6(i) of the SNAP regulations. The ROD determined that Appellant was not eligible for the CMP because Appellant had not submitted sufficient evidence to demonstrate that it had established and implemented an effective compliance policy and program to prevent SNAP violations.

On April 5, 2018, Appellant appealed the ROD's determination and requested an administrative review of this action. The appeal was granted.

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 § 278.6(a) and (e)(1)(i) establish the authority upon which a permanent disqualification may be imposed against a retail food store or wholesale food concern in the event that personnel of the firm engaged in trafficking of SNAP benefits.

7 CFR § 278.6(a) states, in part:

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

7 CFR § 278.6(a) states, in part:

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

7 CFR § 278.6(c) reads, in part:

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

7 CFR § 278.6(e)(1)(i) reads, in part:

FNS shall [d]isqualify a firm permanently if . . . personnel of the firm have trafficked as defined in § 271.2.

Trafficking is defined in 7 CFR § 271.2, in part, as:

The buying, selling, stealing, or otherwise effecting an exchange of SNAP benefits issued and accessed via Electronic Benefit Transfer (EBT) cards, card numbers and personal identification numbers (PINs), or by manual voucher and signature, for cash or consideration other than eligible food, either directly, indirectly, in complicity or collusion with others, or acting alone”

Also at 7 CFR § 271.2, eligible food is defined as:

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

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

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

7 CFR § 278.6(b)(2)(iii) states:

If a firm fails to request consideration for a civil money penalty in lieu of a permanent disqualification for trafficking and submit documentation and evidence of its eligibility within the 10 days specified in § 278.6(b)(1), the firm shall not be eligible for such a penalty.

SUMMARY OF CHARGES

The charges under review were based on an analysis of SNAP Electronic Benefit Transfer (EBT) transaction data during the period from February 2017 through July 2017. This analysis identified the following patterns of SNAP transaction activity that indicate trafficking:

- An inordinate number of transactions ending in same-cents values;
- Consecutive transactions made too rapidly to be credible;
- Multiple transactions made from the same accounts in unusually short time frames;
- Transactions that depleted the majority or all of a recipient's monthly SNAP benefits made in unusually short timeframes;
- An excessive number of manual (key-entered) transactions; and,
- Excessively large transactions.

The attachments enclosed with the charge letter specify the questionable and unusual SNAP transactions indicative of trafficking which were conducted at Appellant during the review period.

APPELLANT'S CONTENTIONS

Appellant's responses regarding this matter are essentially as follows:

- Appellant has operated for many years and this is the first time there has been a problem with SNAP compliance;
- Totals ending in .99 were a random coincidence;
- Appellant offers credit accounts. Appellant provided 26 pages of credit ledgers and ten affidavits signed by customers;
- Appellant is approximately 3,400 sq. ft., while the store visit report stated it is 1,260 sq. ft.;
- Benefit depletions are because most households redeem nearly all their benefits within the first two weeks of the month;
- SNAP participants are more likely to shop at convenience stores and small grocery stores, and customers of these stores are among the most loyal customers;
- Customers typically shop at Appellant when running errands at night or on the way to work or school;
- Customers make multiple purchases because they forgot an item or decided to purchase additional items;
- Household members shop together, but make purchases separately;
- Some participants go on a spending spree, making back-to-back purchases;

- Convenience stores and similar stores had a 3% increase in customers over 2015;
- The store visit form failed to list expensive items sold at Appellant;
- There were errors in the store visit report including that there were no storage coolers, no microwave, no shopping baskets, there is no storage area, and that the firm operated through a night window;
- The store visit report is dated after the review period;
- Appellant denies the allegations;
- The ALERT system has not been independently proven accurate in finding fraud. Data analysis is prone to error without accurate context. The analyst overly relied on the results of the ALERT system when issuing a charge of trafficking;
- *Brooklyn Mini Market v. U.S.* and *Skyson USA, LLC v. U.S.* caution against relying too much on the ALERT system;
- Recent administrative review cases discuss the precedent that should be considered in this case: Howard's *Quik Mart vs. Retailer Operations Division* and *Gloesis Group vs. Retailer Operations Division*;
- Case law supports that a SNAP retailer who issued credit is not required to maintain records of the credit issued, and the practice of issuing credit has been accepted by FNS as a reasonable explanation of suspicious transaction patterns where the retailer provides relevant ledger statements and/or client affidavits;
- Same-cents transactions are due to the store's pricing;
- Back-to-back transactions are due to credit payments;
- At times, households participate in co-shopping where different household members split benefits evenly or proportionately and separately shop at Appellant during a short period of time;
- Transactions that occur on consecutive days are not suspicious;
- Multiple transactions occurring over the span of hours are not inherently suspicious according to *Onukwugha v. U.S.*, however transactions that are large and for identical amounts are extremely suspicious. Appellant has no such transactions;
- Benefit exhaustions are the result of payment of credit accounts;
- Rapid purchases are because cashiers memorize the prices of items in the store and efficiently ring these items into the point of sale system;
- Large transactions are due to the payment of credit accounts;
- The store is well stocked; and,
- Appellant is located in an area where many people are SNAP participants. Appellant provided ~242 pages of receipts and invoices.

These explanations may represent only a brief summary of Appellant's contentions. However, in reaching a decision, full consideration has been given to all contentions presented, including any others that have not been specifically listed here.¹

¹ Appellant cites the FMI U.S. Grocery Shopper Trends 2016 annual report as support for various statements included in its supplementary brief. The supplementary brief stated the document was attached, but the document was not submitted.

ANALYSIS AND FINDINGS

Regarding Appellant's denial of violations, this review examines the relevant information regarding the determination. Once the ROD establishes trafficking occurred, Appellant bears the burden of providing relevant evidence to support a conclusion, considering the record as a whole, that it did not engage in trafficking. If this is not demonstrated, the case will be sustained. Without supporting evidence and rationale, assertions that the firm has not violated program rules do not constitute valid grounds for overturning the determination.

Store Characteristics

In reaching a disqualification determination, the ROD considered information obtained during an August 19, 2017 store visit conducted by a USDA contractor to observe Appellant's operation, stock, and facilities. Appellant is correct that the store visit occurred almost three weeks after the review period. Store visits typically occur after a review period, as the act of conducting a store visit can change the behavior of a firm that is engaging in trafficking. This store visit information was used to ascertain if there were justifiable explanations for the firm's irregular SNAP transaction patterns. The store visit report documented the following store size, description, and characteristics:

- Store size is approximately 1,260 square feet without a storage cooler with food storage outside of public view;
- Available inventory of SNAP-eligible food items showed stock composed predominantly of inexpensive items, which is typical of a convenience store;
- Only one cash register and one electronic SNAP terminal device;
- Four shopping carts and no hand baskets;
- No scanners or conveyor belts;
- No evidence of a wholesale business such as posted prices or separate entrances for wholesale customers; and,
- No meat or seafood specials or bundles.

Appellant contends there were errors in the store visit report as the store is approximately 3,400 sq. ft. Appellant also contends there was a storage cooler with food storage outside of public view, a microwave, and shopping baskets. Appellant also stated the firm did not operate through a plastic barrier. The store visit photos support that Appellant is correct in several respects. The square footage of the store appears to be somewhere between the contractor's estimate and that of Appellant. There were two hand baskets visible on an upper shelf behind a pile of cardboard boxes. There is a microwave or two stacked behind a counter, yet it does appear customers can access this area. However, the store's checkout counter space area was surrounded by plastic barriers. In addition, this checkout counter space area was cluttered and small allowing very little surface area to place large purchases and making it impractical to process more than one customer at a time.

Appellant maintains the store was well stocked, which is not supported by the store visit documentation. There was no indication that SNAP households were inclined to visit the store regularly to purchase large quantities of grocery items. The available food was primarily of a

low-dollar value and there was no hint that the firm sold items in bulk. Given the available inventory, there was no sign that Appellant would be likely to have SNAP redemption patterns that differed significantly from those of similarly-sized competitors.

Same-Cents Transactions

An interesting characteristic of questionable transactions is that many of them end in a same-cents value. Sets of repeating digits are highly unorthodox and do not regularly occur in legitimate transactions; such transaction structuring is a common hallmark of trafficking activity. In the absence of any compelling rationale to the contrary, these patterns strongly indicate that the firm is trafficking in SNAP benefits.

Attachment 1 to the charge letter documents transactions ending in same-cents values. Appellant contends the totals ending in .99 were a random coincidence. A review of the store visit record indicates that the store did not promote any specials that could explain the pattern of large numbers of transactions ending in these values. This attachment includes 230 same-cents transactions totaling 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

5 U.S.C. § 552 (b)(6) & (b)(7)(C).

A number of households whose transactions were cited in other attachments to the charge letter also consistently made transactions that ended in same-cents values. Transactions appearing in more than one attachment to the charge letter are more suspicious as they display multiple patterns common to trafficking transactions.

Appellant argues same-cents transactions are due to the store's pricing. The prices evident in the store visit photos show a pricing structure typical of convenience stores, where items are often priced to end in ".x9" cents. With such a pricing structure, it is unlikely for transactions to naturally end in ".99" cents with the frequency they occurred during the review period.

Patterns of transactions ending in same-cents amounts indicate that SNAP transaction amounts are contrived. Random data, which legitimate transaction activity approximates, is extremely difficult to produce intentionally; it is very difficult to avoid repetitive patterns when attempting to create the appearance of normal, near-random transactions. That various customers each repeatedly had totals with identical cents values during the review period strains the credibility of Appellant's declaration that this activity reflected the acceptance of SNAP benefits in exchange for eligible food items. As Appellant has offered no rational explanation for why such patterns might exist, it is reasonable to conclude that these same-cents transactions are the result of trafficking.

Rapid Transactions

Attachment 2 to the charge letter documents back-to-back transactions made in rapid order at the same terminal. There are 28 sets of transactions totaling 5 U.S.C. § 552 (b)(6) & (b)(7)(C) included in this document.

Appellant asserts the rapid purchases are because cashiers memorize the prices of items in the store and efficiently ring these items into the point of sale system. These transactions were conducted with implausible speed. Frequent and large transactions conducted quickly to purchase eligible foods at Appellant are highly unlikely given Appellant's low-dollar inventory and limited counter space. The firm does not maintain the logistical wherewithal required to rapidly process these transactions. The steps required to process a legitimate SNAP purchase include the following:

- 1) Waiting for the customer to load the items onto the counter space near the cash register;
- 2) Separating eligible items from ineligible items;
- 3) Manually entering the cost of each item;
- 4) If applicable, weighing any individual items sold by weight, such as fresh meat or fruits and vegetables;
- 5) Inputting manufacturers cents-off coupons, if applicable;
- 6) Bagging the items for carry out;
- 7) Handing the customer bagged items to make room for more food items on the counter;
- 8) Informing the customer of the totals (one for eligible foods and one for non-eligible items, if applicable);
- 9) Pressing the "SNAP transaction key" on the point-of-sale device;
- 10) Swiping the card;
- 11) Entering of the required PIN by the customer;
- 12) Entering the purchase amount by the cashier;
- 13) Confirming that the customer has a sufficient benefit balance;
- 14) Processing and approval of the transaction by the system;
- 15) Printing out cash register and EBT receipts;
- 16) Accepting an alternate form of payment for nonfood items and possibly handling cash and change; and,
- 17) Removing products from the checkout area so the next customer in line can begin another transaction.

While such transactions may well be conducted in succession, performing these actions on large transactions cannot be done rapidly. The amount of time required is generally proportional to the dollar amount of the transaction; typically, the larger the dollar amount transacted the longer the time period between transactions. Limited counter space adds additional time to transactions. Appellant processed very large orders considerably faster than supermarkets typically process them, yet it has only one small checkout counter, no optical scanner, and none of the logistical tools (such as conveyor belts, rotating bagging platforms or order separators) routinely used in rapid throughput operations.

As described above, the rapid processing of large transactions of eligible food items at Appellant is improbable. Yet, the questionable transaction data cited in Attachment 2 reveals consecutive transactions involving large-dollar amounts 5 U.S.C. § 552 (b)(6) & (b)(7)(C). It is highly unlikely that the rapid, multiple, large transactions described above involve solely the sale of eligible foods.

Repeat Transactions by the Same Household

Attachment 3 to the charge letter documents the same household conducting back-to-back transactions in unusually short time frames. Violating stores may conduct multiple transactions from the same household account 5 U.S.C. § 552 (b)(6) & (b)(7)(C) to avoid the detection of single, high-dollar trafficking transactions. There are 157 repeat transactions totaling 5 U.S.C. § 552 (b)(6) & (b)(7)(C) included in this document.

Appellant stated customers typically shop at Appellant when running errands at night or on the way to work or school. The Case Analysis Document identifies much larger stores with more reasonable prices located within one mile of Appellant. There is no basis for unusually high customer attraction to Appellant, there being no great price advantage, profusion of ethnic goods, or special or custom services rendered. Oddly, some SNAP households spent considerably less at the larger stores than at Appellant.

Appellant argues households participate in co-shopping where different household members split benefits evenly or proportionately and separately shop at Appellant during a short period of time. That members of a household share the chore of grocery shopping (“co-shopping”) means that household members take turns doing the shopping, not that both shoppers shop on or about the same day. This would defeat the purpose of why households typically share the chore of grocery shopping. A household is one that purchases and prepares meals together, so there would be no need to split benefits. Households that purchase and prepare meals separately are considered separate households.

Appellant contends the back-to-back transactions are due to household members shopping together and making purchases separately, and participants going on spending sprees. Appellant has offered no evidence whatsoever that SNAP households share their cards with friends or go on spending sprees. As previously stated, there is no reason for members of the same household to make separate purchases. Appellant has also not provided any explanation for why, if such behaviors were occurring, these purchases would occur at Appellant rather than at nearby, larger stores. It is unlikely that a family relying on SNAP to supplement their nutritional needs would share these benefits with another family that purchases and prepares meals separately. An unsubstantiated argument such as this does not provide a valid basis for dismissing the charges or for mitigating the penalty imposed.

Appellant contends that customers make multiple purchases because they forgot an item or decided to purchase additional items. Customers sometimes forget an item or see something at the checkout and decide to purchase it after already having completed a transaction. In such instances, it is reasonable to expect the subsequent purchase would be for a nominal amount. This is because it is quite rare to find very expensive items positioned at the checkout area, especially in smaller stores. Also, forgotten goods purchased immediately after a prior transaction typically consist of only one or two items. However, the subsequent transactions exceeded any minor amount. In some cases, the amounts of subsequent transactions equaled or exceeded the preceding transaction total.

Appellant contends multiple transactions occurring over the span of hours are not inherently suspicious according to *Onukwugha v. U.S.* This case, which supported that the pattern of back-to-back transactions identified by FNS were indicative of trafficking, also stated that transactions “occurring in relatively quick succession” are “extremely suspicious.” It notes that this is especially the case when transactions are large and for identical amounts, but also cites as suspicious a variety of examples of back-to-back transactions – similar to those included in the charge letter in this case - that when considered together establish a pattern of trafficking.

Appellant asserts that transactions that occur on consecutive days are not suspicious. While there are legitimate reasons why a SNAP recipient might return to a convenience store in a short period of time, the examples in Attachment 3 indicate a series of purchases that total to large amounts. SNAP benefits are intended to supplement the food budget for households whose net income is near or below the Federal Poverty Level. It is difficult to believe customers who must rely on SNAP benefits to make ends meet prefer to pay higher prices and spend considerable amounts of their benefits at a convenience store. Spending sizable portions of one’s SNAP benefit allotment in a convenience store - when there are larger stores at which one also shops that carry more variety of foods at a lower cost - is unreasonable customer behavior. Moreover, households listed in this attachment conducted this strange shopping pattern of making substantial purchases at Appellant multiple times during the review period. Appellant argues that if the store were trafficking, it would not go through the effort of breaking up larger transactions into smaller transactions. On the contrary, given the common practice of violating retailers breaking up large, suspicious transactions into multiple, smaller transactions to avoid detection, a firm’s explanation and evidence for why these transactions are occurring **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** in a convenience store should be both rational and compelling. Appellant's explanation is neither.

SNAP Benefit Depletions

Attachment 4 to the charge letter documents the same household exhausting all or nearly all its benefits in rapid order. There are 46 transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** included in this document.

In some cases, SNAP customers depleted SNAP account balances to within pennies of a zero balance and/or depleted balances during the first week of the month. It is highly implausible that customers would desire, or be able, to regularly conduct large transactions that deplete balances to within pennies of a zero balance. The likelihood that these transactions were the result of the legitimate sale of only eligible foods only is extremely small.

Appellant is correct that a government report on SNAP shopping patterns² indicates that after the first day of benefit issuance, on average, 80 percent of a household’s allotment remains unspent. Even after seven days, 40 percent of benefits still remain unspent. It typically takes 14 days to deplete 80 percent of one’s benefits, and 21 days to deplete 90 percent. Appellant implies that as most of the suspicious transactions occurred during this period of time this must reflect

² U.S. Department of Agriculture, Food and Nutrition Service, Office of Research and Analysis, Benefit Redemption Patterns in the Supplemental Nutrition Assistance Program, by Laura Castner and Juliette Henke. Project officer: Anita Singh, Alexandria, VA: February 2011.

legitimate purchases. Yet, this report also revealed that households most often redeemed their benefits at supermarkets and supercenters, with only four percent of all households never shopping in a supermarket.

Appellant contends that SNAP participants are more likely to shop at convenience stores and small grocery stores than non-SNAP participants, and customers of these stores are among the most loyal customers. Appellant did not provide any evidence in support of these contentions. Even if true, this does not support that SNAP participants make large purchases at these smaller stores.

Appellant asserted convenience stores and similar stores had a 3% increase in customers over 2015. Appellant cited a 2016 U.S. Grocery Shopper Trends report which was not provided. The U.S. Grocery Shopper Trends 2017 summary shows a 2% decline from 2016 in customers for convenience stores and similar stores. This report also supports that customers are much more likely to shop at supermarkets and superstores.

It is extremely doubtful that a SNAP household making a legitimate purchase would choose to spend a large portion of its monthly allotment at a convenience store with likely higher prices and substantially less inventory than what would be found at a supermarket or superstore. Although many SNAP households do shop early in the month as opposed to later in the month, most households do not spend all or a majority of their monthly benefits in only a few transactions or a single day. Depleting a large portion of one's SNAP balance early in the benefit month, leaving little to purchase food for the remainder of the month, is inconsistent with the normal shopping behavior of SNAP households.

Large Transactions

The food stock and facilities of Appellant as reported in the store visit documentation do not appear sufficient to provide for all of one's food needs. People generally do not spend large sums at such stores. They usually stop at convenience stores to pick up a few staple food items, such as bread, milk, or a can or two of food that they may consider are not worth a trip to the supermarket to purchase. It is rare for a convenience store such as Appellant's to have purchases like those included in Attachment 5 to the charge letter. 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

Additionally, many of the charge letter transactions arrive at, or cluster around, certain dollar amounts in \$5 increments (5 U.S.C. § 552 (b)(6) & (b)(7)(C)). Households typically shop to obtain a certain mix of food items, irrespective of the total cost (other than to remain within allotment balances), and do not strive to achieve a particular total. The purchase amount of eligible food items typically approximates a random total. In contrast, firms facilitating trafficking tend to concentrate transactions at particular dollar amounts. In the absence of any compelling rationale to the contrary, the pattern of clustering transactions around certain dollar levels is implausible and indicative of transaction structuring and SNAP-benefit trafficking.

These transactions significantly exceed the state's average SNAP transaction, which was \$7.94 for this type of store during the six months of the review period. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Appellant's average transaction is significantly higher than

the state's average transaction. As previously stated, Appellant has a limited food stock typical of a convenience store and does not have any features that would induce people to spend substantially more than the typical convenience store purchase amount.

Based on the store layout, infrastructure, and available inventory, it is not credible that the Appellant would so frequently conduct large transactions closely resembling those typically found at a supermarket or superstore. Appellant is not set up to process high-dollar transactions, as indicated by its lack of equipment to facilitate large transactions and limited counter space. There are no legitimate bases for SNAP customers' unusual attraction to the firm such as a superior selection of staple foods, price advantages, package specials, bulk or promotional items, an extensive variety of otherwise unavailable ethnic food items, or special services rendered. Appellant failed to provide convincing evidence to establish the legitimacy of these excessively large transactions, such as itemized cash register receipts. Based on all of these factors discussed in this section, the large volume of transactions for high-dollar amounts is unlikely to indicate a pattern of legitimate food purchases.

Credit Accounts

Appellant maintains that one of the reasons for the suspicious transactions is that credit is extended to loyal customers, and their tabs are paid in full when they receive their SNAP benefits. In its December 21, 2017 letter, the ROD requested additional information from Appellant to support the contention that credit was extended to customers. In support of this assertion, Appellant provided 26 credit ledger pages covering four households that Appellant contends support the use of credit accounts at Appellant. On review, Appellant also provided ten affidavits signed by customers. The ROD analyzed the transactions of the households included in the credit ledger pages. Many of the credit entries listed were unpersuasive for a variety of reasons: the names provided by Appellant do not match the names listed for the household, they did not include a list of items purchased or included items that are not eligible for purchase with SNAP benefits; large SNAP benefits remained available to participants on the same days that they were allegedly purchasing food on credit at Appellant; participants allegedly paid off some balances in cash on the same day that SNAP benefits remained on their EBT cards. It is also unclear why participants would pay off credit balances through multiple transactions, rather than paying the entire balance at once. The analysis of these credit ledgers does not support Appellant's contention.

Appellant asserts *Redmond v. United States* supports that a SNAP retailer who issued credit is not required to maintain records of the credit issued. Appellant mischaracterizes *Redmond* in this context. The 5th Circuit Court of Appeals in *Redmond* clearly affirms "that the burden of proof under 7 U.S.C.A. § 2022 is upon the aggrieved food store to establish the invalidity of the administrative action in issue by the preponderance of the evidence."

Appellant argues the practice of issuing credit has been accepted by FNS as a reasonable explanation of suspicious transaction patterns where the retailer provides relevant ledger statements and/or client affidavits. Appellant lists four cases in support of this contention, however only in two of these cases listed (*183 Bronx Deli Grocery Corp. v. United States* and *Lugo v. United States*) did FNS determine that credit accounts explain the suspicious transaction

activity listed in the charge letters. In neither of these cases did FNS make a determination that trafficking occurred, as it did in Appellant's case.

When a retailer attempts to refute charges of trafficking by claiming it maintains credit accounts, the retailer must provide adequate proof that credit accounts existed at the time the suspicious transactions occurred so that the ROD can compare such proof with transactions outlined in the letter of charges. This is because it is not uncommon for retailers to make false admissions of credit in an attempt to obtain a lesser penalty after committing the more egregious violation of trafficking. Appellant failed to provide such proof in this case. Without substantial documentation that credit was extended to SNAP customers, it is impossible to compare against any specific transactions outlined in the letter of charges dated November 9, 2017, or substantiate that such transactions were indeed the result of credit account repayments.

5 U.S.C. § 552 (b)(6) & (b)(7)(C).

Customer Statements

With regard to customer statements provided by Appellant that purport to establish that questionable transactions were legitimate and no trafficking occurred, the truth of such statements cannot be verified. Customers engaging in trafficking transactions would be unlikely to admit to this behavior. On the contrary, customer statements would be expected to attest to the legitimacy of questionable transactions regardless of whether they were, in fact, legitimate.

Expensive Offerings

Appellant asserts it sells expensive items that were not listed in the store visit form including 12 packs of soft drinks, and boxes of cheese burgers and cheese steaks. The evidence does not support this contention. The store review report did not show the availability of these items for purchase in such quantities, nor were there posted prices supporting the availability of these bulk items for purchase. The invoices provided by Appellant were reviewed to identify the boxes of cheese burgers and cheese steaks Appellant contends it offered. A review of the Sam's Club invoices provided by Appellant support these items were purchased 20 and 12 times, respectively, during the six-month review period. Sales of these items in these quantities would not explain the suspicious transactions.

While there may have been occasions when Appellant sold 12-packs of drinks or boxes of cheese burgers and cheese steaks, evidence from the store visit, and lack of corroborating receipts or invoices, it is more likely true than not true that the sale of expensive items does not explain the large and rapid SNAP transactions that occurred at Appellant. Trafficking is a more likely explanation for the unusual and irregular pattern of high-dollar transactions.

Infant Formula

Appellant contends that it also sells expensive infant formula, and this was not listed on the store visit form. Even if Appellant does sell infant formula, it would be unusual for a SNAP household to purchase baby formula with SNAP benefits, as households who participate in SNAP are

eligible to participate in the Special Supplemental Nutrition Program for Women, Infants and Children (WIC). WIC has a more lenient income threshold for participation - and a higher participation rate of eligible participants - than SNAP. WIC provides participants with vouchers for baby formula as well as other staple items, such as orange juice and cereal. WIC participants would likely purchase all their infant formula, as well as other expensive staple goods, with their WIC benefits.

No Applicable Mitigating Factors

Appellant asserts that this is the first time there has been an issue related to SNAP. A record of program participation with no documented previous violations, however, does not constitute valid grounds for mitigating the impact of the present serious determination of trafficking.

Neither the Food and Nutrition Act of 2008, as amended, nor the accompanying regulations 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 extremely serious, 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, § 278.6(e)(1)(i) of the SNAP regulations states that FNS must 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.

Invoices

Appellant submitted approximately 242 pages of invoices to establish that the store purchased enough inventory to support the total of its SNAP sales. However, the invoices are insufficient to demonstrate this. Many of the invoices provided did not include Appellant's name or the supplier's name, were outside of the review period, did not include a list of items purchased or included items that are not eligible for purchase with SNAP benefits. The SNAP-eligible inventory included in the invoices from the review period 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Appellant's bookkeeper stated the typical mark up for SNAP-eligible items were between 35% and 40%. Using a 40% markup, this amount of inventory would support 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in SNAP transaction activity. Appellant's bookkeeper stated 20% of the firm's sales were from non-SNAP purchases. However, the total amount of inventory after markup is substantially less than the total SNAP transactions during the review period plus the 20% for non-SNAP purchases. In sum, the invoices and receipts do not explain the questionable transactions at Appellant.

Earlier Court Decisions

Appellant contends *Brooklyn Mini Market v. U.S.* and *Skyson USA, LLC v. U.S.* support that USDA should not rely overmuch on information generated by the ALERT system. Neither case is applicable to Appellant's case. In *Brooklyn Mini Market v. U.S.* the court found USDA failed

to compare the firm to other similarly-situated local grocers. This is did not occur in Appellant's case. Contrary to Appellant's contention that *Skyson USA, LLC* held that data compiled by ALERT was unreliable, the court analyzed all the evidence in support of the disqualification, including additional documents that had not been previously provided to USDA, and determined that the particular evidence in that case did not support a finding of trafficking. The evidence in *Skyson* differs significantly from the evidence in this case.

Earlier Administrative Review Decisions

Appellant asserts recent administrative review cases discuss the precedent that should be considered in this case: *Howard's Quik Mart vs. Retailer Operations Division* and *Gloesis Group vs. Retailer Operations Division*. The sentence quoted by Appellant in *Howard's Quick Mart* regarding trafficking being the "only plausible explanation" was incorrectly included in that decision. As stated elsewhere in that decision, as well as earlier in this decision, 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. Appellant mischaracterizes the findings of *Gloesis Group* as that decision clearly states that the determination was based on the preponderance of the evidence. In evidence in both cases differs significantly from the evidence in this case.

Evidence of Trafficking

Appellant argues there is insufficient evidence of trafficking, the ALERT system has not been independently proven accurate in finding fraud, and that data analysis is prone to error without accurate context. As previously stated, 7 CFR § 278.6(a) states, in part:

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

Government analyses of stores caught in trafficking violations during on-site investigations found that transactions involving trafficking consistently display particular characteristics or patterns. These patterns include those cited in the letter of charges. Appellant is correct that FNS employs a computerized fraud detection tool called ALERT to identify these patterns, however Appellant is incorrect in its contention that ROD overly relied on the results of the ALERT system when issuing a charge of trafficking. This tool does not determine that trafficking has occurred. The ROD must still analyze the transaction patterns, along with other information such as store visit observations, customer shopping patterns, and comparative data from nearby stores. Only then does the ROD conclude whether questionable transactions were, more likely than not, the result of trafficking. Nevertheless, transactions with these patterns sometimes have valid explanations that support the idea they were the result of legitimate purchases of eligible food items, which is why opportunities are given to charged retailers to explain the questionable transactions cited. In this case, based on the empirical data of past trafficking investigations, the number of suspicious patterns displayed, the other evidence in the file, and in the absence of any

reasonable explanations for such transaction patterns, the preponderance of the evidence supports that the “unusual, irregular, and inexplicable” transactions and patterns cited in the letter of charges are the result of trafficking.

Summary

The ROD determined that Appellant likely trafficked in SNAP benefits. The charges of violations were based on the ROD’s assessment that substantial evidence exists that the questionable transactions occurring during the review period displayed patterns inconsistent with legitimate sales of eligible food to SNAP participants. The evidence the ROD considered in support of its determination included:

- The irregular SNAP transaction data of Appellant as compared to similar stores;
- Observations made during an store visit by a USDA contractor, including the inadequacy of the firm’s staple food stock to support such large transactions;
- The availability of other SNAP-authorized stores located close to Appellant; and,
- Shopping behaviors of Appellant’s customers.

The transaction data and overall firm record demonstrate the patterns of unusual, irregular, and inexplicable SNAP activity for this firm is likely the result of trafficking.

Upon review, Appellant failed to prove by a preponderance of the evidence that the administrative action should be reversed. Appellant provided inadequate explanations for the suspicious transactions and insufficient evidence to legitimize its transaction data. It has not convincingly rebutted the ROD’s determination that Appellant most likely trafficked in SNAP benefits. The SNAP regulations are specific with regard to the action that must be taken if personnel of the firm have trafficked, which is that FNS must disqualify the firm permanently.

CIVIL MONEY PENALTY

For a firm to have the opportunity to be considered for a civil money penalty (CMP), it must request that FNS consider a CMP in lieu of permanent disqualification and submit supporting documentation within ten days of receipt of the charge letter. Appellant was advised of these provisions in the charge letter of November 9, 2017. The regulations specify that such supporting documentation must demonstrate that the firm had established and implemented an effective SNAP compliance policy and training program prior to the occurrence of violations. A review of the administrative record indicates Appellant did not, at any time, request a CMP. Appellant also did not submit any documentation to support its eligibility for this alternative sanction, before or after the deadline.

In the absence of a request for a CMP and any supporting documentation, a CMP was not assessed by the ROD. According to the requirements stated in 7 CFR § 278.6(b)(1), § 278.6(b)(2)(ii and iii), and § 278.6(i), Appellant is not eligible for a CMP in lieu of a permanent disqualification from participation as an authorized retailer in SNAP. The determination by the Retailer Operations Division to deny Appellant a civil money penalty is sustained.

CONCLUSION

The record has yielded no indication of error in the finding by the Retailer Operations Division that Appellant trafficked in SNAP benefits. A review of the evidence supports that it is more likely true than not true that program violations occurred as charged. Based on the discussion above, the determination by the Retailer Operations Division to impose a permanent disqualification against Speedy Mart from participating as an authorized retailer in SNAP is sustained.

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 Appellant desires a judicial review, 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.

RICH PROULX
Administrative Review Officer

July 23, 2018