

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

The Sandwich Spot Inc,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0199587

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS), that there is sufficient evidence to support a finding that a permanent disqualification from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP) was properly imposed against The Sandwich Spot Inc. (hereinafter “The Sandwich Spot Inc.” or “Appellant”) by the Retailer Operations Division of FNS.

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR § 278.6(e)(1)(i) in its administration of the SNAP, when it imposed a permanent disqualification against The Sandwich Spot Inc.

AUTHORITY

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

CASE CHRONOLOGY

In a letter dated May 25, 2017, the Retailer Operations Division informed the Appellant that The Sandwich Spot Inc. was in violation of the terms and conditions of the SNAP regulations, 7 CFR § 270 –282, based on EBT SNAP benefit transactions that "establish clear and repetitive patterns of unusual, irregular, and inexplicable SNAP activity for your type of firm." The letter also noted that the Appellant could request a trafficking civil money penalty (CMP) in lieu of a permanent disqualification within 10 days of receipt under the conditions specified in 7 CFR § 278.6(i).

In a response to the Retailer Operations Division of June 6, 2017, the Appellant, through counsel, replied to the charges therein denying the trafficking allegations and providing various explanations for the questionable SNAP transactions that were outlined in the Charge Letter.

The record indicates that in the Appellant's June 6, 2017 response, the Appellant's counsel requested information and documents from FNS with regard to the agency's case against The Sandwich Spot Inc. pursuant to the Freedom of Information Act (FOIA). Per UPS confirmation, the Appellant's counsel received FNS' response to the FOIA request on July 13, 2017. Subsequently, Appellant's counsel appealed the FOIA request on October 5, 2017. On January 17, 2020, the FNS FOIA office officially closed the appeal. On January 24, 2020, the Retailer Operations Division sent a 10 day letter to counsel providing the opportunity to respond to the letter of charges. Per UPS confirmation, the letter was delivered to the Appellant's counsel on January 27, 2020. FNS received no further communication or response from the Appellant or counsel with regard to the January 24, 2020 letter.

After considering the Appellant's reply and the evidence in the case, the Retailer Operations Division issued a Determination Letter dated February 25, 2020, informing the Appellant that The Sandwich Spot Inc. was being permanently disqualified from participation in the SNAP in accordance with 7 CFR § 278.6(e)(1) for trafficking violations. The letter also stated that the Appellant was not eligible for a trafficking civil money penalty (CMP) as the Appellant did not submit sufficient evidence to demonstrate that the firm had established and implemented an effective compliance policy and program to prevent violations of the SNAP.

In a letter postmarked February 27, 2020, the Appellant, through counsel, requested an administrative review of the Retailer Operations Division's decision to permanently disqualify the firm from participation in the SNAP. FNS granted the Appellant's request for administrative review by letter dated March 6, 2020.

STANDARD OF REVIEW

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

CONTROLLING LAW

The controlling statute in this matter is contained in the Food and Nutrition Act of 2008, amended, 7 U.S.C. § 2021 and 278 of Title 7 of the Code of Federal Regulations (CFR). 7 U.S.C. § 2021, Part 278.6(a) and Part 278.6(e)(1)(i) of the Regulations establish the authority upon which a permanent disqualification may be imposed upon a retail food store or wholesale food concern. There also exist FNS policy memoranda and clarification letters which further explain the conditions necessary in order to permanently disqualify retail stores.

7 U.S.C. § 2021(b)(3)(B) states, inter alia:

... a disqualification under subsection (a) shall be ... permanent upon ... the first occasion or any subsequent occasion of a disqualification based on the purchase of coupons or trafficking in coupons or authorization cards by a retail food store or wholesale food concern or a finding of the unauthorized redemption, use, transfer, acquisition, alteration, or possession of EBT cards ...

7 CFR § 278.6(a) states, inter alia:

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(e)(1)(i) states:

Disqualify a firm permanently if: Personnel of the firm have trafficked as defined in § 271.2.

7 CFR § 271.2 states, inter alia:

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

7 CFR § 278.6(f)(1) states, inter alia:

A civil money penalty for hardship to SNAP households may not be imposed in lieu of a permanent disqualification.

7 CFR § 278.6(i) states, inter alia:

FNS may impose a civil money penalty in lieu of a permanent disqualification for trafficking as defined in § 271.2 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 ...

7 CFR § 278.6(b)(2) states, inter alia:

(ii) 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 as specified in § 278.6(i), 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). [Emphasis added].

(iii) 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 penalty. [Emphasis added].

SUMMARY OF CHARGES

The Appellant was charged and determined to be trafficking based on an analysis of EBT transaction data from November 2016 through April 2017. This involved the following SNAP transactions patterns which are indicative of trafficking:

- There were an unusual number of transactions ending in a same cents value;
- There were multiple transactions made from the accounts of individual SNAP households in unusually short timeframes; and
- There were excessively large EBT purchase transactions made from recipient accounts.

The issue in this review is whether, through a preponderance of evidence, it is more likely true than not true that questionable transactions were the result of trafficking.

APPELLANT'S CONTENTIONS

The following represents a brief summary of the Appellant's contentions in this matter. Please be assured, however, that in reaching a decision, full attention and consideration was given to all contentions presented, including any not specifically recapitulated or specifically referenced herein.

In the reply to the Charge Letter and in the administrative review request, the Appellant, through counsel, stated the following summarized contentions, in relevant part:

- The Appellant vehemently denies that he or anyone involved with or employed by the firm has engaged in trafficking of SNAP benefits.
- FNS has wrongly concluded that the Appellant firm has engaged in trafficking activities as defined in the SNAP regulations. Such an erroneous conclusion was apparently based solely on a faulty analysis of records, with no additional or further investigation. There are no specific violations committed by individual personnel of the firm. There is no evidence that shows the firm's intent to violate the SNAP regulations. It is unconscionable that FNS can cause the owner to be permanently disqualified merely based on his business judgment without any other proof of wrongdoing. FNS' use of computer generated EBT records in sole support of what is claimed as unlawful activity is inadequate. The conclusions reached are unfounded and without merit. FNS has failed to establish intent, which is an essential element of the basis for its decision to permanently disqualify this vendor from the SNAP. FNS' review and statistical analysis based on the EBT transactions are not and cannot be a basis for your determination that the firm's

intent was to violate the regulations. The disqualification decision is based upon a predetermined standard of SNAP or EBT activity for the type of firm owned and operated by this vendor. If this be the case, then a statistical sampling or survey has been used to erroneously determine that the normal transactions in this vendor's store significantly exceed the normal practice for his type of firm. FNS has failed to specifically describe the type of firm operated by the Appellant, and it has failed to investigate and set forth herein, which of the precise transactions constitute trafficking activities.

- There has been no prior action taken by FNS to warn the firm about the possibility that violations are occurring.
- The Appellant is open seven days per week, 24 hours per day. By virtue of the location of this firm and the community in which it is situated, a substantial portion of its sales and revenues result from participation in the SNAP. EBT transactions in exchange for eligible items constitute approximately 85% of the firm's sales and provide the income necessary to keep this business profitable so it can continue its operation. The vendor would not jeopardize this source of business and his livelihood by engaging in the illegal activated as charged. A SNAP disqualification would cause irreparable harm to the Appellant and cause the owner to lose his livelihood.
- The Appellant has an unblemished record as a participant in the SNAP. The owner, since being authorized to participate in the SNAP, has continuously trained and tested his employees concerning the SNAP regulations and requirements relating to the prohibitions against sales of ineligible items and exchanging SNAP benefits for cash. The Appellant has maintained an exemplary record. Such an unblemished record is evidence of his continued compliance with the law and his training and supervision of his employees. While he is not on premises during the entire period the store is open, the owner is regularly in the store supervising employees and that they are in compliance with SNAP regulations and are adhering to the standards set by store policy. The training program consists of two (2) weeks of intensive, hands on classes, overseen by the owner of this store. The owner works with each employee during this period, teaching them the rules and regulations of the SNAP. He ensures that they watch the on-line video, provides them with employee handbooks and other printed materials, which they must read, study and learn prior to engaging in SNAP sales and their full employment in this store. Upon the conclusion of the two week period, this owner gives each employee a test to ensure their compliance with SNAP regulations. He also trains them to treat all customers and benefit holders with courtesy and respect in accordance with the rules and regulations of the SNAP. Any employee that is suspected of failing the test or failing to comply with the policies of this store is immediately terminated. It is unclear which employees might have been on duty during the alleged transactional violations, as there are no exact set dates or times when any violations may have occurred; however, the owner has never witnessed or observed any type of trafficking incidents during the period in question through the present that are alleged in the letter of charges.
- The Appellant is staffed by two full-time employees, with one cash register and hand-baskets as it is a large to medium sized grocery/deli store of approximately 1,100 square feet. The store is at all times well stocked with staple food inventory specifically designed to accommodate those low income customers who regularly purchase items with SNAP benefits, receiving regular deliveries. The store sells fruits, vegetables, and

other cooking ingredients, including rice, beans and pasta. It has numerous shelving for eligible food stuffs, two refrigerators (one with 8 doors and one with 2 doors) for cold drinks with three separate freezers for meats, cold cuts, and frozen foods with a separate freezer for ice cream and desserts. It has a deli counter with a vast array of sandwiches, selling a variety of cold cuts on rolls, subs, and other bread, which is one of the store's best-selling items. The vast majority of people who patronize the store are regular customers.

- The Appellant provides necessary items to the community which is comprised of numerous large multi-family complex apartment houses and other multistory apartment buildings, all with large families, which are all within a two block radius of the subject firm. There are also family homeless shelters and other commercial enterprises in the immediate area. In fact, the closest supermarket is approximately ¼ mile away and closes early in the evening. There is a great need for families who live and work in the neighborhood, many of which families are large, to have access to basic items like Enfamil, Similac, milk, eggs, baby food, cereal, bread, juice and other infant and child care products after work and at all hours of the day. Baby food items are expensive with Enfamil selling for \$20.00 per small container, \$24.99 per midsize container, and \$34.99 per large container which is a common item sold in volume in the Appellant firm. This store, in addition to basic items like meat, fruits, vegetables, eggs, and bread, also sells items such as cereal, prepared foods, other dairy products, rice, beans, and other cooking ingredients. Additionally, there are numerous schools, churches and family shelters in the immediate area which bring parents of school age children to the subject firm to buy foodstuffs and other eligible items on a daily basis, before and after pickup. The store sells prepared foods such as sandwiches, deli meats, i.e., cold cuts and sells sandwiches to its customers for breakfast, lunch and dinner. It also sells sweetened drinks, desserts, salty snacks, candy and sugar. The Appellant is located near a bus stop directly across the street in front of the store. There are also other businesses in the area bringing employees to patronize the firm. There are no other similar providers or eligible SNAP providers in the immediate area, and such a disqualification would result in hardship to the community.
- Regular customers of this vendor will often call the store by telephone to place their large grocery orders, and then personally pick-up these orders at which time they pay for the orders and purchase additional items, which they cannot do at a supermarket. They also buy items on their way home from picking up their children from school or to and from church. The business practices that cause the using of individual benefit accounts in short time frames or large purchase transactions are not for any unlawful purpose. It is designed to accommodate the needs of regular and repetitive customers of this business.
- With regard to the transactions documented in Attachment 1, these are all legitimate EBT transactions and none were ever in exchange for cash or consideration other than eligible food. This is a business model for this vendor, who has the right to make such a business judgment under the law without being accused and suspected of wrongful behavior, no matter whether the percentage of same cents values are outside the analysis. It is unconscionable that FNS can cause an owner to be permanently disqualified merely based on his business judgment, without any other proof of wrongdoing.
- FNS should be investigating the benefit cardholders to determine whether they are misusing and abusing the supplemental nutrition assistance they have applied for and

which has been provided. It is not the responsibility of this vendor to deny an EBT recipient services or police violations or misuse of the benefits and enforce or address violations thereof.

- With regard to the transactions documented in Attachment 2, these are all legitimate transactions and none were ever in exchange for cash. The usage of SNAP benefits are not within the control of the Appellant. Some of these SNAP recipients allow others to use their card or they themselves use the card for other families. Many of these transactions resulted from individuals who live in close proximity and are going out to pick up items they need for convenience or who are picking up their children or low income seniors who live nearby and frequent the store regularly. Most of these customers do not own motor vehicles and by virtue of that fact, need to make multiple trips to transport their purchases, which are packaged in plastic shopping bags. Many of the store's SNAP recipients live in the immediate area and do not have the capacity to carry heavy shopping bags through the street and up into their apartment buildings. Most do not have vehicles and are on foot so as a result they make several trips to the Appellant to make their daily, weekly, and monthly purchases. The Appellant allows individuals to purchase items throughout the day and night, allowing them to purchase breakfast, lunch, and dinner for themselves and their families. This vendor is permitted under the law so make such decisions on his business model. These transactions are in no way indicative of trafficking. There are a total of 66 transaction sets and a total of 164 violations **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. It is not credible to assert that the Appellant would risk a permanent SNAP disqualification for this mere sum, over a six month period and where it is unknown by FNS as to what portion of that amount was even exchanged for cash, if any swipe amount was in fact exchanged for cash.
- With regard to the transactions documented in Attachment 3, many of these purchases were made immediately after the benefits are added to SNAP cards. As a result, recipients use much of the balance on their SNAP card at the subject firm. These resulted from well-established customers placing advanced large orders via telephone and paying for same when they were picked up or delivered at a time when they know they can use the balance of their benefits for food and eligible items. While there are larger stores in the area, those supermarkets are not preferred by residents as they are crowded with long lines, selling the same items for similar prices. There is nothing unusual or inexplicable about customers in New York City using a grocery store to purchase their groceries. All foods items in New York City are costly. If FNS averages the amount of the purchases, it would find that the average purchase **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**, which is not unusual under the circumstances. As happens during this past winter when the weather was cold, the Appellant submits that numerous customers only wanted to go out when they needed to and bought in bulk to avoid going out numerous times in the cold weather. A customer's shopping habits should not be interpreted in a negative manner with an inference that trafficking has occurred. It is ridiculous that after years of participation in the SNAP that this vendor would risk permanent disqualification for the sum **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**.
- As there is no other basis to disqualify this vendor from the SNAP, in lieu of disqualification, the Appellant requests that a civil money penalty be imposed per Section 278.6(a) as disqualification would cause hardship to participating households and the Appellant requests an immediate hearing to determine same.

ANALYSIS AND FINDINGS

Store Characteristics

FNS authorized The Sandwich Spot Inc. as a small grocery store on October 11, 2016. The case file indicates that in reaching a disqualification determination, the Retailer Operations Division considered information obtained during an April 10, 2017 store visit conducted by a FNS contractor to observe the nature and scope of the firm's operation, stock, and facilities. This information obtained from the store visit was also used to ascertain if there were justifiable explanations for the firm's irregular SNAP transactions. The store visit report and photographs documented the following store size, description, and characteristics:

- Approximately 1,200 square feet in size with approximately 84 square feet of additional storage outside of public view;
- No shopping carts or hand-held baskets available for customer use;
- One cash register and one EBT point-of-sale (POS) device for use in ringing-up SNAP transactions;
- One checkout counter area with limited check-out counter space;
- No optical scanners;
- Had empty/broken coolers/freezers;
- No signs posted or flyers available advertising the availability of bulk foods offered at a discounted rate to include meats in bulk, foods sold by the case, and grocery package deals;
- No meat/seafood specials or bundles or fruit/vegetable boxes that might sell for high prices;
- No evidence of a wholesale business such as posted prices or separate entrances for wholesale customers;
- No indication from the store visit report that the firm has a special pricing structure, such as prices ending in \$x.x9, \$x.50, and/or \$x.00;
- Transaction totals are not rounded up or down at the checkout counter;
- Telephone orders were taken;
- Delivery was not offered;
- A minimal variety and amount of infant foods and formula;
- The four most expensive staple food items in stock were Enfagrow infant formula at \$30.00 per 24 ounces; All varieties of Boar's Head deli meats at \$10.00 per pound; Taster's Choice coffee at \$9.99 per 12 ounces; and Mazola oil at \$8.99 per 24 ounces;
- No fresh meats, poultry, or seafood;
- The only frozen meats/poultry in stock were two units of breaded chicken nuggets;
- Other frozen foods included ice cream only;
- Had a kitchen and hot foods and prepared, made-to-order sandwiches were sold;
- Had a deli counter and deli meats and cheeses were sold by the pound;
- Meat items included units of canned/potted meat, deli meats, canned fish, meat jerky, and eggs;
- Dairy included milk and cheese;

- A limited variety and amount of fresh produce;
- Other staple foods available for purchase included such items as juice, pasta, rice, cereal, baking mix, loaf bread, corn meal, flour, buns/rolls, and canned goods;
- Much of the remaining food stock consisted of accessory foods such as candy, carbonated and non-carbonated drinks, snack foods, spices, and condiments; and
- Ineligible nonfood items included tobacco products, health and beauty aids, paper products, household cleaning supplies, pet food, and household items.

The available inventory of SNAP eligible food at the time of the store visit showed food stock that would be typical of a small grocery store, where households normally purchase a limited number of items. The SNAP eligible food stocked by the store was generally of a low dollar value, consisting mainly of inexpensive canned and packaged goods, snack foods, single-serving food items and accessory food items. There was little indication that SNAP households would be inclined to regularly visit the store to purchase large quantities of groceries. Given the available inventory and the store's characteristics, this review could find no reason why the Appellant firm's SNAP redemption patterns differed so significantly from those of similar sized competitors.

Charge Letter Attachments

On review, the investigative materials provided by the Retailer Operations Division, including computer printouts of transaction data available from Federal records, store visit observations, information regarding area competitor firms, and household shopping patterns, were analyzed.

Stores caught in trafficking violations consistently display particular characteristics or patterns of transactions, including 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 the 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 the Appellant store during the review period. As patterns of unusual transactions appear across multiple Attachments, the case of trafficking becomes more convincing.

Same Cents Transactions (Charge Letter Attachment 1)

This Charge Letter Attachment documents transactions ending in same cents values. 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 166 transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Also included are 162 transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C) ending in \$x.50 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

The Appellant contends that the transactions documented in this Attachment are all legitimate EBT transactions and none were ever in exchange for cash or consideration other than eligible food. This is a business model for this vendor, who has the right to make such a business judgment under the law without being accused and suspected of wrongful behavior, no matter whether the percentage of same cents values are outside the analysis. It is unconscionable that FNS can cause an owner to be permanently disqualified merely based on his business judgment, without any other proof of wrongdoing. FNS should be investigating the benefit cardholders to determine whether they are misusing and abusing the supplemental nutrition assistance they have applied for and which has been provided. It is not the responsibility of this vendor to deny an EBT recipient services or police violations or misuse of the benefits and enforce or address violations thereof.

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.

The SNAP regulations do not prohibit SNAP transactions that end in a same cents number value. However, 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.

5 U.S.C. § 552 (b)(7)(E).

The Appellant has not offered a single piece of evidence to support its claim that prices ending in \$x.00 and \$x.50 are a business model for the firm. In addition, the store visit record indicates that the Appellant did not promote any specials nor did it have a special pricing structure, such as prices ending in \$x.50 or \$x.00, that could explain the pattern of large numbers of transactions ending in these values. In addition, the store visit record indicates that transaction totals are not rounded up or down at the checkout counter.

Furthermore, the EBT card is like a credit card and there is no need for recipients to worry about a cent value or to round purchases for the purpose of budgeting benefits. Additionally, when rounding prices either the SNAP recipient will pay more for a purchase rounded up or the retailer will lose money if purchases are consistently rounded down to an even amount. Also, for the purpose of keeping track of any remaining balance, every SNAP transaction receipt has the recipient's ending balance printed on the receipt or the recipient can request a "balance inquiry" at any time to determine the balance.

Based on the store visit observations, the Appellant's inventory contains almost exclusively inexpensive single-serving, prepared food items and accessory foods. As such, it is implausible that several of these relatively inexpensive items purchased together would routinely total to a purchase amount ending in .00 or .50 cents. 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.

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 the Appellant's declaration that this activity reflected the acceptance of SNAP benefits in exchange for eligible food items. As the Appellant has offered no rational explanation or supporting documentation for why such patterns might exist, it is reasonable to conclude that these same cents transactions are the result of trafficking.

Repeat Transactions by the Same Household (Charge Letter Attachment 2)

This Charge Letter Attachment documents 66 sets of transactions (164 total transactions) **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** in SNAP benefits to meet the parameters of this scan. Multiple transactions conducted by the same household account within a short period of time is a method which violating stores use to avoid single high dollar transactions that cannot be supported by a retailer's inventory and structure.

The Appellant contends that the transactions documented in this Attachment are all legitimate transactions and none were ever in exchange for cash. The usage of SNAP benefits are not within the control of the Appellant. Many of these transactions resulted from individuals who live in close proximity and are going out to pick up items they need for convenience or who are picking up their children or low income seniors who live nearby and frequent the store regularly. The Appellant allows individuals to purchase items throughout the day and night, allowing them to purchase breakfast, lunch, and dinner for themselves and their families. This vendor is permitted under the law so make such decisions on his business model.

Although it is not uncommon for customers to have more than one transaction per day and there are no limits on the number of times EBT cards may be used or the amount of eligible foods that may be purchased, it is not common that such multiple transactions are for large dollar amounts. The SNAP transactions noted in the Charge Letter 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 the Appellant's stock and facilities and are therefore, indicative of trafficking.

The report and photographs from the store visit offer no explanation as to why SNAP customers would routinely shop at The Sandwich Spot Inc. multiple times during a short period or purchase such a large volume of items, there being no great variety of products, price advantage, profusion of large packages, or significant bulk items or food cases for sale. The second, third, and subsequent transactions in each set are too large to consist of forgotten items. In addition, there was a small checkout area with one cash register for food purchases and one EBT POS device. While the Appellant contends that the firm has shopping baskets, there were no shopping carts or hand-held baskets at the time of the store visit available to customers for transporting food within

the store. There were no optical scanners or conveyor belts to expedite high dollar or rapid consecutive purchases.

It is recognized that sometimes a firm may have unusual transaction patterns due to a recipient's lack of access to other SNAP authorized stores. However, there are eight (8) SNAP authorized retailers of a comparable size or larger, including a supermarket located 0.01 mile away, located within a 1.0 mile radius of The Sandwich Spot Inc. that can meet the nutritional needs of SNAP customers. Some of these authorized SNAP stores are larger than The Sandwich Spot Inc. and offer a greater quantity and variety of food products at comparable or better prices as compared to the subject store.

The Appellant contends that most of the store's customers do not own motor vehicles and by virtue of that fact, need to make multiple trips to transport their purchases, which are packaged in plastic shopping bags. Many of the store's SNAP recipients live in the immediate area and do not have the capacity to carry heavy shopping bags through the street and up into their apartment buildings. Most do not have vehicles and are on foot so as a result they make several trips to the Appellant to make their daily, weekly, and monthly purchases. However, the record indicates that SNAP customers who shopped at The Sandwich Spot Inc. during the review period also shopped at other area grocery stores and, therefore, transportation to other stores is not an issue for these customers. Therefore, lack of access to other authorized stores or the availability of other food stores does not appear to be an explanation for the Appellant's abnormally high SNAP transaction amounts conducted within a short timeframe of each other.

The Appellant contends that some SNAP recipients allow others to use their card or they themselves use the card for other families. As to whether or not co-shopping or sharing of SNAP cards actually affected the Appellant firm during the review period, this argument is little more than conjecture. The Appellant has provided no evidence to show that co-shopping and/or sharing of SNAP cards is particularly common among SNAP recipients in Rockaway Beach, New York. If co-shopping/card sharing truly impacted The Sandwich Spot Inc. as the Appellant suggests, it would stand to reason that co-shopping/card sharing would affect other nearby firms as well. This would manifest itself in comparable firms having similar transaction patterns – multiple transactions from the same household in a short period of time. But this is simply not the case.

5 U.S.C. § 552 (b)(7)(E).

Unfortunately, the Appellant has not provided any evidence to show that the transactions listed in Attachment 2 were legitimate purchases of eligible foods. The arguments presented by the Appellant hold little weight without some kind of evidence to substantiate its claims.

Excessively Large Transactions (Charge Letter Attachment 3)

This Charge Letter Attachment lists 316 SNAP transactions, **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. These large transaction amounts are not consistent with the store's observed characteristics and food inventory. The frequency of high dollar purchases in the review period calls into question the legitimacy of these transactions.

The Appellant contends that it is at all times well stocked with staple food inventory specifically designed to accommodate low income customers. The store offers a variety of food items including basic items like meat, fruits, vegetables, eggs, and bread, also sells items such as cereal, prepared foods, other dairy products, rice, beans, and other cooking ingredients. It also offers prepared foods such as sandwiches, deli meats, i.e., cold cuts and sells sandwiches to its customers for breakfast, lunch and dinner. It also sells sweetened drinks, desserts, salty snacks, candy and sugar.

The food stock and facilities of the 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 small grocery 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. The Appellant contends that the large transactions are not the result of trafficking of SNAP benefits. However, it is rare for a small grocery store such as The Sandwich Spot Inc. to have purchases like those included in this Attachment to the Charge Letter.

The FNS store visit report and photos of April 10, 2017 show that The Sandwich Spot Inc. offers a moderate stock of SNAP eligible foods with no fresh meats, poultry, or seafood, no frozen meats or seafood, only two units of frozen poultry, a minimal variety and amount of fresh produce, and lacks an abundant depth and breadth of staple foods. The only frozen food items in stock were ice cream and two units of chicken nuggets. The store visit inventory report and photos also show only a few expensive eligible foods in stock that would account for these large amounts as well as showing the store has limited checkout counter space, no optical scanners, and no shopping carts or hand-held baskets in which to transport the large number of items required to make up these large transaction amounts. Without these, it is unlikely that such large dollar value transactions could be for actual food purchases and more likely they are trafficking. While the store visit observations indicate that telephone orders are taken from customers, the Appellant provided no evidence to support its contention that the transactions listed are the result of regular customers calling to place an order, then picking-up the order, and then purchasing additional food items.

The Appellant contends that as happened during this past winter when the weather was cold, numerous customers only wanted to go out when they needed to and bought in bulk to avoid going out numerous times in the cold weather. However, the store visit report and photos indicate that there were no signs posted or flyers available advertising the availability of bulk foods offered at a discounted rate to include meats in bulk, foods sold by the case, and grocery package deals, no evidence of meat/seafood specials or bundles or fruit/vegetable boxes that might sell for high prices, and no evidence of a wholesale business such as posted prices or separate entrances for wholesale customers. There is no evidence of a price advantage or custom or special services rendered at the subject store that are not offered at other authorized SNAP stores in the area. There is no evidence that the firm would be likely to have SNAP redemption patterns that differ considerably from similar sized competitors. These large transaction amounts are also not consistent with the Appellant store's inventory.

The Appellant contends that baby food items are expensive with Enfamil selling for \$20.00 per small container, \$24.99 per midsize container, and \$34.99 per large container which is a common item sold in volume in the Appellant firm. However, the store visit report documents that the four most expensive staple food items in stock were Enfagrow infant formula at \$30.00 per 24 ounces; All varieties of Boar's Head deli meats at \$10.00 per pound; Taster's Choice coffee at \$9.99 per 12 ounces; and Mazola oil at \$8.99 per 24 ounces. In addition, the Appellant had only a minimal variety and amount of infant formula and foods in stock.

The Appellant contends that many of these purchases were made immediately after the benefits are added to SNAP cards. As a result, recipients use much of the balance on their SNAP card at the subject firm. A June 2006 study entitled "An Analysis of Food Stamp Benefit Redemption Patterns" prepared by USDA FNS, notes that typical EBT purchases are small (about 71 percent 5 U.S.C. § 552 (b)(6) & (b)(7)(C)) and SNAP benefits are spent throughout a given month--63 percent of SNAP households use more than half of their benefits in the first week after issuance and over half (56 percent) use more than 90 percent of the household benefits within two weeks after issuance. However, the study also found that "Supermarkets accounted for over 64 percent of all EBT transactions and 83 percent of the total value of EBT purchases" while "less than 6 percent never shopped at supermarkets." The study indicates that most SNAP benefits are redeemed at supermarkets. Supermarkets generally provide the widest range of high-quality foods at reasonable prices. Although access to supermarkets may be limited in some areas (which is not the case with regard to the Appellant firm as there is a SNAP authorized supermarket located 0.01 mile away), most low income shoppers redeem most of their SNAP benefits in supermarkets as opposed to small grocery stores like the Appellant firm.

The Appellant contends that all foods items in New York City are costly. If FNS averages the amount of the purchases, it would find that the average purchase 5 U.S.C. § 552 (b)(6) & (b)(7)(C), which is not unusual under the circumstances. 5 U.S.C. § 552 (b)(7)(E).

While the Appellant firm may be located in a neighborhood with households that qualify for SNAP benefits, these factors are not an indication that questionable transactions would be occurring at any given store. The subject store shows unusual transaction patterns that are not displayed in other similarly stocked stores. If specific household needs are causing these questionable transactions at the subject store, it would be expected that similar patterns would also present themselves at nearby firms as well. But this is simply not the case.

As noted previously, there are eight (8) SNAP authorized retailers of a comparable size or larger, including a supermarket located 0.01 mile away, located within a 1.0 mile radius of The Sandwich Spot Inc. that can meet the nutritional needs of SNAP customers. Some of these authorized SNAP stores are larger than The Sandwich Spot Inc. and offer a greater quantity and variety of food products at comparable or better prices as compared to the subject store.

The Appellant contends that while there are larger stores in the area, those supermarkets are not preferred by residents as they are crowded with long lines, selling the same items for similar prices. However, an analysis of the shopping patterns for all of the SNAP households listed in this Attachment shows that the majority of the households shopping at The Sandwich Spot Inc.

have access to transportation and that all are regularly shopping at a variety of larger stores, including large grocery stores, super stores and/or supermarkets, located nearby and at several miles distance from the Appellant's location. While The Sandwich Spot Inc. does offer some staple food items, SNAP recipients are already shopping at other larger SNAP retailers located in proximity to the Appellant's business offering a greater quantity and variety of products, including fresh meats/seafood and produce, at lower prices.

5 U.S.C. § 552 (b)(7)(E).

While some households may have conducted legitimate SNAP transactions at the Appellant, insufficient evidence was presented to support this argument. **5 U.S.C. § 552 (b)(7)(E).**

The USDA employs a computerized fraud detection tool to identify EBT transactions that form patterns that have characteristics indicative of trafficking. However, this tool does not, by itself, determine or conclude that trafficking has occurred. The Retailer Operations Division analyzes the transaction data and patterns along with other documentation such as, information from the onsite store visit report including photographs of stock and the store layout, an analysis of recipient shopping behavior, and comparisons with similar store types in local area, to render a determination as to whether or not the questionable transaction patterns were, more likely than not, the result of trafficking. The regulations at 7 CFR § 278.6(a) 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, and that such disqualification shall result from a finding of a violation on the basis of evidence that may include facts established through, inconsistent redemption data, and evidence obtained through a transaction report under an electronic benefit transfer system.

Prior to a disqualification determination, the firm was given ample opportunity to reply to the Charge letter and provide any information to justify as legitimate the transaction patterns detailed in the Charge letter Attachments. Thus, the agency has afforded the owner his due process rights. The Appellant was also given an additional opportunity to provide a response to the Charge letter after the FOIA appeal was closed, however, no correspondence or communication to the Retailer Operations Division was provided by counsel. On review, counsel submitted essentially the same reply as his initial June 2017 response, which was absent documentation and evidence to support the contentions and explanations advanced to support the denial of trafficking. As noted herein, the Appellant has the burden of providing credible, relevant evidence, which a reasonable mind, considering the record as a whole, would accept as sufficient to support a conclusion that the argument asserted is more likely to be true than not true. This burden has not been met.

Based on the discussion above and in the absence of credible evidence for 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 letter of charges evidence trafficking as the most likely explanation. Nevertheless, transactions having such characteristics do sometimes have valid explanations that support that they were the result of legitimate purchases of eligible food items, and this is why opportunities are afforded to charged retailers to explain the questionable transactions cited. In this case, however, the Retailer Operations determined that the Appellant's contentions did not outweigh the evidence. Assertions that the

firm has not violated program regulations, by themselves and without supporting evidence and rationale, do not constitute valid grounds for dismissal of the current charges of violations.

In summary, the store's layout, infrastructure, and food inventory do not support a high percentage of transactions markedly exceeding those of similar type stores. In addition to the statistical irregularity of such high dollar transactions, the limited availability of counter space for checking out, the lack of optical scanners, and the lack of shopping carts and hand-held baskets support the Retailer Operations Division's determination. It is not plausible that the store's customers are carrying large amounts of food around the store without the benefit of shopping carts and/or hand-held baskets. Customers purchasing such large quantities of food items would have to hold them in their arms, or enlist the help of others while shopping. Based on the preponderance of the evidence, the irregular transaction patterns cited in this Attachment are more likely than not the result of trafficking in SNAP benefits.

No Warning

The Appellant contends that there has been no prior action taken by FNS to warn the firm about the possibility that violations are occurring. 7 CFR § 278.6(d)(2) and (3) of the SNAP regulations provides that "The FNS office making a disqualification or penalty determination ... shall consider ... any prior action ... to warn the firm about the possibility that violations are occurring..." The citation simply requires FNS to consider any prior warnings when determining a sanction. It does not require FNS to give such warnings. FNS did not consider prior actions to warn The Sandwich Spot Inc. about the possibility that violations were occurring because there were no prior warnings during the review period. The evidence considered by the Retailer Operations Division included the raw data of questionable transactions and information obtained during the aforementioned store visit conducted on April 10, 2017.

No Prior Violations

The Appellant contends that it has an unblemished record as a participant in the SNAP. The owner, since being authorized to participate in the SNAP, has continuously trained and tested his employees concerning the SNAP regulations and requirements relating to the prohibitions against sales of ineligible items and exchanging SNAP benefits for cash. The Appellant has maintained an exemplary record. Such an unblemished record is evidence of his continued compliance with the law and his training and supervision of his employees. While he is not on premises during the entire period the store is open, the owner is regularly in the store supervising employees and that they are in compliance with SNAP regulations and are adhering to the standards set by store policy. The training program consists of two (2) weeks of intensive, hands on classes, overseen by the owner of this store. The owner works with each employee during this period, teaching them the rules and regulations of the SNAP. He ensures that they watch the on-line video, provides them with employee handbooks and other printed materials, which they must read, study and learn prior to engaging in SNAP sales and their full employment in this store. Upon the conclusion of the two week period, this owner gives each employee a test to ensure their compliance with SNAP regulations. He also trains them to treat all customers and benefit holders with courtesy and respect in accordance with the rules and regulations of the SNAP. Any employee that is suspected of failing the test or failing to comply with the policies

of this store is immediately terminated. It is unclear which employees might have been on duty during the alleged transactional violations, as there are no exact set dates or times when any violations may have occurred; however, the owner has never witnessed or observed any type of trafficking incidents during the period in question through the present that are alleged in the letter of charges.

The Appellant provided no evidence to substantiate his claim of SNAP training of store employees. Regardless, a record of participation in the SNAP with no previously documented instance of violations does not constitute valid grounds for dismissal of the current charges of violations or for mitigating the impact of those charges.

Financial Hardship

The Appellant contends that it is open seven days per week, 24 hours per day. By virtue of the location of this firm and the community in which it is situated, a substantial portion of its sales and revenues result from participation in the SNAP. EBT transactions in exchange for eligible items constitute approximately 85% of the firm's sales and provide the income necessary to keep this business profitable so it can continue its operation. The vendor would not jeopardize this source of business and his livelihood by engaging in the illegal activity as charged. A SNAP disqualification would cause irreparable harm to the Appellant and cause the owner to lose his livelihood.

However, there is no provision in the SNAP regulations or internal agency policy directives for waiver or reduction of an administrative penalty assessment on the basis of possible economic hardship to the firm resulting from imposition of such penalty. To allow store ownership from being excused from assessed administrative penalties based on purported economic hardship to the firm would render virtually meaningless the enforcement provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of the USDA.

Moreover, giving special consideration to economic hardship to the firm would forsake fairness and equity, not only to competing stores and other participating retailers who are complying fully with program regulations, but also to those retailers who have been disqualified from the program in the past for similar violations. Therefore, the Appellant's contention that the firm may incur economic hardship based on the assessment of an administrative penalty does not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

Customer Hardship

The Appellant contends that there are no other similar providers or eligible SNAP providers in the immediate area and therefore, a SNAP disqualification will impose hardship on participating SNAP households. The Appellant requests an immediate hearing.

7 CFR § 278.6(f) of the SNAP regulations provides for civil money penalty assessments in cases where disqualification would cause "hardship" to SNAP households because of the unavailability of a comparable participating food store in the area to meet their needs. However, this regulation also sets forth the following specific exception to such assessments there under:

“A civil money penalty for hardship to SNAP households may not be imposed in lieu of a permanent disqualification”. Therefore, since this case involves a permanent disqualification action, the civil money penalty provision is not applicable to the present case.

With regard to the Appellant’s request for an immediate hearing, this disqualification is an administrative action and the SNAP regulations do not provide for a hearing, but rather for an administrative review of the action. The Act and regulations provide that any firm aggrieved by an administrative review determination may seek judicial review of the determination in Federal court or a State court of record having competent jurisdiction. In such event, trial de novo proceedings ensure the firm of a full evidentiary hearing on the agency action at issue.

CIVIL MONEY PENALTY

In the May 25, 2017 Charge Letter the Appellant was informed by the Retailer Operations Division that, under certain conditions, FNS may impose a civil money penalty (CMP) of up to \$59,000 in lieu of permanent disqualification of a firm for trafficking. Per Section 278.6(i) of the SNAP regulations, four criteria must be met in order to be considered for a trafficking civil money penalty. If requesting a trafficking CMP, an Appellant must meet each of the four criteria listed and provide the documentation as specified within ten days of the Appellant’s receipt of their Charge Letter. As specified in 7 CFR § 278.6(i), in determining the minimum standards of eligibility of a firm for a civil money penalty in lieu of trafficking, the firm shall, at a minimum, establish by substantial evidence its fulfillment of each of the following four criteria:

Criterion 1. The firm shall have developed an effective compliance policy as specified in 7 CFR § 278.6(i)(1);

Criterion 2. The firm shall establish that both its compliance policy and program were in operation at the location where the violation(s) occurred prior to the occurrence of violations cited in the Charge Letter;

Criterion 3. The firm had developed and instituted an effective personnel training program as specified in 7 CFR § 278.6(i)(2); and

Criterion 4. Firm ownership was not aware of, did not approve, did not benefit from, or was not in any way involved in the conduct or approval of trafficking violations.

If the Appellant’s request for a trafficking CMP and the required documentation are not submitted on time, it will lose its right for any further consideration for a trafficking CMP. The SNAP regulations are specific at 7 CFR §278.6(b)(2)(iii) that “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, the firm shall not be eligible for such a penalty”. The regulations do not provide the agency discretion to extend the time within which documentation and evidence in support of a trafficking civil money penalty may be submitted.

In the Appellant’s reply to the Charge Letter of June 6, 2017 and in the administrative review request, the Appellant, through counsel, requested consideration of a civil money penalty in lieu of permanent disqualification. The Appellant contends that the owner, since being authorized to participate in the SNAP, has continuously trained and tested his employees concerning the SNAP

regulations and requirements relating to the prohibitions against sales of ineligible items and exchanging SNAP benefits for cash. The Appellant has maintained an exemplary record. Such an unblemished record is evidence of his continued compliance with the law and his training and supervision of his employees. While he is not on premises during the entire period the store is open, the owner is regularly in the store supervising employees and that they are in compliance with SNAP regulations and are adhering to the standards set by store policy. The training program consists of two (2) weeks of intensive, hands on classes, overseen by the owner of this store. The owner works with each employee during this period, teaching them the rules and regulations of the SNAP. He ensures that they watch the on-line video, provides them with employee handbooks and other printed materials, which they must read, study and learn prior to engaging in SNAP sales and their full employment in this store. Upon the conclusion of the two week period, this owner gives each employee a test to ensure their compliance with SNAP regulations. He also trains them to treat all customers and benefit holders with courtesy and respect in accordance with the rules and regulations of the SNAP. Any employee that is suspected of failing the test or failing to comply with the policies of this store is immediately terminated. It is unclear which employees might have been on duty during the alleged transactional violations, as there are no exact set dates or times when any violations may have occurred; however, the owner has never witnessed or observed any type of trafficking incidents during the period in question through the present that are alleged in the letter of charges.

However, the Appellant provided no supporting documentation as evidence that the store had an effective compliance policy and personnel training program in place.

The Retailer Operations Division determined that the Appellant was not eligible for a trafficking civil money penalty in lieu of a disqualification under 7 CFR § 278.6(i) because the Appellant failed to submit sufficient evidence to demonstrate that the firm had established and implemented an effective compliance policy and program to prevent SNAP violations. 5 U.S.C. § 552 (b)(7)(E).

Therefore, the Retailer Operations Division's decision not to impose a civil money penalty in lieu of disqualification is sustained as appropriate pursuant to 7 CFR § 278.6(i).

CONCLUSION

The Retailer Operations Division's analysis of the Appellant's EBT transaction record, upon which charges of violations are based, together with observations made during the store visit and an analysis of customer shopping behaviors, provide substantial evidence that questionable transactions during the focus period have characteristics and display patterns that are not consistent with legitimate sales of eligible food to SNAP benefit customers at a store of this type, size and makeup. Rather, the characteristics are indicative of illegal trafficking in program benefits. The Appellant's contentions do not outweigh this evidence.

The record has yielded no indication of error or discrepancy in the reported findings by the Retailer Operations Division that program benefits were accepted in exchange for cash or consideration other than eligible food. Therefore, based on a review of the evidence in this case, it is more likely true than not true that program violations did, in fact, occur as charged.

Therefore, the decision to impose a permanent disqualification from participation in the SNAP against The Sandwich Spot Inc. is sustained.

RIGHTS AND REMEDIES

Your attention is called to Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. 2023) and to Section 279.7 of the Regulations (7 CFR § 279.7) with respect to your right to a judicial review of this determination. Please note that if a judicial review is desired, the Complaint, naming the United States as the defendant, must be filed in the U.S. District Court for the district in which you reside or are engaged in business, or in any court of record of the State having competent jurisdiction. If any Complaint is filed, it must be filed within thirty (30) days of receipt of this Decision.

Under the Freedom of Information Act, FNS is 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.

LORIE L. CONNEEN
ADMINISTRATIVE REVIEW OFFICER

April 27, 2020