

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

Three Brothers Market,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0222440

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 Three Brothers Market (hereinafter “Three Brothers Market” 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 Three Brothers Market.

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 November 5, 2019, the Retailer Operations Division informed the Appellant that Three Brothers Market 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). Per UPS confirmation of delivery, the charge letter was delivered to the Appellant on November 6, 2019 and signed for by “5 U.S.C. § 552 (b)(6) & (b)(7)(C)”.

The Appellant did not respond to the charges outlined in the November 15, 2019 charge letter within the required 10 calendar days of receipt timeframe.

After considering the evidence in the case, the Retailer Operations Division issued a determination letter dated November 25, 2019, informing the Appellant that Three Brothers Market 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 December 4, 2019, 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 December 20, 2019.

The record indicates that in a letter dated January 7, 2020, the Appellant's counsel requested information and documents from FNS with regard to the agency's case against Three Brothers Market pursuant to the Freedom of Information Act (FOIA). In a September 25, 2020 email, the Appellant, through counsel, submitted additional information in support of the request for administrative review. In an email confirmation of September 28, 2020, the Appellant's counsel requested that the administrative review of the subject case be conducted based upon the information provided to date as counsel has curtailed its FOIA request.

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 April 2019 through September 2019. This involved the following SNAP transactions patterns which are indicative of trafficking:

- There were a large number of transactions ending in a same cents value;
- There were multiple transactions made from the accounts of individual SNAP households within a set time period; and
- There were EBT transactions conducted that are large based on the observed store characteristics and recorded food stock.

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 administrative review request and in subsequent correspondence to FNS, the Appellant, through counsel, stated the following summarized contentions, in relevant part:

- The Appellant vehemently denies that trafficking took place.
- The Appellant operates as a large convenience store, approximately 3,000 square feet in size, and would likely be more appropriately categorized as a small grocer. The Appellant stocks a variety of staple food items, including, but not limited to, fresh meat products, milk, cheese products, juices, cereals, canned goods, noodles, etc. The Appellant offers groceries which are unique to the African American community.
- The Appellant is located in a neighborhood which is composed predominately of low income families who do not have transportation services and rely on the Appellant to provide them with all of their needs. The Appellant has been around for over thirty (30) years and many families depend on it to deliver all the groceries, food and meats which they need.
- The store is, to the owner's knowledge, the only retail store in the surrounding area that provides the community with such a unique selection of grocery products. The Appellant is primarily a meat market and grocery store in a low-income area. The meat products come in various meat plans that range in price depending on the meats that are included

in those plans. The plans range from \$20.00 to \$300.00 per meat plan and often families who purchase these plans purchase enough meat to last them for the entire month.

- Since the Appellant is the only meat market in the immediate area, most of its customers come in regularly, some several times a day and often use their EBT card to purchase not only meats, but also a wide range of merchandise including groceries, milk, cheeses, juices, cereal, snacks, canned goods and noodles.
- All large orders for the customers are greeted by the store's floor manager who assists the customer in finding the items they are looking for, and transporting items to the front counter. All meat orders are transported home to the customer in empty boxes and the sales are based on a first come first serve basis. For large orders, customer must pay for their order at the counter and then the food is delivered to their cars by the floor manager once the sale is completed.
- It is likely that this store has been miscategorized. Given its meat inventory and sales, the store should be qualified as a specialty grocer. A miscategorization of the store has dramatic implications for the SNAP Scans, as each scan is tied to a particular store type. If the store's category were to change, all of the Scans would have to be reassessed. However, given the circumstances, leaving the store qualified as a small grocer or convenience store is likely to have a prejudicial effect on USDA's statistical analysis.
- According to USDA's most recent numbers, in the 13th Congressional District of Florida, where the Appellant is located, approximately 11% of households receive SNAP benefits. Of those participant households, approximately 39.70% have children under eighteen years of age (compared to only 17.50% of those households who do not receive SNAP benefits) and 46.50% of said households have disabled individual(s). The median income of those SNAP participants **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**.
- As noted by FNS in its Benefit Redemption Patterns in the Supplemental Nutrition Assistance Program, Final Report (issued in 2011), a large portion of households redeem nearly all of their benefits in the first two weeks of the month. As was noted in the 2016 study conducted by the Convenience Store News, small grocery/convenience store customers are among some of the most loyal customers when it comes to their store selection. Some 70.5% of *daily* shoppers state that they shop at the same store every time, as do 62.8% of *weekly* shoppers. Of these regular customers, most daily and weekly customers are between 35 and 44 years of age. Children also regularly effect the store's customer base: 57% of consumers with at least one child under the age of eighteen visit small grocers/convenience stores on a daily basis, while 42.9% of them visit on weekly basis. Consumers without children are notably less likely to make visits to the store.
- Most visits to a store the size of Three Brothers Market are made while the customer is on his/her way to work or school (65% of frequent shoppers buy during this time), or while running errands at night (63.3% of the surveyed shoppers shop at this time). Typically, SNAP participants who visit on a daily or weekly basis are significantly more likely to do so in the morning (6 a.m. to 8:59 a.m.), or during the late evening (7 p.m. to 10 p.m.). Furthermore, it is not uncommon for the store's SNAP clientele to make multiple purchases in a short period of time after the customer receives his or her benefits. Often enough, the participants realize after they have left the store (and made their initial purchase) that they have forgotten a grocery item or have decided that they wanted to purchase items they saw during their first trip through the store, but originally

opted not to purchase. In other instances, multiple members of the same household will shop together and then make their purchases separately (using the same account and card) in quick succession. In yet other circumstances, the participants will go on a spending spree wherein they make purchase after purchase without leaving the store, or by returning after a brief absence, thereby reducing their benefits in short order.

- Finally, in 2016, consumers' shopping habits trended towards an increase in the use of convenience stores, small grocers, and ethnic food stores. Specifically, according to the FMI U.S. Grocery Shopping Trends 2016 annual report, limited assortment stores (stores which have the main food items though not necessarily in a wide variety) saw an increase of consumers who use them as a primary grocer by 3% over 2015; convenience stores likewise saw an increase of 3% in consumers who used their store as their primary grocer; ethnic food stores saw a rise of 1% in primary grocer usage.
- USDA has compiled some data on the shopping habits of SNAP participants titled "Foods Typically Purchased by SNAP Households," which is attached hereto for your review. In short, the study found that SNAP participants spend almost 62% of their monthly benefits on meats, sweetened beverages (sodas and energy drinks, Gatorade and the like), vegetables, frozen prepared foods, prepared desserts, high fat dairy/cheese and breads – in that order. Unlike normal shopping habits, SNAP participants buy sweetened beverages, frozen prepared foods and prepared desserts at a much higher rate than traditional consumers. These purchasing habits, set against the inventory outlined above, shows that the Appellant stocks the majority of a SNAP household's preferred needs, and has sufficient variety and quantity to meet the needs of several households all at once without having to replenish inventory.
- With regard to the transactions documented in Attachment 1, these transactions are a result of the store's business practice of selling a significant number of their items (especially bundles) at prices ending in \$x.00. As nearly every bundle in the Appellant is priced to have a high likelihood of resulting in a \$x.00 price, the statistical possibility of the store's transactions reflecting said value is almost a certainty. What USDA's computer program has identified is just such a result. Accordingly, rather than labeling these transactions trafficking, USDA should disregard them as a logical and necessary result of the Appellant's volume of business mixed with the pricing structure for purchased meats. USDA has no evidence to refute the Appellant's position regarding the pricing of the individual items in the store, and as such, USDA should take the Appellant's representation on pricing as undisputed. While USDA may look to averages in determining whether or not a store conducts certain activity, there are no local stores that sell the same items as the Appellant, nor are there other stores that sell to this customer base in such a significant volume. USDA cannot present evidence as to the inventory of the other stores that are similarly situated because there are none. Thus, the baseline for comparison in this instance does not exist. As such, there is no credible evidence in the instant case which would cause the Department's position on this count to be more likely than that of the Appellant.
- With regard to the transactions documented in Attachment 2, Florida SNAP households and recipient benefits are issued between the 1st through the 28th day of each month. USDA has previously conducted research into the standard practices of participants for food purchases, and purchases within the first seven (7) days after receiving benefits is not unusual. In fact, multiple purchases within the first forty-eight (48) hours after

receiving SNAP benefits is not unusual. Co-shopping, which is where both adult members of an average household are about 50 percent responsible for picking up groceries, is on the rise in the United States. This is manifested in the SNAP participants that shop at Appellant in the following ways: (1) different household members will shop separately (using the same account) to pick up different needs and personal needs, on top of the household's list; and (2) different household participants will travel to the store together to make purchases, and then separate their purchases to track what amount each party has used from their benefits account. On a regular basis, the participants will make significant grocery purchases from Three Brothers Market 5 U.S.C. § 552 (b)(6) & (b)(7)(C) of receiving the deposit into their accounts, as reflected in the majority of the transactions set forth in Attachment 2 to the charge letter. Such patterns are supported by the Benefit Redemption Patterns in the Supplemental Nutrition Assistance Program Final Report (2011), which found "[i]n an average month during fiscal year 2009, a SNAP household spends more than half of its benefit in the first week, and more than three-quarters by the second week." Furthermore, it found that 21.4% of the benefits were immediately pulled out within the first twenty-four (24) hours of receiving them, then another 37% were taken out in the days following thereafter, up to seven (7) days after issuance thereof. Accordingly, it is not unexpected that the SNAP participants are going to spend their money quickly in this timeframe. As stated by the court in *Onukwugha v. U.S.*, "multiple transactions occurring over the span of hours" are not "inherently suspicious," as it is not uncommon for a customer to make multiple trips to the same store on the same day. No. 11-CV-907, 2013 WL 1620247, at *7 (E.D. Wis. Apr. 12, 2013) (finding it unclear as to why FNS found certain close in proximity transactions to be consistent with patterns of trafficking "rather than the innocent explanation of a shopper realizing he forgot something or, for example, one household member wanting to make a small purchase ... while the other household member stays behind to complete a larger purchase."). In the instant case, the closest transactions cited by USDA were separated by 6:48, which is more than adequate time for a customer to identify an order to the store's manager, have the order rung up and paid for. After the purchase is completed, the items are gathered and brought to the car. Given that some items, such as the \$200.00 Meat Plan 2, can be instantly calculated, adding a drink or small snack/food item to the package would mean that the cashier would only have to enter two items before processing the transaction: the snack/small item, and the meat bundle. It is not logistically difficult for this type of transaction to occur given the pricing at the store, nor is it unlikely given that this store sells a considerable amount of meat on reasonable prices (84 pounds of meat for \$200.00 = \$2.38 a pound). The store would not process these two transactions together at the behest of the client, or where the customer is debating what else to purchase. Furthermore, if the customer is awaiting assistance for the meat (which can be easily rung up separately), they are likely to conduct their other shopping as there is no financial or logistic reason not to. The transactions at issue consisted of innocent transactions, 5 U.S.C. § 552 (b)(6) & (b)(7)(C) at the Appellant, easily explained by either (1) the participant forgetting an item in his/her prior transaction; (2) co-shopping; and/or (3) the participant separating their meat purchases from the remainder of their shopping list either because they are waiting for managerial help, or as a matter of convenience.

- With regard to the transactions documented in Attachment 3, these transactions are the result of the prices of meat bundles and as a result of the store’s loyal clientele – many of which have shopped there for decades. Nearly all of the transaction amounts listed in Attachment 3 are closely tied to the meat bundle prices: **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. Other meal packages include Breakfast and Deli Plans (\$15.00 - \$25.00). These plans are purchased by the SNAP participants from time to time, resulting in the purchase prices seen in the charge letter. Aside from the substantial inventory at the store, a reasonable and plausible explanation for these higher transactions is that the households that conducted these transactions have a larger amount of SNAP residents residing therein, thus requiring a larger quantity of grocery products each month than those households with less participants. Some of the SNAP participants who filled out the provided affidavits have five (5) or more members in their household, which would naturally result in larger purchase transactions. These transactions are the result of the practices set forth above, i.e. the result of the store’s inventory, convenience, and/or are the normal reflections of a SNAP participant’s shopping preferences. In addition, the store offers several family meat packages as well as Deli and Breakfast packages – all of which necessarily result in larger purchase amounts. The store clearly stocked enough inventory to account for said large transactions. These transactions are supported by the substantial inventory of the store and are reasonably explained by the location of the Appellant, co-shopping, reliance on the store as a primary grocer for some minutiae of local participants, or the general aberration and statistical outlier to the average whole.
- By the Department’s own sworn statement, the ALERT System cannot identify fraud. It is designed to identify “suspicious behavior” at most, but the basis for the system is unknown. That is not to say that USDA does not have the right to utilize inconsistent redemption data in disqualifying stores, as the statute plainly permits it. However, the statute does not authorize the Department to rely upon a system that inaccurately accounts for what is “consistent” or “inconsistent”. Context is king, and the purpose for developing a reliable data model from which to work. USDA has held that “without relevant evidence from the [retailer], such as inventory records or itemized cash register receipts, it is reasonable for this review” to conclude that trafficking more likely than not occurred at the store. (Emphasis added). *See TG Mini Mart, Inc.*, Case No. C0203554, Pg. 11-12 (stating that the retailer failed to provide evidence, such as cash register receipts, accounting records, or inventory purchase invoices to demonstrate that the transactions were in fact legitimate – and indicating that the presence of these documents would change the outcome of the analysis); *See also Lima Mini Mart Inc.*, Case No. C0208310, Pg. 11 (finding the retailer to have not provided a preponderance of evidence that the transactions were innocent because the retailer did not provide itemized cash register receipts, comprehensive pricing information, SNAP recipient statements, federal business tax returns or state tax filings, nor any business banking statements – again indicating that where such documents were provided, there would be a different outcome). At this point, it is more likely that USDA has misidentified legitimate transactions as a result of an errant assumption about the Store’s inventory and clientele.
- The district courts have cautioned USDA in relying too heavily on numbers generated by the ALERT system: *Brooklyn Mini Market vs. U.S.*, Federal Western District of New York, 12-CF-6708, Document 26, Order Denying Motion for Summary Judgment (holding that ALERT transaction data is not reliable for disqualification where

comparison stores have either not been considered or were not available); and *Skyson USA, LLC vs. U.S.*, 2010 WL 651032 (D. Hawaii 2010) (holding that data compiled by ALERT was unreliable for purposes of disqualification where reasonable explanations existed within the store's operations and were presented to the Department as a likely alternative to trafficking). Recent administrative review cases discuss the precedent that should be considered in this case: *Howard's Quik Mart vs. Retailer Operations Division*, Case No. C0192424 (holding that a store who had provided "meager" documentation supporting its responses that the transactions were a part of regular business operations, presented a sufficiently credible case to explain the transactions; further noting that "the determination of permanent disqualification must be supported to such a degree as to conclude that trafficking is the only plausible explanation." *Id.* at 6) and *Gloesis Group vs. Retailer Operations Division*, Case No. 0189046 (similarly noting that a permanent disqualification must be supported by evidence that trafficking is the only plausible explanation, and finding for the appellant who had explained that local purchasing trends had contributed to the patterns noted in the charge letter).

- It is likely that the presence of a Confirmation Bias exists, as it does in many cases handled by FNS. The danger of Confirmation Bias is obvious: USDA starts with the theory that trafficking exists because that is allegedly what the ALERT patterns were designed to detect and if the store is flagged often enough, then the automatic hypothesis put forth by USDA that trafficking is occurring. A valid statistical analysis should take into consideration all relevant factors and not favor any particular hypothesis when evaluating the Appellant's reply.
- A SNAP disqualification will impose a severe financial hardship on the Appellant.
- As trafficking did not occur, the Appellant requests that the permanent SNAP disqualification be reversed.
- However, in the event that FNS determines that trafficking did occur, the Appellant requests imposition of a civil money penalty pursuant to 7 CFR § 278.6(i) which states that to be considered for a CMP, a retailer must demonstrate that the firm had established and implemented an effective compliance policy and program to prevent violations.

In support of these contentions, the Appellant, through counsel, submitted the following documents for review:

- Numerous vendor purchase invoices dated in April 2019;
- Cash register z-tapes dated in April 2019;
- Know Your Core, Protect Your Core, Convenience Store News for the Single Store Owner, April 2016;
- Benefit Redemption Patterns in the Supplemental Nutrition Assistance Program, Final Report, USDA FNS, February 2011;
- U.S. Grocery Shopping Trends, FMI, 2016;
- Foods Typically Purchased by SNAP Households, FNS, November 2016;
- Affidavits of six (6) SNAP customers; and
- Four (4) flyers advertising store specials (breakfast and lunch deli plans, meat plans, hot foods, etc.)

ANALYSIS AND FINDINGS

SNAP Authorization

FNS authorized Three Brothers Market for participation in the SNAP on May 20, 2016. During the review period of April 2019 through September 2019, Three Brothers Market was classified as a small grocery store. The owner signed a SNAP application for the store on April 2, 2016 and acknowledged he was aware of the SNAP regulations and understood those regulations. That application included a certification and confirmation that the owner would “accept responsibility on behalf of the firm for violations of the SNAP regulations, including those committed by any of the firm’s employees, paid or unpaid, new, full-time or part-time.” The violations listed on this certification include accepting SNAP benefits in exchange for cash, otherwise known as trafficking, and other violations such as accepting SNAP benefits as repayment on credit accounts or in exchange for ineligible items.

Store Visit Observations

The case file indicates that in reaching a disqualification determination, the Retailer Operations Division considered information obtained during a September 23, 2019 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 2,400 square feet in size with approximately 260 square feet of additional storage area outside of public view which stocked predominantly drinks and non-food items;
- One shopping cart and no hand-held baskets available for customer use (Note: A second shopping cart and one hand-held basket were noted in the store visit photos; however, both appear to have trash/cardboard/pot tops stored in them; as such, it is not clear as to whether they are available for customer use);
- One cash register and one EBT point-of-sale (POS) device for use in ringing-up SNAP transactions;
- One small checkout counter area with limited check-out counter space;
- Had optical scanners;
- Had an ATM for customer use;
- Had poor lighting and empty shelves;
- 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;
- Did not have an unusual price structure, such as ending most product prices with \$x.00 cents;

- Transaction totals were not rounded up or down at the checkout counter;
- Telephone and on-line orders were not taken and delivery was not offered;
- The four most expensive SNAP-eligible food items in stock were Enfamil infant formula at \$18.99 per 12.5 ounce can; Chefmate corned beef hash at \$18.99 per 1 gallon (5 units in stock); Showboat beans at \$12.99 per 1 gallon (5 units in stock); and Isabella diced tomatoes at \$8.99 per 1 gallon (6 units in stock);
- A minimal variety and amount of fresh meats, poultry and seafood;
- No frozen meats, poultry or seafood or other frozen food items;
- Had a limited variety and amount of infant foods and formula;
- Had a kitchen and hot foods were sold;
- Had a deli counter and deli meats were sold by the pound (prices posted) as well as prepared, made-to-order sandwiches;
- Meat items included units of canned/potted meat, canned fish and meat jerky;
- Dairy included milk and cheese;
- Fresh produce stock consisted of a few onions and potatoes;
- Other staple foods available for purchase included such items as juice, pasta, rice, cereal, baking mix, loaf bread, corn meal, buns/rolls, oats and canned goods;
- Much of the remaining food stock consisted of accessory foods such as candy, carbonated and non-carbonated drinks, condiments, snack foods, and spices; and
- Ineligible nonfood items included tobacco products, lottery tickets, health and beauty aids, paper products, household cleaning supplies, pet food/supplies, housewares, gift items/souvenirs, alcohol, automotive supplies and clothing.

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.

Government analyses of stores caught in trafficking violations during on-site investigations have found that transactions involving trafficking consistently display particular characteristics or patterns. These patterns include, in part, those cited in the letter of charges. Based on this empirical data, and in the absence of any reasonable explanations for such transaction patterns, a conclusion can be drawn through a preponderance of evidence that the most likely explanation for "unusual, irregular, and inexplicable" transactions and patterns cited in the letter of charges is trafficking. Transactions having such characteristics sometimes do have valid explanations that

support that they were the result of legitimate purchases of eligible food items. This is why opportunities are afforded to charged retailers to explain the questionable transactions cited. In this case, the Retailer Operations Division determined that the Appellant's contentions did not outweigh the evidence. 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. 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 42 transactions (5 U.S.C. § 552 (b)(6) & (b)(7)(C)) ending in \$x.00
5 U.S.C. § 552 (b)(6) & (b)(7)(C).

The Appellant contends that these transactions are a result of the store's business practice of selling a significant number of their items (especially bundles) at prices ending in \$x.00. As nearly every bundle in the Appellant is priced to have a high likelihood of resulting in a \$x.00 price, the statistical possibility of the store's transactions reflecting said value is almost a certainty.

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).

In this Attachment, there are also several unusually repetitive transactions totals.

5 U.S.C. § 552 (b)(6) & (b)(7)(C). With more transactions that occur at a given store, the greater the likelihood that a transaction total will be duplicated. These transactions stand out as irregular giving their frequency and large transaction amount. That a number of randomly selected items would so frequently result in these transactions totals is highly irregular.

The store visit report and photos indicate that Three Brothers Market does not have any irregular or unusual pricing structure and that most of the items end in a domination of \$x.x9. The FNS store visit observations indicate that the Appellant's food inventory consisted of mostly inexpensive single-serve prepared food items and accessory foods, including canned goods, pasta, rice, cereal, juice, milk, condiments and snack foods. The prices of these food

items along with the deli meats by the pound and fresh meats by the pound ended in \$.99 or variations of \$.x9. Based on the store pricing information gathered from the store visit, it is highly unlikely customers purchasing more than one item ending in any variation of nine (9) or 00 cents would routinely have transactions ending in 00 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.

While the Appellant contends that these transactions are the result of SNAP customers purchasing grocery/meat bundles with prices ending in \$.00 (Appellant submitted four (4) flyers advertising store specials in support thereof), the store visit observations noted that the Appellant does not offer any grocery/meat bundles, deals, or specials. The store visit form and photographs did not reveal any profusion of beef/poultry/seafood items or any pre-packaged bundles/deals ready to be purchased. The photographs did not reveal any meat processing equipment such as meat saws or slicers. There was no signage or advertisements on the exterior or in the interior of the store advertising meat bundles/deals. A previous store visit conducted by FNS on May 12, 2016 also noted that Three Brothers Market did not offer any grocery/meat bundles, deals, or specials. During the 2016 visit, there was no signage or advertisements noted on the exterior or in the interior of the store advertising grocery/meat bundles/deals. The photographs also revealed no profusion of these products. As such, there is little evidence to support the Appellant's contention that Three Brothers Market offered these bundles prior to or 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 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 34 sets of transactions (88 total transactions) **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. These transactions were conducted by 25 different SNAP households. 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 these transactions are easily explained by either (1) the participant forgetting an item in his/her prior transaction; (2) co-shopping; and/or (3) the participant separating their meat purchases from the remainder of their shopping list either because they are waiting for managerial help, or as a matter of convenience. In addition, on a regular basis, the participants will make significant grocery purchases from Three Brothers Market

5 U.S.C. § 552 (b)(6) & (b)(7)(C) of receiving the deposit into their accounts, as reflected in the majority of the transactions set forth in Attachment 2 to the charge letter. USDA has previously conducted research (Benefit Redemption Patterns in the Supplemental Nutrition Assistance Program Final Report, 2011) into the standard practices of participants for food purchases, and purchases within the first seven (7) days after receiving benefits is not unusual.

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.

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 benefit allotment in just one or two days, especially from a small grocery store like the Appellant firm that has a moderate food stock, little fresh produce and carries only a minimal variety and amount of fresh meats, poultry, and seafood and no frozen foods/meats. The February 2011 government report cited by the Appellant revealed that households most often redeemed their benefits at supermarkets and super stores with only 4% of all households never shopping in a supermarket or super store. Thus, when a supermarket or super store is available, it is highly unlikely that a SNAP recipient would conduct multiple transactions within a limited period of time or excessively large SNAP transactions at a small grocery store like Three Brothers Market with a moderate selection of staple foods.

The Appellant contends that as was noted in the 2016 study conducted by the Convenience Store News, small grocery/convenience store customers are among some of the most loyal customers when it comes to their store selection. Most visits to a store the size of Three Brothers Market are made while the customer is on his/her way to work or school or while running errands at night. Typically, SNAP participants who visit on a daily or weekly basis are significantly more likely to do so in the morning (6 a.m. to 8:59 a.m.), or during the late evening (7 p.m. to 10 p.m.).

FNS acknowledges the statement regarding small grocery/convenience store shoppers being some of the most loyal, based on the supplied 2016 study and that customers often pick-up needed items on their way to or from work or school. However, no evidence was submitted by the Appellant to support the statement that SNAP customers are more likely to shop regularly at a small grocery or convenience store than non-participants. The Appellant's claim that SNAP customers are more likely to shop regularly at a small grocery or convenience store than non-participants is located nowhere in the supplied study. This study appears to refer to all types of customers. The consumer research on convenience store core shoppers cited in the 2016 study did not address SNAP redemptions or SNAP customers.

The Appellant contends that according to the FMI U.S. Grocery Shopping Trends 2016 annual report, consumers' shopping habits trended towards an increase in the use of convenience stores,

small grocers, and ethnic food stores. FNS does not question the data in the report and acknowledges that it could be possible that some people shop at the subject store regularly. However, the Appellant is using this average and or overall data to attempt to explain the questionable transactions in the charge letter. This data, however, is not specific to the subject store. This report does not mention the number of SNAP recipients, if any, included in the survey. In addition, the survey participants were located in Seattle, Washington, while the subject firm is located in Saint Petersburg, Florida. As such, the referenced report does not substantiate that trafficking did not occur at the Appellant firm.

As to whether or not co-shopping 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 is particularly common among SNAP recipients in Saint Petersburg, Florida. If co-shopping truly impacted Three Brothers Market as the Appellant suggests, it would stand to reason that co-shopping 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.

The Appellant contends that these purchases are also the result of a SNAP participant forgetting an item in his/her initial transaction and after going home, returning to the store to make a second purchase for the forgotten item. In other instances, multiple members of the same household will shop together and then make their purchases separately (using the same account and card) in quick succession. In yet other circumstances, the participants will go on a spending spree wherein they make purchase after purchase without leaving the store, or by returning after a brief absence, thereby reducing their benefits in short order.

However, these transaction sets do not contain the characteristics associated with a household purchasing a forgotten item right after checking-out or of a household making a separate purchase to check their balance followed by another transaction as 31 of the 34 transaction sets **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. The transaction sets also do not contain the characteristics of a household returning later in the day to purchase a forgotten item or two as all of the sets have subsequent transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**, far more than the cost of a forgotten item or two.

The Appellant contends that FNS's own study, Foods Typically Purchased by SNAP Households (November 2016), notes that SNAP participants spend almost 62% of their monthly benefits on meats, sweetened beverages, vegetables, frozen prepared foods, prepared desserts, high fat dairy/cheese and breads – in that order. Unlike normal shopping habits, SNAP participants buy sweetened beverages, frozen prepared foods and prepared desserts at a much higher rate than traditional consumers. These purchasing habits show that the Appellant stocks the majority of a SNAP household's preferred needs, and has sufficient variety and quantity to meet the needs of several households all at once without having to replenish inventory.

It is acknowledged that the subject store does offer items that SNAP households would purchase; however, many of these items are accessory items that a SNAP customer would not purchase all the time. However, the key findings of the noted study indicate that there were no major differences in the expenditure patterns of SNAP and non-SNAP households, no matter how the

data was categorized. The study noted that similar to most American households: About 40 cents of every dollar of food expenditures by SNAP households was spent on basic items such as meat, fruits, vegetables, milk, eggs, and bread; another 20 cents out of every dollar was spent on sweetened beverages, desserts, salty snacks, candy and sugar; the remaining 40 cents was spent on a variety of items such as cereal, prepared foods, dairy products, rice, and beans; and the top 10 summary categories and the top 7 commodities by expenditure were the same for SNAP and non-SNAP households, although ranked in slightly different orders.

The report and photographs from the store visit offer no explanation as to why SNAP customers would routinely shop at Three Brothers Market 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 store visit photos indicate that there were no signs posted advertising the availability of specials or bulk packages. In addition, there was a small checkout area with limited check-out counter space and one cash register and one EBT POS device for ringing-up SNAP purchases. There was one shopping cart and no hand-held baskets available to customers for transporting food within the store. There were no conveyor belts to expedite high dollar or rapid consecutive purchases. While research reports acknowledge the rapid spending habits of SNAP participants as normal practices, it is expected SNAP benefits are expended in establishments with adequate inventory to support purchases. Such inventory was not confirmed in the subject store.

The Retailer Operation Division's analysis of shopping patterns for households listed in the charge letter Attachments shows they have ready access to transportation as evidenced by their shopping at a variety of larger food stores located nearby and at a distance from the Appellant's location, including a variety of super stores and supermarkets. It is improbable that households would choose to spend large dollar amounts at the Appellant firm if their purchases consisted solely of eligible food items that could be purchased at any of the super stores and/or supermarkets they were already regularly shopping at.

Unfortunately, the Appellant has not provided any evidence to show that the transactions listed in this Attachment 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 Purchase Transactions (Charge Letter Attachment 3)

This charge letter Attachment documents 200 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 has provided several contentions with regard to the transactions in Attachment 3, including a claim that the store stocks a variety of staple food items, including, but not limited to, fresh meat products, milk, cheese products, juices, cereals, canned goods, noodles, etc. There are no local stores that sell the same items as the Appellant, nor are there other stores that sell to this customer base in such a significant volume.

However, 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 Three Brothers Market to have purchases like those included in this Attachment to the charge letter.

5 U.S.C. § 552 (b)(7)(E).

The Appellant contends that it offers groceries which are unique to the African American community. However, there is no indication as to how this explains the questionable transaction patterns addressed in the charge letter. Many households are comprised of a diverse family dynamic and/or are low-income households, yet this is not an indication that questionable transactions would be occurring at any given store. The subject store shows unusual transaction patterns that are not occurring in other similarly or even better stocked stores. If specific household needs are causing these questionable transactions at the subject store, it would be expected that similar patterns would also be present themselves at nearby firms as well. But this is simply not the case.

The Appellant contends that these transactions are the result of the prices of the meat bundles offered by the store and as a result of the store's loyal clientele – many of which have shopped there for decades. Nearly all of the transaction amounts listed in Attachment 3 are closely tied to the meat bundle prices: **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. Other meal packages include Breakfast and Deli Plans (\$15.00 - \$25.00). These plans are purchased by the SNAP participants from time to time, resulting in the purchase prices seen in the charge letter. The Appellant submitted four (4) flyers advertising store specials in support thereof.

However, the FNS store visit report and photos show that Three Brothers Market offers a moderate stock of SNAP eligible foods with a minimal variety and amount of fresh meats, poultry, and seafood, no frozen meats, poultry, or seafood, no frozen foods, only two varieties of fresh produce in a limited amounts, and a lack of an abundant depth and breadth of staple foods.

The store visit inventory report and photos also show only a few expensive eligible foods in stock that would account for these large amounts, 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.

5 U.S.C. § 552 (b)(7)(E).

While the Appellant contends that this store should be categorized as a “specialty grocer” given its meat inventory and sales, a review of the vendor purchase invoices provided by the Appellant reveals that meat/poultry/seafood product purchases represent about 17 percent of total products purchased. If Three Brothers Market is truly a specialty grocer/store specializing in meat products then it would be expected that this percentage would be significantly higher. The current and prior store visit surveys and photographs revealed no profusion of fresh beef, pork, or poultry products. There were no noted excess products contained within the storage area for the hot/cold prepared food business. It is also important to note that the Appellant did not provide any statement/information clarifying what portion or percentage of the meat/poultry/seafood product purchased is reserved for the hot/cold prepared food business at the firm. The Appellant did not provide any additional evidence, such as but not limited to, business tax returns or updated sales percentages, to support its contention. Therefore, a review of the available evidence indicates that Three Brothers Market is appropriately categorized as a small grocery store.

The Appellant contends that a reasonable and plausible explanation for these higher transactions is that the households that conducted these transactions have a larger amount of SNAP residents residing therein, thus requiring a larger quantity of grocery products each month than those households with less participants. Some of the SNAP participants who filled out the affidavits had five (5) or more members in their household, which would naturally result in larger purchase transactions.

5 U.S.C. § 552 (b)(7)(E).

FNS acknowledges the affidavits provided. However, in cases where violations are suspected these affidavits are frequently considered unreliable because the persons writing them often give inaccurate information. These affidavits, even if well-intentioned, are typically not accurate depictions of a household’s shopping behavior, as households generally do not retain records of transactions and often do a poor job of recalling actual spending patterns at a particular location. Even if the statements were accepted as evidence of legitimate transactions, they account for just 10.6 percent (35 of 330) of the transactions/transaction sets in the charge letter.

The Appellant contends that the store is, to the owner’s knowledge, the only retail store in the surrounding area that provides the community with such a unique selection of grocery products. 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 18 SNAP authorized retailers of a comparable size or larger, including 4 supermarkets and 1 super store, located within a 2.0 mile radius of Three Brothers Market that can meet the nutritional needs of SNAP customers. Some of these authorized SNAP stores are larger than Three Brothers Market 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 the store is located in a neighborhood which is composed predominately of low income families who do not have transportation services and rely on the Appellant to provide them with all of their needs. The Appellant has been around for over thirty

(30) years and many families depend on them to deliver all the groceries, food and meats which they need.

However, the record also indicates that SNAP customers who shopped at Three Brothers Market 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 during the review period.

5 U.S.C. § 552 (b)(7)(E).

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 and the lack of a sufficient number 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 a sufficient number 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.

Regarding the Appellant's contentions with respect to the reliability of the ALERT system and Confirmation Bias, 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.

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. 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.

Invoice Analysis/Z-Tapes

In support of its contentions that the questionable SNAP transactions included in the charge letter Attachments are legitimate food purchases and not the result of trafficking of SNAP benefits, the Appellant provided FNS with numerous vendor purchase invoices/receipts for one month of the review period—April 2019.

An analysis of the invoices provided reveals that the majority of eligible food items purchased for Three Brothers Market was primarily single-serve snack food items and accessory food items such as but not limited to chips, cookies, candies, carbonated and non-carbonated beverages, and various other eligible food items. Fresh and perishable staple food items accounted for a small portion of the eligible food items purchased for Three Brothers Market during the review period. The invoices also reveal fresh meat/poultry/seafood products were purchased. However, there is no indication as to what portion or percentage is allocated to meat/grocery bundles noted by the Appellant or the hot/cold prepared food business of the Appellant firm. Further, the calculated invoice totals for April 2019 with an average 40 percent mark-up percentage 5 U.S.C. § 552 (b)(6) & (b)(7)(C) whereas the combined SNAP redemptions for the entire review period 5 U.S.C. § 552 (b)(6) & (b)(7)(C), leaving a negative difference 5 U.S.C. § 552 (b)(6) & (b)(7)(C). As such, the data reveals the purchased inventory did not cover the SNAP redemptions.

End of the day sales receipts from the store's cash register (z-tapes) were also provided by the Appellant for April 2019; however, this documentation provides little credible evidence to substantiate that the SNAP transactions listed in the charge letter Attachments were legitimate, bona-fide transactions.

It is important to note that even if the store had sufficient inventory to support its SNAP redemptions, this would still not explain the irregular transaction patterns cited in the charge letter. It is not unusual for violating stores to conduct largely legitimate SNAP transactions while conducting a smaller number of trafficking transactions with a few trusted households.

Case Laws

With regard to the case laws cited by the Appellant, it is beyond the scope and authority of this review to determine the applicability of same. This review is limited to consideration of whether or not the Retailer Operations Division duly adhered to the Food and Nutrition Act of 2008, as amended, and the implementing regulations, and whether or not the action taken is sustainable by a preponderance of the evidence. Therefore, the application of any judicial precedent is better addressed via judicial review. Accordingly, no further findings or conclusions are rendered in this regard.

Financial Hardship

With regard to the Appellant's contention that a SNAP disqualification will impose a severe financial hardship on the firm, 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.

CIVIL MONEY PENALTY

In the November 5, 2019 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 a correspondence of September 25, 2020, the Appellant, through counsel, requested consideration for a civil money penalty in lieu of permanent disqualification. In addition to not meeting the 10-day required timeframe for requesting consideration for a civil money penalty in lieu of a permanent disqualification for trafficking, the Appellant also provided no supporting documentation in support of its request.

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 Three Brothers Market 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

January 6, 2021