

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

**Wafs2 Investment Llc,**

**Appellant,**

**v.**

**Retailer Operations Division,**

**Respondent.**

**Case Number: C0233023**

**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 Wafs2 Investment Llc (hereinafter “Wafs2 Investment Llc” 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 Wafs2 Investment Llc.

**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 September 1, 2020, the Retailer Operations Division informed the Appellant that Wafs2 Investment Llc 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 at the store address of record on September 2, 2020.

The record reflects that in a letter received on September 10, 2020, the Appellant's counsel requested information and documents from FNS with regard to the agency's case against Wafs2 Investment Llc pursuant to the Freedom of Information Act (FOIA). In a letter dated April 5, 2022, FNS provided counsel with a response to the FOIA request. The Appellant's counsel did not appeal the FOIA request. On April 14, 2022, the Retailer Operations Division sent a letter to counsel providing 10 days to provide an additional response to the letter of charges. In a response to the Retailer Operations Division of April 25, 2022, the Appellant, through counsel, replied to the letter of charges. The record reflects that the Retailer Operations Division received and considered the information provided prior to making a determination.

After considering the Appellant's responses and the evidence in the case, the Retailer Operations Division issued a determination letter dated November 30, 2022, informing the Appellant that Wafs2 Investment Llc 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) in accordance with 7 CFR § 278.6(i) 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 an email correspondence of December 7, 2022, 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 15, 2022.

The record reflects that via an email correspondence of December 15, 2022, the Appellant's counsel requested an extension in time for providing additional information in support of the request for administrative review. Via email correspondence of December 15, 2022, the Administrative Review Officer granted counsel's time extension request to January 20, 2023. In an email correspondence of January 20, 2023, the Appellant, through counsel, submitted additional information in support of the request for administrative review.

### **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 December 2019 through May 2020. This involved the following SNAP transactions patterns which are indicative of trafficking:

- 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 replies to the charge letter, 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 denies that trafficking took place.
- The store measures 2,700 square feet with an additional approximately 400 square of storage space and sells a variety and quantity of staple food items to the surrounding community such as beef, chicken, turkey, cereal, pasta, milk, and a variety of fruits and vegetables.

- Inventory is replenished on a rolling basis and depending upon demand. Inventory during the beginning of the month is typically superior to inventory at the end of the month.
- The store visit report notes that the firm is sufficiently stocked in all four staple food categories to account for the transactions listed in the charge letter.
- A substantial portion of the Appellant's clients come from the surrounding residential neighborhoods, and the Appellant has crafted the store's offerings to cover a material portion of the grocery purchases of local participants.
- The Retailer Operations Division considered a single store visit (which captures the store's inventory at a particular point in time) and attempts to extrapolate what the store's inventory is like for a half-year based on a single afternoon's visit.
- The store visit report, prepared by FNS's contractors, represents a snapshot of the store's inventory on the day and at the time in which the investigator arrived at the store. These visits, which last on average about 45 minutes on the high end, are typically completed with SNAP authorization/reauthorization applications. Many of the contractors will treat them as though they are for authorization purposes.
- Store visit reports for comparison stores should be close in time to the review period so as to have an apples-to-apples comparison of the stores during the period of time in which the transactions occurred. If a comparison retailer's store visit report is significantly before the review period (more than three months), it is impossible to determine whether or not that store maintained the inventory and appearance that the store visit report indicates.
- The Appellant serves the surrounding community which has a total poverty rate of 8.3 percent. According to USDA's *Profile of SNAP Households in 2018 for the* 5 U.S.C. § 552 (b)(6) & (b)(7)(C) *Congressional District of* 5 U.S.C. § 552 (b)(6) & (b)(7)(C), 15% of the local households receive SNAP benefits.
- The Appellant is located in an area with a higher per-capita population of SNAP households than the average store. According to USDA's SNAP Retailer Locator Tool, there are ten which participate in the SNAP. However, not all SNAP retailers are created equally, and many of these stores offer different inventories, services, and hours of availability.
- Households with particular demographic information and located in particular geographic areas are more likely to be disqualified which shows a bias towards smaller grocers.
- Regional differences in disqualification rates and shopping habits support this contention as well. The difference in disqualification rates is likely due to a confirmation bias within the retailer disqualifications.
- Households in the Northeast conduct 25.3% of their transactions at small grocers or convenience stores and their disqualification rate is the highest at 3.7%. Likewise, the Mid-Atlantic conducts 26.4% of their transactions at small grocers or convenience stores, and has the second highest rate of disqualification at 2.6%. Areas that do not rely on small grocers and convenience stores like the Southwest (only 18.5% of their transactions are conducted at these stores) and the Southeast (only 17.9% of their transactions are conducted at these stores) have drastically smaller disqualification rates: .8% and 1.1% respectively. This is driven by the Retailer Operations Division's belief that small stores should not account for the volume of transactions or SNAP benefits that the data shows they legitimately do.

- Single-adult SNAP households with children have a much higher disqualification rate (1.6%) than multiple-adult SNAP households with children (1.1%). This is likely because their shopping patterns (which rely more significantly on small stores like the Appellant and much less on larger stores) trigger a disproportionate rate of SNAP disqualification at retailers.
- This analysis is supported by the fact that the highest disqualification rates in the nation are for African American households (2.6%) and Hispanic households (1.9%--both ethnicities that show up at a disproportionate rate in EBT analysis cases because of their shopping preferences for smaller stores). Furthermore, Hispanic's higher transaction size averages increase the likelihood that their transactions are flagged by ALERT scans because they are more likely to conduct them at smaller stores.
- Furthermore, disabled households (with elderly) are also disqualified at a high rate (1.7%)—they too are more likely to shop exclusively at small stores (1.2% do so), and shop at a very high rate at convenience stores (20.3% of their transactions are conducted at convenience stores).
- The numbers show that if a store is near a large number of Hispanic or African American SNAP households that are comprised of one adult and children, who have more than \$500.00 worth of benefits and four or more household participants—the store is much more likely to be flagged through no fault of its own. This is especially true of Scan F transactions which takes into account far greater geographic areas than just the neighborhoods in which these documented transactions occurred.
- Store categories are not homogenous; there are often big differences in how stores operate and inventory.
- Neighborhood differences can be dramatic but not obvious in comparison to store's data.
- Studies have shown that households will commonly skip over larger neighborhood stores, favoring instead local small/convenience retailers, and more distant supermarkets. See *What Does SNAP Benefit Usage Tell Us About Food Access in Low-Income Neighborhoods*, (Shannon, J., Elsevier, Ltd., 2014). USDA studies have shown that certain households do not prefer to shop at larger stores, or shop much less frequently at larger stores than is commonly believed.
- Elements of the household such as their size, their demographics, ethnicity and geographic location all play into what “expected” shopping habits should look like.
- Households with children are more likely to have Scan B2 or F transactions.
- Households with more benefits are more likely to have Scan B2 and F transactions.
- Many of the households that shop at the Appellant are families and the elderly. USDA's SNAP report by Congressional District also indicates that the local SNAP households are disproportionately favorable to families. These households have different shopping patterns than the “average” SNAP household.
- There are a number of studies that indicate that the precise location of a convenience store can have a significant impact on the market share and profitability of the business. In support thereof, the Appellant cited Turhan, G., Akalin, M., Zehir, C., *Literature Review on Selection Criteria of Store Location Based on Performance Measures*, Procedia Social and Behavioral Sciences, 2013.
- According to the *Online Grocery Shopping Knowledge, Attitudes, and Behaviors Among SNAP Participants* report, 2019 (USDA Economic Research Service summary entitled “Recent and Upcoming ERS Research: SNAP and Retail”), many SNAP households

were inclined to utilize in-person shopping as a recreational event. This means that the act of shopping on SNAP itself is a rewarding experience, and that the purchase is a secondary (if not tertiary) consideration for the participant. Furthermore, it indicates that the participant is likely to conduct this activity with other people, either from their household or with friends and neighbors. Households which engage in recreational grocery shopping behavior are likely to have multiple transactions over the course of a day or two.

- In support of the Appellant's discussions regarding SNAP households' shopping habits, the following studies were provided and/or cited: *Benefit Redemption Patterns in the SNAP in Fiscal Year 2017 Final Report*, Insight Policy Research, September 2020; *Shopping Pattern and Food Purchase Difference Among SNAP Households and Non-SNAP Households in the United States*, Preventative Medicine Reports, June 20, 2017; *What Does SNAP Benefit Usage Tell Us About Food Access in Low-Income Neighborhoods?*, Social Science & Medicine, 2014; *Online Grocery Shopping Knowledge, Attitudes and Behaviors Among SNAP Participants* ([www.sciencedirect.com](http://www.sciencedirect.com)); and *Recent and Upcoming ERS Research: SNAP and Retail*, USDA ERS.
- Despite dozens upon dozens of households cited in a given set of ALERT data, the Case Analysis Branch selects a handful which contain transaction attributes intended to support FNS's argument that the shopping is an indication of trafficking, rather than fairly evaluating the complete set to determine whether or not one or another is an aberration in the data.
- It is only logical that stores located within close proximity to SNAP customers are likely to drive more business in EBT than stores that are located in affluent or low-participation neighborhoods. However, even within a relatively short distance (less than a mile), the population dynamics may shift significantly based upon the housing arrangements and types of households that those domiciles may attract. Several population factors such as the number and density of households (single family homes versus apartments/multifamily dwellings), population growth rate, age (elderly versus households with young children), marital status (single adult households as the USDA's data discusses versus two adult households), travel time to and from the subject store, and population ethnicity/cultural purchasing habits are all driving factors. Turhan at 393.
- Stores with a higher competition saturation rate are not as profitable as those with lower rates because there are more stores offering similar goods to the same population, thereby taking smaller percentages of the overall business. Turhan at 394-395. This manifests itself in SNAP transactions as fewer overall transactions. In the ALERT Scans, this will appear as fewer Scan hits because the business is split amongst a number of retailers rather than concentrated as it is at the Appellant. For example, with respect to Scan B2, a household which would normally shop at the local SNAP retailer twice over a day or two, may choose instead to shop once at one small store and then a second time at another small store, thereby avoiding Scan B2 hits at both stores – whereas a single store with a lower competition saturation would garner both sales and thereby incur the Scan B2.
- Even where population composition and competition saturation are the same, differences between store characteristics can change the volume of business that a retail food store does. There are three factors that fall under the store characteristics category: (1) Ease of accessibility; (2) Store image attributes; and (3) Operating costs and prices elasticity. See Turhan at 395.

- Many retailers are also impacted by the presence of other businesses or facilities that are considered “magnets” in that they draw in a potential customer base for other reasons, which in turn drives walk-in business for the subject firm. Turhan at 395.
- Store operations costs contribute to price elasticity, which in turn drives customer purchases. Operations costs, such as rent/mortgage, taxes, equipment costs and personnel create the baseline to which the store sales need to meet in order to keep operating. The higher these expenses, the higher the prices have to be on the store merchandise. Conversely, stores with controlled or low operations costs have the ability to reduce prices on goods to beat out competition, or to offer sales points that are more competitive to larger stores.
- The transactions documented in Attachment 1 are the result of the store’s business practices, the participant forgetting an item in his/her prior transaction, co-shopping, the participant making a purchase, returning home, and then returning to the store to make a second purchase, and/or a reflection of the normal shopping habits of SNAP participants.
- As stated in 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 (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).
- Past Administrative Review Branch decisions have identified a number of certain explanations which adequately explain the presence of Attachment 1 transactions. These cases (the Appellant cited numerous administrative review cases and numbers in support thereof) and explanations include: The significant presence of low-income population of SNAP residing near the retailer; absence of local SNAP retailers to compete with the subject store; significant inventory that encourages multiple shopping trips, like the presence of deli or meat by the pound; customer loyalty and loyalty programs; lack of transportation for local SNAP households; delivery services; bulk discounts on food purchases, especially expensive items and sodas (like Red Bull); and forgotten items.
- The pertinent factors in the above referenced cases which are also present in this case include low-income SNAP population near the retailer and lack of transportation for local SNAP participants.
- In 5 U.S.C. § 552 (b)(6) & (b)(7)(C), participant benefits are issued on the 5<sup>th</sup> through the 23<sup>rd</sup> of each month, based on the last two digits of your ID number. USDA has previously conducted research into the standard practices of participants for food purchases, and purchases made within the first seven days after receiving benefits is not unusual. In fact, on a regular basis, the participants will make significant grocery purchases from the Appellant store within 48 hours of receiving the deposit in their accounts. Such patterns are supported by the *Benefit Redemption Patterns in the Supplemental Nutrition Assistance Program in Fiscal Year 2017* (2020). Here, almost all of the transactions set forth in Attachment 1 reflect this standard shopping habit and patterns of SNAP participants.
- The inventory offered by the store is of such a variety that it is reasonable to assume a household could satisfy all of their needs on a single shopping trip. Given the transportation and convenience issues, the store benefits from being able to satisfactorily



supply their customers with enough types of food for them to be able to make meals for their families.

- Small grocers/convenience stores in African American communities are more likely to have Scan B2 transactions. The presence of a large African American SNAP household community increases the store's likelihood to make purchases on a more frequent basis.
- Many of the local SNAP household members are unemployed. To satiate their boredom, these participants will regularly shop at stores to find something to do.
- The Appellant is located within walking distance of townhomes, apartments, parks, bus stops, funeral services, and several churches. The presence of these facilities has a direct impact on how the Appellant's customers shop, either as a result of the identify of the participants, or the convenience of the store.
- In some instances, the act of purchasing an item is pleasing, as much of the month they lack the financial ability to do so. So they will either shop regularly on the same day, or they will binge shop and make large purchases because they have the benefits to do so.
- The Appellant is aware that there are a number of SNAP households that come into the store multiple times a day because of convenience, often sending their children on separate shopping trips to pick up items from time to time. In other cases, participants make purchases for friends, for large gatherings, or to satisfy needs that are not obvious.
- Co-shopping is on the rise where both adult members are responsible for picking up groceries.
- The store does have an optical scanner, but the clerk has the ability to visually identify and enter items into the register. Item prices are usually consistent if not outright uniform, and are frequently memorized by the clerk through repetition over time. Furthermore, the store will tabulate transactions on a rolling basis, meaning that unlike a grocery store when you line up, set all of your items on the counter and then purchase them, this store permits participants to gather items, bring them to the register, and then return to gather more items. Although the EBT transactions are processed consecutively over a matter of a few minutes, the calculations, bagging and gathering of items can take dozens of minutes if the participant chooses.
- The store has two cash registers and only one EBT terminal. This means that transactions could be split up (in the instance of co-shopping) between two registers, calculated separately, and processed sequentially in a lower amount of time.
- From a physical transportation angle, the groceries are bagged, and often the customers carry the groceries by hand (using their children or friends to carry some items). On occasion, other items (like strollers) can be used to help transport the items out of the store. Nevertheless, they are bagged, by the store and physically carried out by the participants.
- From a causation standpoint, it is important to consider the store's size, inventory, and operations. The store's inventory is sufficient to account for the transactions.
- It is much easier for the customer to get through the spaces of a store like the Appellant's than it is for them to go into a supermarket/super store. Accordingly, these customers are more likely to come back for supplemental and quick shopping trips than they otherwise would at an average convenience store with an inferior inventory and a further distance from their homes.
- Transportation inconsistency is another reason for the transactions outlined in this Attachment. Participants do not have their own vehicles (it is part of the SNAP

participant's application requirements that they have only one vehicle at most), so trips to larger stores are dependent upon rides from friends or family. A household that cannot depend on those trips is forced to shop nearby.

- The transactions documented in Attachment 2 are the result of co-shopping, the store's inventory, the normal reflections of a SNAP participant's shopping habits, the local SNAP household's demographics and shopping habits, the store's pricing structure, 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.
- Past Administrative Review Branch decisions have identified a number of certain explanations for the presence of Attachment 2 transactions. Examples of acceptable explanations for excessively large purchase transactions include (the Appellant cited numerous administrative review cases and numbers in support thereof): Sufficient inventory to account for the transactions, as supported by invoices; sales tax documentation to support sales of food items in amounts to satisfy the transactions; large families shopping contemporaneously; presence of high dollar eligible foods in the store's inventory; presence of specialty or imported foods, which are expensive and not generally available elsewhere; miscategorization of the store, leading to inadequate comparisons of transaction sizes; sales of large quantities of soda; absence of local large SNAP retailers; presence of a large local SNAP population; and presence of bulk pricing or a reward system for larger purchases.
- The Appellant offers its clientele a considerable inventory in breads, cereals, and meats.
- The items typically purchased by SNAP households include a significant number of "accessory food items" which, while not offering as much in nutritional value as staple food items, are popular none the less.
- According to USDA's research (*Foods Typically Purchased by SNAP Households*, 2016), sweetened beverages and salty snacks are within the top 10 expenditures for SNAP households, as are meats and a number of other items offered by the Appellant. It is therefore reasonable to expect customers to spend large amounts and/or the majority of their benefits at the Appellant on the inventory evidenced in the on-site inspection.
- 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.
- Stores miscategorized as convenience stores are likely to have far higher Scan F hits.
- Shopping habits and preferences are more sophisticated than just distance and price.
- Households that conducted the transactions in Attachment 2 likely have a larger amount of SNAP residents residing in their homes, thus requiring a larger quantity of grocery products each month than those households with less participants.
- Certain household types are more likely to conduct transactions that fit the Scan F thresholds and would therefore generate hits in the Scan report. In particular, households with children and multiple adults tend to make much larger purchases on average. Furthermore, households comprised of Hispanic members are far more likely to make large purchase transactions than households of other ethnicities.
- Households with more than four members, and correspondingly large monthly benefits, make much larger purchase transactions than the average SNAP household.

- Small/convenience grocers in Hispanic/Native American neighborhoods are likely to have more Scan F hits.
- The largest transaction is \$160.17, and the majority of Scan F transactions are less than \$60.00. Given the higher priced items in the store, it is not difficult to imagine \$60.00 worth of groceries being purchased in a single trip – and being transported by hand back to the store. The remainder of the transactions could easily be transported by two people.
- The number of high priced items in the store does not require the store to have a huge amount of counter space to set all of the items. Given that a number of these items is roughly \$10.00 each, six of such items would not be difficult to carry and could be placed on the given space set out in the store visit report.
- Furthermore, visual identification on the part of the store clerk is easier than scanning items as they are aware of the prices because of experience so they need only to identify the items and enter the price on the register.
- The store visit report captures a snapshot in time of the store's inventory, though it lacks complete detail. The inspector's list of higher priced items was not exhaustive as there appears to be items in the inventory that were documented but not listed by price. Examples of these food items missed by the store reviewer include: Dasani water case at \$35.00; Honey Bun cases at \$35.64; Tropicana Raz (all flavors) case at \$40.00; Frito-Lay cake bulk boxes at \$30.00+; Bimbo Cake bulk boxes at \$30.00+; Jack Link teri beef steak box bag at \$19.99; Sather Peppermint Twist 6.25 ounces at \$8.99; Realtree original beef jerky 3.25 ounces at \$7.99; Jack Links new teriyaki beef jerky 3.25 ounces at \$8.49; Margaret Holmes green cajun boiled peanuts 6 pounds at \$8.39; water cases at \$8.99; Coke 12 pack at 2/\$9.99; Jack Links turkey jerky at \$7.99; and Tropicana orange 52 ounces at \$11.99.
- Because the Appellant is located much closer to the SNAP participants (who do not have regular access to transportation—otherwise they would not qualify to be SNAP participants) and its inventory contains such a wide variety of items, these transactions are more likely to occur as a matter of course.
- Furthermore, the only other stores that are nearby do not have the inventory variety that the Appellant has. Accordingly, this store is going to have larger transactions than the average small retail store.
- To help substantiate the Appellant's inventory and to supplement the store visit report's loose inventory, inventory invoices are submitted. The store had an average markup of 40%.
- The Appellant has not had a compliance problem with SNAP in the past.
- It would defy logic for a store owner with a long history of compliance to suddenly start trafficking in SNAP benefits for the de minimus amounts set forth in the charge letter. As such, the store's past compliance should be given consideration in support of the position that trafficking did not occur.
- FNS has been adamant over the years that an EBT analysis case is not dependent upon any one particular component. As noted in *Arch Street Market vs. Retailer Operations Division*, the ALERT Scan categories (and the transactions which comprise them) are allegedly just one part of the overall analysis, which includes consideration of a series of factors.
- There remains a significant lack of evidentiary process at this stage of the administrative proceedings. The lack of evidentiary process, or frankly any adversarial analysis of the

data hidden behind the screen that is the Case Analysis Document and ALERT, serve to create a higher likelihood of such wrongful disqualification. These wrongful disqualifications are a result of an imperfect understanding by the Case Screening Branch and the Investigative Analysis Branch of the Appellant's operational circumstances. The Appellant cited *Redmond vs. U.S.* and *Saunders vs. U.S.* in support thereof.

- Retailers involved in disqualification actions under 7 CFR § 278.6 are entitled to “have full opportunity to submit to FNS information, explanation, or evidence concerning any instances of noncompliance before FNS makes a final administrative determination. The Appellant has not been afforded the opportunity to review fully reply in accordance with Section 278.6(b)(1).
- The pertinent proof at this stage of the disqualification process is the “preponderance of the evidence” standard, which means that the evidence must be adequate enough 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. See *L&M Grocery Market, Inc. v. Retailer Operations and Compliance*.
- The Department bears the burden of proof, not the retailer at this stage of the proceedings. See *Cardenes Market v. Retailer Operations and Compliance*.
- The burden of proof in this administrative review case rests with the Retailer Operations Division. See Policy Memorandum 2021-01. See also *Star Market vs. Retailer Operations Division* and language change in Policy Memorandum 2020-01, which used the term “substantial evidence.”
- USDA does not know the correlation coefficient between ALERT scans and trafficking. It has calculated this based on results of undercover investigations and determined that it was a positive correlation, but the relationship between the values is weak.
- In the event that USDA determines that the store trafficked in SNAP benefits, the Appellant requests consideration for the issuance of a trafficking civil money penalty in lieu of a permanent SNAP disqualification. The Appellant has trained staff on the appropriate rules and regulations regarding EBT transactions and has made certain that each of the employees has an understanding of the rules and regulations prior to being permitted to operate the cash register without constant supervision. The Appellant has always maintained a policy that SNAP violations will not be tolerated.

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

- Inventory purchase invoices (263 pages total);
- Customer affidavit (1 total);
- *Profile of SNAP Households in 2018*, 5 U.S.C. § 552 (b)(6) & (b)(7)(C) Congressional District 5 U.S.C. § 552 (b)(6) & (b)(7)(C), USDA, FNS;
- *SNAP Training Guide for Retailers*, USDA, FNS;
- *Benefit Redemption Patterns in the SNAP in FY 2017 Final Report*, Insight Policy Research;
- *Pearson Correlation Coefficient Calculator*, Social Science Statistics;
- *What Does SNAP Benefit Usage Tell Us About Food Access in Low-income Neighborhoods?* Social Science & Medicine, 2014;

- *Shopping Pattern and Food Purchase Differences Among SNAP Households and Non-SNAP Households in the United States*, Preventative Medicine Reports, June 20, 2017;
- *U.S. Grocery Shopping Trends Annual Report*, FMI, 2016; and
- *Foods Typically Purchased by SNAP Households*, USDA, FNS, November 2016.

## **ANALYSIS AND FINDINGS**

### **SNAP Authorization and Compliance History**

During the review period of December 2019 through May 2020, Wafs2 Investment Llc was classified as a convenience store. When the Appellant was authorized by FNS for participation in the SNAP on August 9, 2018, the owner signed a SNAP application for the store 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 June 22, 2020 store visit conducted by a FNS contractor to observe the nature and scope of the firm’s operation, stock, and facilities. The available inventory of SNAP-eligible food at the time of the store visit showed food stock that would be typical of a convenience 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. 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 900 square feet in size with approximately 150 square feet of storage area outside of public view which stocked predominantly nonfood items;
- Did not have storage coolers or freezers;
- No shopping carts and no hand-held baskets available for customer use;
- One small checkout counter area with limited check-out counter space which was surrounded by a plexiglas barrier with only a small slit for placing items for purchase;
- Two cash registers and one EBT point-of-sale (POS) device for use in ringing-up SNAP transactions;
- Did not have optical scanners;
- Did not have an unusual pricing structure, such as ending most product prices in \$x.x9 or \$x.00;
- Did not round transactions up or down at the checkout counter;

- 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;
- Telephone orders were not taken;
- Delivery was not offered;
- Had empty shelves;
- Was not a WIC Program vendor;
- Did not sell a profusion of specialty or ethnic foods;
- The four most expensive (i.e., costing \$5.00 and above) SNAP-eligible food items in stock were Nestle water at \$9.99 per 35/0.5 liters (7 units in stock); various sodas at \$7.99 per 12/12 ounces; various water at \$7.99 per 24/16.9 ounces; and Red Bull at \$5.33 per 2/8.4 ounces;
- No fresh or frozen meats, poultry, or seafood;
- Frozen food stock consisted of ice cream only;
- Did not have a kitchen; The only hot food sold was coffee;
- Did not have a deli or prepared food section and the firm did not sell deli meats and cheeses by the pound;
- Meat items included units of canned/potted meat and meat jerky;
- Did not meet the requirements for participation in the SNAP under Criterion A at the time of the store visit as the only dairy product stocked by the store was milk;
- Did not have fresh produce stock;
- Other staple foods available for purchase included such items as juice, pasta, nuts, oats, cereal, baking mix, and canned goods;
- Much of the remaining food stock consisted of accessory foods such as candy, carbonated and non-carbonated drinks, condiments, vegetable oil, snack foods, and cakes/pastries; and
- Ineligible nonfood items included tobacco products, health and beauty aids, paper products, household cleaning supplies, automotive supplies, lottery tickets, gasoline, alcohol, gaming machines, and incense.

### **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.

### **Repeat Transactions by the Same Household (Charge Letter Attachment 1)**

This charge letter Attachment documents 35 sets of transactions (87 total transactions) that total \$5,873.14 in SNAP benefits to meet the parameters of this scan. These transactions were conducted by 21 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.

#### **5 U.S.C. § 552 (b)(7)(E).**

The Appellant contends that FNS has previously conducted research (*Benefit Redemption Patterns in the Supplemental Nutrition Assistance Program in Fiscal Year 2017* (2020) which indicates that purchases made within the first seven days after receiving benefits is not unusual. In fact, on a regular basis, the participants will make significant grocery purchases from the Appellant within 48 hours of receiving the deposit into their accounts. In some instances, the act of purchasing an item is pleasing, as much of the month they lack the financial ability to do so. So they will either shop regularly on the same day, or they will binge shop and make large purchases because they have the benefits to do so.

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 convenience store like the Appellant firm that has a limited food stock, no fresh or frozen meats, poultry, or seafood, no fresh produce stock, no frozen food stock other than ice cream, and lacks an abundant depth and breadth of staple foods. Wafs2 Investment Llc’s transaction activity is unusual as every transaction in each set of transactions range from \$20.00 to \$153.77 and the average convenience store transaction in 5 U.S.C. § 552 (b)(6) & (b)(7)(C) during the review period was 5 U.S.C. § 552 (b)(7)(E) and 5 U.S.C. § 552 (b)(7)(E) for 5 U.S.C. § 552 (b)(6) & (b)(7)(C) County.

While FNS acknowledges the cited *Benefit Redemption Patterns in the Supplemental Nutrition Assistance Program in Fiscal Year 2017* report, it is important to note many of the statistics cited by the Appellant have little to no connection to the case against the subject firm. While the subject firm is located in 5 U.S.C. § 552 (b)(6) & (b)(7)(C), which is located in the 5 U.S.C. § 552 (b)(6) & (b)(7)(C) region, household transaction activities in the other regions do not appear to be impactful on this particular case. In addition, there is nothing in this report supporting a finding that average SNAP households make multiple substantial (more than \$20.00) transactions in short periods, which exceeds the transaction amount for this store type (convenience store) average for the state and county. Lastly, there is nothing in the study which would explain why households in the charge letter are traveling to the subject convenience store which has a limited stock to complete repetitive and excessively large dollar transactions.

The Appellant contends that households with children are more likely to have Scan B2 or F transactions. Households with more benefits are more likely to have Scan B2 and F transactions. Small grocers/convenience stores in African American communities are more likely to have Scan B2 transactions. However, there is no indication as to how these factors explain the questionable transaction patterns addressed in the charge letter. Many households are comprised of a diverse family dynamic, 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 diverse family needs are causing these questionable transactions at the subject store, it would be expected that similar patterns would exist at other neighboring stores. However, this is not the case.

In addition, there is nothing in the study cited by the Appellant (*Benefit Redemption Patterns in the SNAP in Fiscal Year 2017*) which indicates that African American communities are more likely to conduct Scan B2 transactions. This study noted that African American Non-Hispanic households averaged 9.9 transactions per month with an average EBT transaction of \$28.66 (as opposed to White Non-Hispanic households that averaged 8.5 transactions per month with an average transaction of \$29.95).

The Appellant contends that the inventory offered by the store is of such a variety that it is reasonable to assume a household could satisfy all of their needs on a single shopping trip. These transactions are the result of the store's business practices, the participant forgetting an item in his/her prior transaction, the participant making a purchase, returning home, and then returning to the store to make a second purchase, and a reflection of the normal shopping habits of SNAP participants. The Appellant is aware that there are a number of SNAP households that come into the store multiple times a day because of convenience, often sending their children on separate shopping trips to pick up items. Some participants make purchases for friends, for large gatherings or to satisfy needs that are not obvious.

However, the second, third, and subsequent transactions in each set are too large to consist of forgotten items. In addition, the report and photographs from the store visit offer no explanation as to why SNAP customers would routinely shop at Wafs2 Investment Llc multiple times during a short period or purchase such a large volume of items, there being no great variety or advertisements of products, price advantage, profusion of large packages, or significant bulk items or food cases for sale. The majority of the Appellant's food stock consists of generally low



dollar items such as packaged food items, canned items, accessory food items, snacks, and beverages.

While the Appellant contends that the firm was sufficiently stocked in the four staple food categories at the time of the store visit, the store visit observations indicate that the firm had empty shelves and did not meet the requirements for participation in the SNAP under Criterion A as the only dairy product stocked by the store was milk. In addition, the Appellant's variety of meat stock was minimal, stocking canned/potted meat and meat jerky only. The store visit report, which was completed in collaboration with and signed by a store employee, also indicates that the firm offered no special or custom services to customers, such as on-line or telephone orders and/or delivery services, which would entice SNAP customers to utilize the subject store over other area authorized retail stores.

FNS does not refute the Appellant's contention that it is easier for a customer to get through the spaces of a store like the subject firm than it is for them to go into a supermarket/super store. Nor does FNS refute the Appellant's claim that customers are more likely to come back for supplemental and quick shopping trips than they would at an average convenience store with an inferior inventory and a further distance from their homes. However, these contributing factors do not explain the multiple and often large transactions made at the Appellant from the same household in a short period of time.

The Appellant contends that the store has an optical scanner, but the clerk has the ability to visually identify and enter items into the register. Item prices are usually consistent if not outright uniform, and are frequently memorized by the clerk through repetition over time. Furthermore, the store will tabulate transactions on a rolling basis, meaning that unlike a grocery store when you line up, set all of your items on the counter and then purchase them, this store permits participants to gather items, bring them to the register, and then return to gather more items. Also, as the store has two cash registers and only one EBT terminal, transactions could be split up (in the instance of co-shopping) between two registers, calculated separately, and processed sequentially in a lower amount of time.

FNS does not dispute the Appellant's claim that the store has two cash registers for grocery purchases. However, the store visit report indicates that the firm did not have optical scanners or conveyor belts to expedite high dollar or rapid consecutive purchases. While experienced clerks could memorize the prices of frequently purchased items such as milk, bread, etc., it is unlikely that they would have the prices of items that are sold on a less regular or infrequent basis memorized. In addition, the store visit observations indicate that the firm had a small checkout area with limited check-out counter space which was surrounded by a Plexiglas barrier with only a small slit to place items for purchasing and only one EBT POS device for use in ringing-up SNAP transactions. The customers have no place to put multiple purchases while shopping. As a customer this would be inconvenient at best and it would make it hard for the cashiers to keep a running total of items purchased as the Appellant suggests. As such, even if cashiers do know the price of goods by memory, these factors call into question that this is a reasonable explanation for the transactions.

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 5 U.S.C. § 552 (b)(6) & (b)(7)(C). If co-shopping truly impacted Wafs2 Investment Llc 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.

No evidence was submitted to support the Appellant's contention that these transactions are the result of unemployed local SNAP household members satiating their boredom by regularly shopping at stores to find something to do. If shopping due to boredom were a regular occurrence at the Appellant, this pattern would manifest itself in comparable firms having similar transaction patterns. But this is simply not the case.

With regard to the Appellant's statements regarding vehicle restrictions in SNAP, households are eligible to receive SNAP benefits based on their income, not vehicle ownership. According to the USDA SNAP eligibility requirements, a vehicle may be counted as a resource (<https://www.fns.usda.gov/snap/recipient/eligibility>); resources are deducted from a household's gross income for the purpose of determining eligibility. However, a household may own one or more vehicles without them being counted as a resource or being subjected to the equity test based on the listed criteria.

The Appellant contends that the store is located in an area with a higher per-capita population of SNAP households than the average store. According to USDA's SNAP Retailer Locator Tool, there are ten which participate in the SNAP. However, not all SNAP retailers are created equally, and many of these stores offer different inventories, services, and hours of availability.

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, during the review period there were eight (8) SNAP authorized retailers located within a 1.0 mile radius of Wafs2 Investment Llc, including 1 supermarket, 2 combination grocery stores, and 5 other convenience stores, which could meet the nutritional needs of SNAP customers. In addition, there were 39 SNAP authorized retailers located within a 2.0 mile radius of the Appellant, including 3 super stores, 2 supermarkets, 2 large grocery stores, 2 small grocery stores, 11 combination grocery stores, and 19 other convenience stores. Some of these area authorized stores offer a comparable or greater quantity and variety of food products at comparable or better prices as compared to the subject store.

The Appellant contends that transportation inconsistency is another reason for the transactions outlined in this Attachment. Participants do not have their own vehicles so trips to larger stores are dependent upon rides from friends or family. A household that cannot depend on those trips is forced to shop nearby. With respect to Scan B2, a household which would normally shop at the local SNAP retailer twice over a day or two, may choose instead to shop once at one small store and then a second time at another small store, thereby avoiding Scan B2 hits at both stores – whereas a single store with a lower competition saturation would garner both sales and thereby incur the Scan B2.

However, the record indicates that SNAP customers who shopped at Wafs2 Investment Llc 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 has not provided any evidence to show that the transactions listed in this Attachment were legitimate purchases of eligible foods and not the result of trafficking of SNAP benefits. The arguments presented by the Appellant hold little weight without some kind of evidence to substantiate its claims. The Appellant has the burden to provide relevant evidence to rebut the trafficking charges. This burden has not been met.

### **Excessively Large Purchase Transactions (Charge Letter Attachment 2)**

This charge letter Attachment documents 189 SNAP transactions, as large as \$160.17, that total \$12,801.54. These transactions were conducted by 77 different SNAP households. 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 the store measures 2,700 square feet with an additional approximately 400 square of storage space and sells a variety and quantity of staple food items to the surrounding community such as beef, chicken, turkey, cereal, pasta, milk, and a variety of fruits and vegetables. The Appellant offers its clientele a considerable inventory in breads, cereals, and meats.

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 convenience stores to pick up a few staple food items, such as bread, milk, or a can or two of food that they may consider are not worth a trip to the supermarket to purchase. The Appellant contends that the large transactions are not the result of trafficking of SNAP benefits. However, it is rare for a convenience store such as Wafs2 Investment Llc to have purchases like those included in this Attachment to the charge letter.

The store visit observations indicate that that the Appellant is a convenience store and gas station which measures approximately 900 square feet in size with approximately 150 square feet of storage area outside of public view which stocked predominantly nonfood items and the firm had no storage coolers or freezers. The SNAP-eligible food stocked by the store was generally of a low dollar value, consisting mainly of inexpensive canned and packaged goods, drinks, snack foods, single-serving food items and accessory food items. The stock of SNAP-eligible foods was limited with no fresh or frozen meats, poultry, or seafood, no frozen food stock other than ice cream, no fresh produce stock, and lacks an abundant depth and breadth of staple foods.

As noted previously, the firm had a small checkout area with limited check-out counter space which was surrounded by a plexiglas barrier with only a small slit for placing items for purchasing, one EBT POS device for use in ringing-up SNAP transactions, and no optical scanners or conveyor belts to expedite high dollar or rapid consecutive purchases. The customers would have no place to put large purchases. In addition, there were no shopping carts and no 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.

The Appellant contends that the store visit report captures a snapshot in time of the store's inventory, though it lacks complete detail and consistency. The inspector's list of higher priced items was not exhaustive as there appears to be items in the inventory that were documented but not listed by price.

However, the store visit report, which was completed in collaboration with and signed by a store employee, indicates that the four most expensive (i.e., costing \$5.00 and above) SNAP-eligible food items in stock were Nestle water at \$9.99 per 35/0.5 liters (7 units in stock); various sodas at \$7.99 per 12/12 ounces; various water at \$7.99 per 24/16.9 ounces; and Red Bull at \$5.33 per 2/8.4 ounces. The Appellant submitted no evidence that demonstrates that the firm stocked other high priced SNAP-eligible items that were not observed during the store visit. If there were additional SNAP-eligible items in stock costing more than \$5.00, it would be likely that the store employee would have told the store visit reviewer. An analysis of the invoices provided by the Appellant also indicates that the firm's purchased inventory for the review consisted primarily of snack items such as chips and sodas. There were no discernable invoices for staple food items such as fruits, vegetables, or breads.

The Appellant contends that the number of high priced items in the store does not require the store to have a huge amount of counter space to set all of the items. Given that a number of these items is roughly \$10.00 each, six of such items would not be difficult to carry and could be placed on the given space set out in the store visit report. Furthermore, visual identification on the part of the store clerk is easier than scanning items as they are aware of the prices because of experience so they need only to identify the items and enter the price on the register.

However, a review of the store visit report and photos indicate that Wafs2 Investment Llc is a convenience store and gas station offering a limited variety and amount of staple food items and does not offer custom services to customers, such as on-line or telephone orders and/or delivery services, or a profusion of specialty or ethnic goods which would entice SNAP customers to utilize the subject store over other area authorized retail stores. In addition, the store had empty shelves, did not meet the requirements for SNAP participation under Criterion A stocking milk only as it dairy products, had a minimal meat stock consisting of canned/potted meat and meat jerky only, and the store had empty shelves. The store visit observations also 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.

While the Appellant firm may be located in a neighborhood with households that qualify for SNAP benefits and within walking distance of apartments, parks, bus stops, funeral services, and

several churches, 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.

The Appellant contends that according to USDA's research (*Foods Typically Purchased by SNAP Households*), sweetened beverages and salty snacks are within the top 10 expenditures for SNAP households, as are meats and a number of other items offered by the Appellant. It is therefore reasonable to expect SNAP customers to spend large amounts and/or the majority of their benefits at the Appellant store.

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 Appellant contends that certain household types are more likely to conduct transactions that fit the Scan F thresholds and would therefore generate hits in the Scan report. In particular, households with children and multiple adults tend to make much larger purchases on average. However, the *Benefit Redemption Patterns in the SNAP in Fiscal Year 2017* report cited by the Appellant does not state or suggest the finding that households with children are more likely to have Scan B2 or F transactions. Nothing in the report indicates that households with children were likely to seek out typically stocked convenience stores to complete repetitive and excessively large transactions. In fact, the report indicates that households with children spent 83.2% of their SNAP benefits on average at supermarkets and super stores. Also, households with children had an average transaction at convenience stores of just \$7.81 while their average transaction at supermarkets/super stores was \$48.00.

The Appellant provided statistics pertaining to the general demographic and noted that households that conducted these transactions have a larger amount of SNAP residents residing in their homes and therefore, a larger amount of SNAP benefits. 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, 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 family needs are causing these questionable transactions at the subject store, it would be expected that similar patterns would exist at other neighboring stores. However, this is

not the case. The Appellant's contention with regard to co-shopping resulting in these transactions was previously addressed in the Attachment 1 section of this Final Agency Decision.

The Appellant contends that households with particular demographic information and located in particular geographic areas are more likely to be disqualified which shows a bias towards smaller grocers. Regional differences in disqualification rates and shopping habits support this contention as well. However, the Retailer Operations Division does not complete disqualification actions against SNAP households. It reviews household shopping patterns, transaction data, store visit data, etc. The race of the store owner and SNAP recipients shopping at the firm is not part of the consideration given. With very few exceptions, the Retailer Operations Division does not have access to information with regard to household size. Similarly, the Retailer Operation Division does not have access to the ethnicity of the households shopping at the subject firm. All of this data is maintained and collected by state agencies. After taking permanent disqualification actions against retailers (of any size), the Retailer Operations Division sends a referral to the state agency partners with a list of all transactions in the charge letter. The state agency then conducts their own investigations of SNAP households which the Retailer Operations Division does not take part of.

The Appellant's contention that stores miscategorized as convenience stores are likely to have far higher Scan F hits may be true. However, nothing in this case suggests the subject firm was miscategorized. Wafs2 Investment Llc was classified as a convenience store by FNS based on information the firm provided in its initial application and subsequent periodic reauthorization (if applicable) applications to SNAP. 5 U.S.C. § 552 (b)(7)(E). At the time of the June 22, 2020 store visit, the firm's stock met the criteria of a convenience store and is therefore, categorized as such.

The Appellant contends that the only other stores that are nearby do not have the inventory variety that the Appellant has. Accordingly, this store is going to have larger transactions than the average small retail store. As noted previously, 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, during the review period there were eight (8) SNAP authorized retailers located within a 1.0 mile radius of Wafs2 Investment Llc, including 1 supermarket, 2 combination grocery stores, and 5 other convenience stores, which could meet the nutritional needs of SNAP customers. In addition, there were 39 SNAP authorized retailers located within a 2.0 mile radius of the Appellant, including 3 super stores, 2 supermarkets, 2 large grocery stores, 2 small grocery stores, 11 combination grocery stores, and 19 other convenience stores. Some of these area authorized stores offer a comparable or greater quantity and variety of food products at comparable or better prices as compared to the subject store.

5 U.S.C. § 552 (b)(7)(E).

The Appellant contends that store visit reports for comparison stores should be close in time to the review period so as to have an apples-to-apples comparison of the stores during the period of time in which the transactions occurred. If a comparison retailer's store visit report is significantly before the review period (more than three months), it is impossible to determine

whether or not that store maintained the inventory and appearance that the store visit report indicates.

The names of the stores that are used for comparison reasons in the Case Analysis Document are not released for privacy reasons. Regarding the age of the comparison store visits, FNS is quite aware that inventory supplies can change over time, sometimes even day to day, and this is taken into consideration when evaluating stores in compliance cases. The store comparisons, while important, are only one part of the whole case analysis. Data from ALERT regarding SNAP redemptions, the current inventory of the subject store, and SNAP household shopping patterns are all carefully evaluated as well.

With regard to the one customer statement provided by the Appellant that purports to establish that the transactions in the charge letter were legitimate purchases of eligible food, the truth of such statements cannot be verified. Written affidavits or declarations, by themselves and without supporting documentation relative to the specific transactions in question, offer little to no insight into the actions that occurred between the customer and the store clerk at the point of sale. Unsubstantiated statements are insufficient to rebut the trafficking determination.

In support of the Appellant's discussions regarding SNAP households' shopping habits, the Appellant provided and/or cited the following studies: *Benefit Redemption Patterns in the SNAP in Fiscal Year 2017 Final Report*, Insight Policy Research, September 2020; *Shopping Pattern and Food Purchase Difference Among SNAP Households and Non-SNAP Households in the United States*, Preventative Medicine Reports, June 20, 2017; *What Does SNAP Benefit Usage Tell Us About Food Access in Low-Income Neighborhoods?*, Social Science & Medicine, 2014; *Online Grocery Shopping Knowledge, Attitudes and Behaviors Among SNAP Participants* ([www.sciencedirect.com](http://www.sciencedirect.com)); and *Recent and Upcoming ERS Research: SNAP and Retail*, USDA ERS. While FNS does not dispute the findings of these studies, they do not provide any evidence that trafficking was not occurring at Wafs2 Investment Llc.

The Appellant contends that because the store is located much closer to the SNAP participants and its inventory contains such a wide variety of items, these transactions are more likely to occur as a matter of course. 5 U.S.C. § 552 (b)(7)(E).

Based on the store layout, infrastructure, and available inventory, it is not credible that the Appellant would so frequently conduct large transactions closely resembling those typically found at a supermarket or super store. It is not plausible that the firm's customers would regularly carry very large amounts of merchandise around the store without the benefit of shopping carts, especially since larger, better-stocked stores are readily available and in the vicinity of the Appellant firm. The Appellant is not set up to process high-dollar transactions, as indicated by its lack of equipment to facilitate large transactions and limited counter space. There are no legitimate bases for SNAP customers' unusual attraction to the firm such as a superior selection of staple foods, price advantages, package specials, bulk or promotional items, an extensive variety of otherwise unavailable ethnic food items, or special services rendered. The Appellant failed to provide convincing evidence to establish the legitimacy of these excessively large transactions, 5 U.S.C. § 552 (b)(7)(E). Based on all of these factors discussed

in this section, the large volume of transactions for high-dollar amounts is unlikely to indicate a pattern of legitimate food purchases.

### **Evidence of Trafficking**

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

The Appellant argues that USDA does not know the correlation coefficient between ALERT scans and trafficking. The Appellant asserts that it has calculated this based on results of undercover investigations and determined that it was a positive correlation, but the relationship between the values is weak. These contentions are pure conjecture on the part of the Appellant. The Appellant does not have the necessary data to perform a reliable correlation analysis.

### **Invoices**

The Appellant submitted numerous inventory purchase invoices (263 pages) to substantiate the firm's inventory and demonstrate that there was adequate eligible food items to account for the transactions during the review period.

FNS conducted an analysis of the invoices submitted for review. Invoices were excluded from the analysis which were illegible, undated, duplicates, or were dated outside of the review period, if applicable. Purchases of ineligible nonfood items were also excluded from the invoice analysis. The invoices indicate that the firm's purchased inventory for the review consisted primarily of snack items such as chips and sodas. 5 U.S.C. § 552 (b)(7)(E), the analysis of the invoices indicates that the firm purchased sufficient food stock to cover its SNAP redemptions for the review months. However, the analysis also does not account for any non-SNAP purchases (cash, credit and debit card, etc.) of food items at the Appellant.

5 U.S.C. § 552 (b)(7)(E). Even if there were sufficient food stock at Wafs2 Investment Llc to mathematically support high dollar transactions, there does not appear to be anything that would reasonably attract SNAP households to shop there, a convenience store, in some cases traveling a few miles to do so, and spend substantial amounts of their SNAP benefits.



### **Compliance History**

The Appellant contends that the firm has not had a compliance problem with SNAP in the past. It would defy logic for a store owner with a long history of compliance to suddenly start trafficking in SNAP benefits for the de minimus amounts set forth in the charge letter. As such, the store's past compliance should be given consideration in support of the position that trafficking did not occur at the Appellant.

The Appellant is correct that the firm has not been cited for prior violations. However, 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.

Neither the Food and Nutrition Act of 2008, as amended, nor the accompanying regulations cite any minimum dollar amount of cash or SNAP benefits, or number of occurrences, for such exchanges to be defined as trafficking. Nor do they cite any degrees of seriousness pertaining to trafficking of SNAP benefits. Trafficking is always considered to be extremely serious, even when the exchange of SNAP benefits for cash is dollar-for-dollar or is conducted by a nonmanagerial store clerk. This is reflected in the Food and Nutrition Act, which reads, in part, that disqualification "shall be permanent upon . . . the first occasion of a disqualification based on . . . trafficking . . . by a retail food store." In keeping with this legislative mandate, § 278.6(e)(1)(i) of the SNAP regulations states that FNS must disqualify a firm permanently if personnel of the firm have trafficked. There is no agency discretion in the matter of what sanction is to be imposed when trafficking is involved.

### **Burden of Proof**

The Appellant asserts that the Retailer Operations Division bears the burden of proof in administrative review, not the Appellant. However, the Appellant is incorrect. Once the Retailer Operations Division establishes trafficking occurred, the Appellant bears the burden of providing relevant evidence to support a conclusion, considering the record as a whole, that it did not engage in trafficking. If this is not demonstrated, the case will be sustained. Without supporting evidence and rationale, assertions that the firm has not violated program rules do not constitute valid grounds for overturning the determination.

### **Due Process**

The Appellant contends that it has not been afforded the opportunity to review most of the categories of information to which it is entitled to "fully reply" in accordance with 7 C.F.R. §278.6(b)(1).

However, 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. The Appellant, through counsel, submitted responses to the letter of charges on September 10, 2020 and April 25, 2022. The Retailer Operations Division received and considered this information prior to making a determination.

In the September 10, 2020 response, the Appellant's counsel requested information and documents from FNS with regard to the agency's case against Wafs2 Investment Llc pursuant to the Freedom of Information Act. Counsel was provided a response to the FOIA request via letter of April 5, 2022 and was provided an additional 10 days to provide a response to the letter of charges after receipt of the FOIA response.

The second level of due process involves an administrative review, of which the Appellant, through counsel, has likewise availed itself and in the process of which the Appellant was granted an additional three weeks within which additional information may be provided in support of the request for review. The Appellant's counsel also requested, and was granted, additional time for providing additional information in support of the request for administrative review. Therefore, any evidence and information that the Appellant presented to the Retailer Operations Division, as well as any such information submitted subsequently, have now been considered in this administrative review in rendering the final agency administrative decision in this case. The record does not indicate any departure from established policy or procedures with regard to the Appellant's right to a fair and thorough review. The Appellant has exercised its opportunity to reply to the charge letter and its administrative review rights, and by doing so has availed itself of the full complement of the agency's statutory obligations with regard to due process. Per Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. 2023) and Section 279.7 of the SNAP regulations (7 CFR § 279.7), the Appellant also has the right to a judicial review of this final agency determination.

### **Case Laws and Past Administrative Reviews**

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.

With regard to the prior Final Agency Decisions cited by the Appellant, this administrative review decision is based on the specific circumstances of this case as documented by the materials provided by the Appellant and the Retailer Operations Division. This administrative review decision does not establish policy or supersede Federal law or regulations. The determination in this case conforms to SNAP regulations and is consistent with sanctions imposed upon other retailers that have committed similar violations.

### **CIVIL MONEY PENALTY**

In the September 1, 2020 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.

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 April 25, 2022 response to the letter of charges and in the January 20, 2023 response in support of the request for administrative review (i.e., past the 10 day required timeframe of receipt of the September 1, 2020 charge letter), the Appellant, through counsel, requested consideration for the imposition of a civil money penalty in lieu of a permanent SNAP disqualification pursuant to 7 CFR § 278.6(i). In support thereof, the Appellant submitted for review a copy of the *SNAP Training Guide for Retailers*, USDA, FNS.

However, the record supports that the Appellant did not submit a timely request and timely substantial evidence, as required by the regulations, to meet the criteria for a trafficking CMP in lieu of permanent disqualification. 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 Wafs2 Investment Llc 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

March 13, 2023