

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

**501 Deli Corp,**

**Appellant,**

**v.**

**Retailer Operations Division,**

**Respondent.**

**Case Number: C0221949**

**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 501 Deli Corp (hereinafter “501 Deli Corp” 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 501 Deli Corp.

**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 October 24, 2019, the Retailer Operations Division informed the Appellant that 501 Deli Corp was in violation of the terms and conditions of the SNAP regulations, 7 CFR § 270 –282, based on EBT SNAP benefit transactions that "establish clear and repetitive patterns of unusual, irregular, and inexplicable SNAP activity for your type of firm." The letter also noted that the Appellant could request a trafficking civil money penalty (CMP) in lieu of a permanent disqualification within 10 days of receipt under the conditions specified in 7 CFR § 278.6(i).

In responses to the Retailer Operations Division of October 30, 2019, November 4, 2019, May 15, 2020, and August 26, 2020, the Appellant, through counsel, replied to the charges therein denying the trafficking allegations and providing various explanations for the questionable SNAP transactions that were outlined in the charge letter.

The record indicates that in the response of November 4, 2019, the Appellant's former counsel requested information and documents from FNS with regard to the agency's case against 501 Deli Corp pursuant to the Freedom of Information Act (FOIA). In a letter dated December 4, 2019, FNS provided the Appellant's former counsel with a response to the FOIA request. On May 5, 2020, the Retailer Operations Division issued the Appellant/current counsel a letter noting that the FOIA appeal window had closed and provided the Appellant 10 days to respond to the letter of charges. As noted above, the Retailer Operations Division received responses of May 15, 2020 and August 26, 2020 from the Appellant's current counsel in response to the charge letter allegations.

After considering the Appellant's replies and the evidence in the case, the Retailer Operations Division issued a determination letter dated September 3, 2020, informing the Appellant that 501 Deli Corp 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 September 5, 2020, the Appellant, through counsel, requested an administrative review of the Retailer Operations Division's decision to permanently disqualify the firm from participation in the SNAP. FNS granted the Appellant's request for administrative review by letter dated September 15, 2020. By letter postmarked October 1, 2020, the Appellant, through counsel, provided 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 April 2019 through September 2019. 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, the Appellant, through counsel, stated the following summarized contentions, in relevant part:

- The Appellant strongly denies the charges and stresses that all the subject firm's SNAP redemptions were legitimate.
- FNS contractors visited the subject store on January 16, 2017, April 13, 2017, and August 18, 2019. They witnessed no trafficking and documented a fully stocked store. This contradicts FNS' claim that it based its charges solely on an analysis of ALERT data.
- The subject store has no prior history of non-compliance. This exemplary record is proof, in and of itself, the Appellant is in compliance with SNAP rules/regulations.
- Since initial authorization in 2014, the owner has continuously trained and tested his employees on SNAP-related procedures. The training consists of an intensive two weeks

of hands-on classes, which include the review of videos, a manual and other materials. Any employees caught violating SNAP rules/regulations are immediately terminated.

- It is unclear which employees were on duty at the times of the alleged violations; however, the owner has never witnessed any trafficking during or after the review period.
- The subject store is open 7 days per week from 6:00 a.m. to 3:00 a.m. daily. The store is a small convenience/grocery store and deli. It has 1,000 square feet of active space, with an additional 1,000 square feet of storage in the basement. It is staffed by four full-time employees. The store is well stocked at all times with staple food inventory specifically designed to accommodate those low-income customers who regularly purchase large quantities of items with SNAP benefits. The store receives deliveries on a daily/weekly basis.
- The Appellant sells fruit, vegetables and other cooking ingredients, including rice, beans and pasta. It has numerous shelving for eligible goods, including two aisles and six levels of shelving along the walls and in the middle of the store. There are two refrigerators, a 15-foot walk-in freezer and an 18-foot walk-in freezer. There is also an 8-foot freezer containing ice cream and other desserts, as well as another freezer for frozen meats such as burger patties, steaks, chicken tenders and hot wings, bacon and sausage, french fries and other frozen foods. The subject store sells sweetened drinks, desserts, salty snacks, candy and sugar. The subject store has an 8-foot deli counter, where cold cuts (by the pound) and sandwiches are sold. There is also a salad/juice bar behind the deli counter, which promotes healthy dietary choices.
- The vast majority of patrons are regular customers who utilize the subject store as their primary food-shopping location. To accommodate customers, the store offers handbaskets and delivery service.
- There are large multi-family complexes, apartment buildings and homeless shelters in close proximity to the subject store. The store is located near numerous schools, churches and family shelters; parents will often visit the Appellant before or after dropping off or picking up their children. The store is located nearby low-income housing, a bus stop (which is directly in front of the store) and a subway stop. Nearby businesses also generate walk-in traffic.
- The nearest supermarket is approximately 0.5 miles away, but closes early in the evening, making area beneficiaries dependent on the Appellant for after-hours purchases of items, such as infant formula, milk, eggs, baby food, cereal, bread and juice. Baby items are expensive; for example, Enfamil infant formula is priced at \$28.99 per large container and is sold in bulk at the subject store.
- Due to the community in which it is located, a substantial portion (45 percent) of the Appellant's sales are SNAP sales and provide the income necessary to keep this business profitable so it can continue its operation. The owner would never jeopardize his livelihood in order to engage in trafficking.
- The owner has a right to make a business judgement without being accused of wrongdoing. Customers may use their benefits as often as they like. Transaction patterns falling outside of what FNS considers normal is not proof of wrongdoing.
- The transactions noted in the charge letter Attachments reflect legitimate business and the Appellant's efforts to accommodate regular customers. Regular customers will place telephone orders, visit the store to pick them up and make an additional purchase while

there, which is not possible at a supermarket. They also buy items on their way home from picking up their kids from school or before or after attending church.

- With regard to the transactions noted in charge letter Attachment 1, these transactions reflect legitimate business and not trafficking. The owner cannot control how patrons shop. Some customers allow others to use their cards or shop on behalf of others. Some shoppers, including parents and seniors, live nearby and shop at the Appellant for convenience; most do not own vehicles and have to hand-carry purchases home in plastic bags and make multiple trips. It is not as easy to carry heavy shopping bags home from a supermarket. Some customers purchase breakfast, lunch and dinner at the subject store. These are all legally allowable customer behaviors, and the owner should not be punished or have his livelihood threatened because of them.
- FNS never passed any regulations limiting how often beneficiaries could visit a SNAP retailer; FNS never warned the retailer against allowing beneficiaries to shop at the subject store multiple times during an abbreviated time period.
- It strains credulity to claim that the Appellant, a long-time SNAP participant, would risk permanent disqualification or a costly civil money penalty in exchange for 5 U.S.C. § 552 (b)(6) & (b)(7)(C) (the cumulative amount of all Attachment 1 transactions).
- With regard to the transactions noted in charge letter Attachment 2, the Appellant's food stock is more than adequate to explain these transactions. The Appellant can provide wholesale invoices to substantiate this. Many of these transactions were conducted shortly after patrons received their monthly SNAP deposits, prompting them to spend much of their balances at the subject store. These were established customers placing large advanced/delivery orders. Under these circumstances, an average purchase amount of 5 U.S.C. § 552 (b)(6) & (b)(7)(C) is not unusual. Additionally, during warm-weather months, some patrons complete large transactions to minimize repeat trips.
- FNS erroneously concluded the Appellant was trafficking merely because the store's transaction patterns did not match those of the average national SNAP retailer. This is discriminatory and unfair.
- The submitted "key disc" contains actual store surveillance video that was usual business practice in this store of such aforesaid sales. The video shows 72 transactions of 5 U.S.C. § 552 (b)(6) & (b)(7)(C) from November 2019 through March 2020. The video depicts customers shopping and purchasing common eligible food items such as Red Bull energy drink, Nutriment, Ensure, and Enfamil. The store sells Red Bull at \$48.00 per case (8 ounce cans) and \$72.00 for 12 ounce cans. Ensure is priced at \$48.00 per case and Nutriment at \$24.00 per case. Enfamil sells for \$21.00 per small can. Customers come to the store sometimes three times per day buying these items.
- The submitted surveillance photographs picture purchase transactions (and corresponding EBT receipts), similar to the allegedly violative ones, conducted subsequently. They depict the sale of cases of Red Bull energy drink and Ensure protein drink, which are typical purchases at the subject store. Because these transactions have incorrectly been interpreted by FNS as incidences of trafficking, the owner has voluntarily discontinued them.
- The submitted invoices from wholesale distributors support the excessively large purchase transactions for the review period. The firm's recorded food stock is sufficient

to overcome any erroneous assumption that such transactions are illegal and constitute trafficking.

- There is nothing unusual about customers in New York making all their grocery purchases at a large grocery store. Supermarkets charge roughly the same for eligible items and feature long lines. It strains credulity to claim that the retailer would risk permanent disqualification or a costly civil money penalty in exchange **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** (the cumulative amount of all Attachment 2 transactions).
- FNS' assertion that the unusual transaction patterns detailed in the charge letter were the result of trafficking was incorrect and based on a faulty and incomplete analysis. FNS' use of EBT records in sole support of what is claimed to be a serious unlawful activity is inadequate. FNS' decision is arbitrary and should be based on more than ALERT reports. The list of violative transactions is only a small sampling of transactions that occurred at the subject store, depriving the owner of the ability to submit a proper response to the charges. The disqualification appears to be based upon a predetermined standard of SNAP activity for the type of firm owned and operated by this owner.
- FNS should investigate individual cardholders for suspected misuse of benefits; it is not the retailer's obligation to police patrons' shopping habits.
- Section 278.6(d) of the SNAP regulations directs FNS to consider the nature and scope of the violations committed by store personnel, any prior warnings issued and any other evidence of the Appellant's intent to violate. As FNS cannot identify specific violations committed by individual personnel of the subject firm and FNS did not issue any prior warnings, its determination can only be based on evidence of the subject firm's intent. There is no proof of such intent.
- FNS did not provide Appellant's current counsel with a copy of the FOIA response originally sent to **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**, despite notifying FNS that representation had changed in February 2020. This resulted in the Appellant's FOIA appeal rights lapsing.
- The alleged violative transactions occurred years ago. This is unfair to the owner, who no longer has access to potentially exculpatory evidence, such as receipts and surveillance videos. The statute of limitations prohibits charges being leveled against the Appellant after such a long period of time.
- The Appellant requests imposition of a hardship civil money penalty in lieu of disqualification, per Section 278.6(a), in order to avoid hardship to SNAP beneficiaries. The Appellant requests an immediate hearing to determine same.

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

- Numerous surveillance photos and corresponding EBT receipts dated November 2019, December 2019, and January 2020;
- Surveillance photos dated August 29, 2019 (2 each) and October 13, 2019;
- Notarized letter from Western Surveillance regarding Appellant's surveillance system;
- Invoices for Appellant's CCTV security/surveillance camera system service;
- Purchase invoices from Atlas Candy Wholesale Inc dated November 27, 2019, December 3, 2019, and January 9, 2020; and

- Purchase invoice from Harold Levinson Associates, Inc dated October 28, 2019.

## ANALYSIS AND FINDINGS

### Store Characteristics

FNS authorized 501 Deli Corp as a convenience store on April 19, 2017. The case file indicates that in reaching a disqualification determination, the Retailer Operations Division considered information obtained during an August 18, 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 800 square feet in size with approximately 75 square feet of additional storage outside of public view which stocked non-food items;
- No shopping carts or hand-held baskets available for customer use;
- One specialty cash register (lottery, Western Union, etc.);
- One cash register and one EBT point-of-sale (POS) device for use in ringing-up SNAP transactions;
- One checkout counter area with limited check-out counter space;
- No optical scanners;
- Had a storage cooler;
- 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;
- Had a special pricing structure, such as prices ending in \$x.00;
- Transaction totals are not rounded up or down at the checkout counter;
- Telephone orders were not taken;
- Delivery was not offered;
- Had an ATM for customer use;
- The four most expensive eligible food items in stock were Pedialyte at \$8.99 per 1 quart; Boar's Head honey turkey (deli meat) at \$7.99 per 1 pound; Boar's Head cheese at \$6.99 per 1 pound; and Ben & Jerry's ice cream at \$6.00 per 1 pint;
- No fresh or frozen meats, poultry, or seafood;
- Frozen foods included ice cream only;
- Had a kitchen and hot foods/prepared, made-to-order sandwiches were sold;
- Had a deli counter and deli meats and cheeses were sold by the pound;
- Meat items included units of canned fish, meat jerky, and eggs;
- Dairy included milk and cheese;
- No fresh produce in stock;



- Other staple foods available for purchase included such items as juice, pasta, cereal, flour, buns/rolls, bagels, infant cereal, and canned goods;
- Much of the remaining food stock consisted of accessory foods such as candy, carbonated and non-carbonated drinks, snack foods, coffee, and condiments; and
- Ineligible nonfood items included tobacco products, health and beauty aids, paper products, household cleaning supplies, pet food, lottery tickets, alcohol, mobile phone accessories, and incense.

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. 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.

The Retailer Operations Division presented a case that the Appellant trafficked SNAP benefits. Each Attachment furnished with the charge letter represents the questionable and unusual patterns of SNAP transactions indicative of trafficking which were conducted at the Appellant during the review period. A singular transaction could appear in more than one Attachment as it can meet the criteria for several different types of flags. 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 16 sets of transactions (44 total transactions) **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** in SNAP benefits to meet the parameters of this scan. These transactions were conducted by 10 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 the transactions documented in this Attachment reflect legitimate business and not trafficking. The owner cannot control how patrons shop. FNS never passed any regulations limiting how often beneficiaries could visit a SNAP retailer; FNS never warned the owner against allowing beneficiaries to shop at the subject store multiple times during an abbreviated time period.

Although it is not uncommon for customers to have more than one transaction per day and there are no limits on the number of times EBT cards may be used or the amount of eligible foods that may be purchased, it is not common that such multiple transactions are for large dollar amounts. The SNAP transactions noted in the charge letter are questionable not because they exceed any limits for use, but rather because they display characteristics of use inconsistent with the nature and extent of the Appellant's stock and facilities and are therefore, indicative of trafficking.

The report and photographs from the store visit offer no explanation as to why SNAP customers would routinely shop at 501 Deli Corp multiple times during a short period or purchase such a large volume of items, there being no great variety of products, price advantage, profusion of large packages, or significant bulk items or food cases for sale. The second, third, and subsequent transactions in each set are too large to consist of forgotten items. In addition, there was a small checkout area with one cash register and one EBT POS device for food purchases. While the Appellant contends that the firm has shopping baskets, there were no shopping carts or hand-held baskets at the time of the store visit available to customers for transporting food within the store. There were no optical scanners or conveyor belts to expedite high dollar or rapid consecutive purchases. The Appellant contends that regular customers will place telephone orders, visit the store to pick them up and make an additional purchase while there, which is not possible at a supermarket. However, the store visit observations indicate that telephone orders were not taken and delivery was not offered by the firm.

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, the record indicates that there are 205 SNAP authorized retailers, including 14 super stores and 8 supermarkets, located within a 1.0 mile radius of 501 Deli Corp that can meet the nutritional needs of SNAP customers. Some of these authorized SNAP stores are larger than 501 Deli Corp 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 some shoppers, including parents and seniors, live nearby and shop at the subject store for convenience; most do not own vehicles and have to hand-carry purchases home in plastic bags and make multiple trips. It is not as easy to carry heavy shopping bags home from a supermarket. Some customers purchase breakfast, lunch and dinner at the subject store. However, the record indicates that SNAP customers who shopped at 501 Deli Corp during the review period also shopped at other area grocery stores and, therefore, transportation to other stores is not an issue for these customers. Therefore, lack of access to other authorized stores or the availability of other food stores does not appear to be an explanation for the Appellant's abnormally high SNAP transaction amounts conducted within a short timeframe of each other.

The Appellant contends that some customers allow others to use their cards or shop on behalf of others. As to whether or not co-shopping or sharing of SNAP cards actually affected the Appellant firm during the review period, this argument is little more than conjecture. The Appellant has provided no evidence to show that co-shopping and/or sharing of SNAP cards is particularly common among SNAP recipients in New York, New York. If co-shopping/card sharing truly impacted 501 Deli Corp as the Appellant suggests, it would stand to reason that co-shopping/card sharing would affect other nearby firms as well. This would manifest itself in

comparable firms having similar transaction patterns – multiple transactions from the same household in a short period of time. But this is simply not the case.

**5 U.S.C. § 552 (b)(7)(E).**

Unfortunately, the Appellant has not provided any evidence to show that the transactions listed in Attachment 1 were legitimate purchases of eligible foods. The arguments presented by the Appellant hold little weight without some kind of evidence to substantiate its claims.

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

This charge letter Attachment lists 105 SNAP transactions, **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. These large transaction amounts are not consistent with the store's observed characteristics and food inventory. The frequency of high dollar purchases in the review period calls into question the legitimacy of these transactions.

The Appellant contends that the firm is a small convenience/grocery store and deli. It has 1,000 square feet of active space, with an additional 1,000 square feet of storage in the basement. The firm is at all times well stocked with staple food inventory specifically designed to accommodate low income customers who regularly purchase large quantities of items with SNAP benefits. The Appellant sells fruit, vegetables and other cooking ingredients, including rice, beans and pasta, ice cream and other desserts, frozen meats such as burger patties, steaks, chicken tenders and hot wings, bacon and sausage, french fries and other frozen foods. The store sells sweetened drinks, desserts, salty snacks, candy and sugar. The store has an 8-foot deli counter, where cold cuts (by the pound) and sandwiches are sold. There is also a salad/juice bar behind the deli counter, which promotes healthy dietary choices.

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 501 Deli Corp to have purchases like those included in this Attachment to the charge letter.

The FNS store visit report and photos of August 18, 2019 indicate that the firm is approximately 800 square feet in size with approximately 75 square feet of additional storage outside of public view which stocked non-food items. The store visit observations also show that 501 Deli Corp offers a minimal stock of SNAP eligible foods with no fresh meats, poultry, or seafood, no frozen meats, poultry, or seafood, no fresh produce, and lacks an abundant depth and breadth of staple foods. The only frozen food item in stock was ice cream. In addition, the firm was deficient in dairy products required under Criterion A as it stocked milk and cheese only.

The store visit inventory report and photos also show only a few expensive eligible foods in stock that would account for these large amounts as well as showing the store has limited checkout counter space, no optical scanners, and no shopping carts or hand-held baskets in which

to transport the large number of items required to make up these large transaction amounts. Without these, it is unlikely that such large dollar value transactions could be for actual food purchases and more likely they are trafficking. The store visit observations indicate that telephone orders were not taken from customers and delivery was not offered. The Appellant provided no evidence to support its contention that the transactions listed are the result of established customers placing large advanced/delivery orders and in order to accommodate customers, the Appellant offers handbaskets and delivery service.

The Appellant contends that baby items are expensive; for example, Enfamil infant formula is priced at \$28.99 per large container and is sold in bulk at the subject store. However, the store visit report documents that the four most expensive eligible food items in stock were Pedialyte at \$8.99 per 1 quart; Boar's Head honey turkey (deli meat) at \$7.99 per 1 pound; Boar's Head cheese at \$6.99 per 1 pound; and Ben & Jerry's ice cream at \$6.00 per 1 pint. In addition, the Appellant had no infant formula in stock and the only infant food in stock was cereal.

The Appellant contends that the submitted "key disc" contains actual store surveillance video that was usual business practice in this store of such aforesaid sales. The video shows 72 transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** from November 2019 through March 2020. The video depicts customers shopping and purchasing common eligible food items such as Red Bull energy drink, Nutriment, Ensure, and Enfamil. The store sells Red Bull at \$48.00 per case (8 ounce cans) and \$72.00 for 12 ounce cans. Ensure is priced at \$48.00 per case and Nutriment at \$24.00 per case. Enfamil sells for \$21.00 per small can. Customers come to the store sometimes three times per day buying these items. However, no "key disc" was provided by the Appellant in support of its contentions.

With regard to the Appellant's contentions with regard to purchases of infant formula, it is important to note that the majority of households that qualify for WIC Program benefits also qualify for and are SNAP recipients. In most cases, these households utilize their WIC Program benefits to purchase infant formula and infant foods in lieu of their SNAP benefits in order to save their SNAP benefits for other needed food items. Even if the Appellant stocked sufficient quantities of infant formula during the review period, the firm was not a WIC Program vendor during that timeframe. Therefore, it is unlikely that infant formula purchases would explain the excessively large purchase transactions conducted at the subject firm during the review period.

The Appellant contends that the submitted surveillance photographs (and corresponding EBT receipts) picture purchase transactions, similar to the allegedly violative ones, conducted subsequently. They depict the sale of cases of Red Bull energy drink and Ensure protein drink, which are typical purchases at the subject store. The submitted invoices from wholesale distributors support the excessively large purchase transactions for the review period. However, the surveillance photographs and corresponding EBT receipts as well as the vendor purchase invoices are dated outside of the review period and therefore, are not relevant to the present case. The two surveillance photos dated August 29, 2019 do not show purchases of bulk food items such as Red Bull and/or Ensure.

The store visit report and photos indicate that there were no signs posted or flyers available advertising the availability of bulk foods offered at a discounted rate to include meats in bulk,

foods sold by the case, and grocery package deals, no evidence of meat/seafood specials or bundles or fruit/vegetable boxes that might sell for high prices, and no evidence of a wholesale business such as posted prices or separate entrances for wholesale customers. There is no evidence of a price advantage or custom or special services rendered at the subject store that are not offered at other authorized SNAP stores in the area. There is no evidence that the firm would be likely to have SNAP redemption patterns that differ considerably from similar sized competitors. These large transaction amounts are also not consistent with the Appellant store's inventory.

The Appellant contends that many of these transactions were conducted shortly after patrons received their monthly SNAP deposits, prompting them to spend much of their balances at the subject store. A June 2006 study entitled "An Analysis of Food Stamp Benefit Redemption Patterns" prepared by USDA FNS, notes that typical EBT purchases are small (about 71 percent **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**) and SNAP benefits are spent throughout a given month--63 percent of SNAP households use more than half of their benefits in the first week after issuance and over half (56 percent) use more than 90 percent of the household benefits within two weeks after issuance. However, the study also found that "Supermarkets accounted for over 64 percent of all EBT transactions and 83 percent of the total value of EBT purchases" while "less than 6 percent never shopped at supermarkets." The study indicates that most SNAP benefits are redeemed at supermarkets. Supermarkets generally provide the widest range of high-quality foods at reasonable prices. Although access to supermarkets may be limited in some areas (which is not the case with regard to the Appellant firm as there is one SNAP authorized supermarket located 0.09 miles away and two SNAP authorized **super stores** located 0.12 and 0.14 miles away), most low income shoppers redeem most of their SNAP benefits in supermarkets as opposed to convenience stores like the Appellant firm.

The Appellant contends that an average purchase amount **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** is not unusual under the circumstances. **5 U.S.C. § 552 (b)(7)(E)**.

The Appellant contends that there are large multi-family complexes, apartment buildings and homeless shelters in close proximity to the subject store. The store is located near numerous schools, churches and family shelters; parents will often visit the subject store before or after dropping off or picking up their children. The store is located nearby low-income housing, a bus stop (which is directly in front of the store) and a subway stop. Nearby businesses also generate walk-in traffic.

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

The Appellant contends that the nearest supermarket is approximately 0.5 miles away, but closes early in the evening, making area beneficiaries dependent on the subject store for after-hours purchases of items, such as infant formula, milk, eggs, baby food, cereal, bread and juice. As noted previously, there are 205 SNAP authorized retailers, including 14 super stores and 8

supermarkets, located within a 1.0 mile radius of 501 Deli Corp that can meet the nutritional needs of SNAP customers. Some of these authorized SNAP stores are larger than 501 Deli Corp 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 during warm-weather months, some patrons complete large transactions to minimize repeat trips. The vast majority of patrons are regular customers who utilize the subject store as their primary food-shopping location. While there are larger stores in the area, those supermarkets are not preferred by residents as they are crowded with long lines, selling the same items for similar prices. However, an analysis of the shopping patterns for all of the SNAP households listed in this Attachment shows that the majority of the households shopping at 501 Deli Corp have access to transportation and that all are regularly shopping at a variety of larger stores, including super stores and/or supermarkets, located nearby and at several miles distance from the Appellant's location. While 501 Deli Corp does offer some staple food items, SNAP recipients are already shopping at other larger SNAP retailers located in proximity to the Appellant's business offering a greater quantity and variety of products, including fresh meats/seafood and produce, at lower prices.

#### 5 U.S.C. § 552 (b)(7)(E).

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

With regard to the Appellant's contentions with respect to ALERT, the USDA employs a computerized fraud detection tool to identify EBT transactions that form patterns that have characteristics indicative of trafficking. However, this tool does not, by itself, determine or conclude that trafficking has occurred. The Retailer Operations Division analyzes the transaction data and patterns along with other documentation such as, information from the onsite store visit report including photographs of stock and the store layout, an analysis of recipient shopping behavior, and comparisons with similar store types in local area, to render a determination as to whether or not the questionable transaction patterns were, more likely than not, the result of trafficking. The regulations at 7 CFR § 278.6(a) state that FNS may disqualify any authorized retail food store if the firm fails to comply with the Food and Nutrition Act of 2008, as amended, and that such disqualification shall result from a finding of a violation on the basis of evidence that may include facts established through, inconsistent redemption data, and evidence obtained through a transaction report under an electronic benefit transfer system.

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.

### **Previous Store Visits**

The Appellant contends that FNS contractors visited the subject store on January 16, 2017, April 13, 2017, and August 18, 2019. They witnessed no trafficking and documented a fully stocked store. This contradicts FNS' claim that it based its charges solely on an analysis of ALERT data.

The record indicates that no store visit was conducted at the subject firm on January 16, 2017. A store visit was conducted at the firm on April 13, 2017 in order to assess the firm's food stock and eligibility for participation in the SNAP after the owner applied for SNAP authorization. In the letter of charges dated October 24, 2019, the Retailer Operations Division informed the Appellant that 501 Deli Corp 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 Appellant was charged and determined to be trafficking based on an analysis of EBT transaction data from April 2019 through September 2019. As noted previously, the case file indicates that in reaching a disqualification determination, the Retailer Operations Division considered information obtained during an August 18, 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 charges noted in the charge letter are unrelated to any undercover compliance investigation previously conducted at the subject firm.

### **No Warning**

The Appellant contends that Section 278.6(d) of the SNAP regulations directs FNS to consider the nature and scope of the violations committed by store personnel, any prior warnings issued and any other evidence of the subject firm's intent to violate. As FNS cannot identify specific violations committed by individual personnel of the subject firm and FNS did not issue any prior warnings, its determination can only be based on evidence of the subject firm's intent. There is no proof of such intent.

7 CFR § 278.6(d)(2) and (3) of the SNAP regulations provides that "The FNS office making a disqualification or penalty determination ... shall consider ... any prior action ... to warn the



firm about the possibility that violations are occurring....” The citation simply requires FNS to consider any prior warnings when determining a sanction. It does not require FNS to give such warnings. FNS did not consider prior actions to warn 501 Deli Corp about the possibility that violations were occurring because there were no prior warnings during the review period. The evidence considered by the Retailer Operations Division included the raw data of questionable transactions and information obtained during the aforementioned store visit conducted on August 18, 2019.

### **No Prior Violations**

The Appellant contends that the firm has no prior history of non-compliance. This exemplary record is proof, in and of itself, the subject store is in compliance with SNAP rules/regulations. Since initial authorization in 2014, the retailer has continuously trained and tested his employees on SNAP-related procedures. The training consists of an intensive two weeks of hands-on classes, which include the review of videos, a manual and other materials. Any employees caught violating SNAP rules/regulations are immediately terminated.

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

### **Financial Hardship**

The Appellant contends that due to the community in which it is located, a substantial portion (45 percent) of the store’s sales are SNAP sales and provide the income necessary to keep this business profitable so it can continue its operation. The owner would never jeopardize his livelihood in order to engage in trafficking.

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

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



## FOIA Appeal and Statute of Limitations

The Appellant contends that FNS did not provide current counsel with a copy of the FOIA response originally sent to 5 U.S.C. § 552 (b)(6) & (b)(7)(C), despite notifying FNS that representation had changed in February 2020. This resulted in the Appellant's FOIA appeal rights lapsing.

In responses to the Retailer Operations Division of October 30, 2019, November 4, 2019, May 15, 2020, and August 26, 2020, the Appellant, through counsel (5 U.S.C. § 552 (b)(6) & (b)(7)(C)), replied to the charges noted in the October 24, 2019 charge letter. The record indicates that in the response of November 4, 2019, the Appellant's former counsel (5 U.S.C. § 552 (b)(6) & (b)(7)(C)) requested information and documents from FNS with regard to the agency's case against 501 Deli Corp pursuant to the Freedom of Information Act (FOIA). In a letter dated December 4, 2019, FNS provided the Appellant's former counsel with a response to the FOIA request. On May 5, 2020, the Retailer Operations Division issued the Appellant/current counsel (5 U.S.C. § 552 (b)(6) & (b)(7)(C)) a letter noting that the FOIA appeal window had closed and provided the Appellant 10 days to respond to the letter of charges. As noted above, the Retailer Operations Division received responses of May 15, 2020 and August 26, 2020 from the Appellant's current counsel (5 U.S.C. § 552 (b)(6) & (b)(7)(C)) in response to the charge letter allegations.

FNS held the case in abeyance pending the fulfillment of the FOIA request and the closure of the 90-day FOIA-appeal window. FNS also issued a letter after the FOIA-appeal window had closed, allowing 5 U.S.C. § 552 (b)(6) & (b)(7)(C) an additional 10 days to reply to the charge letter. If 5 U.S.C. § 552 (b)(6) & (b)(7)(C) was no longer representing the Appellant at any time during the period the case was being held in abeyance, either he, the owner or a newly authorized third party (5 U.S.C. § 552 (b)(6) & (b)(7)(C)) should have reached out to FNS with this information. Despite 5 U.S.C. § 552 (b)(6) & (b)(7)(C) proof of third-party authorization dated February 10, 2020, FNS has no record of receiving such proof prior to the issuance of the FOIA 10-day letter.

As 5 U.S.C. § 552 (b)(6) & (b)(7)(C) was verbally notified by Retailer Operations Division staff on May 13, 2020, FNS cannot reproduce the FOIA response sent to a previously authorized third party. If 5 U.S.C. § 552 (b)(6) & (b)(7)(C) wanted to review the records previously disclosed and was unable to retrieve them directly from 5 U.S.C. § 552 (b)(6) & (b)(7)(C) or the owner, he could have submitted a duplicate FOIA request, as suggested by the Retailer Operations Division. However, 5 U.S.C. § 552 (b)(6) & (b)(7)(C) did not submit a duplicate FOIA request to FNS.

The Appellant contends that the alleged violative transactions occurred years ago. This is unfair to the owner, who no longer has access to potentially exculpatory evidence, such as receipts and surveillance videos. The statute of limitations prohibits charges being leveled against the owner after such a long period of time. It should be noted that the Food and Nutrition Act of 2008 and the associated SNAP regulations are silent with regard to timeframes between the conclusion of an investigation and the issuance of a charge letter. This review acknowledges that a long delay makes it difficult to effectively dispute allegations of trafficking. But since a statute of

limitations does not exist in this matter, this review has little option but to conclude that issuance of the charge letter and subsequent permanent disqualification action taken by the Retailer Operations Division is wholly supported by the Act and accompanying SNAP regulations.

### **Customer Hardship**

The Appellant requests imposition of a hardship civil money penalty in lieu of disqualification, per Section 278.6(a), in order to avoid hardship to SNAP beneficiaries. The Appellant requests an immediate hearing to determine same.

7 CFR § 278.6(f) of the SNAP regulations provides for civil money penalty assessments in cases where disqualification would cause “hardship” to SNAP households because of the unavailability of a comparable participating food store in the area to meet their needs. However, this regulation also sets forth the following specific exception to such assessments there under: “A civil money penalty for hardship to SNAP households may not be imposed in lieu of a permanent disqualification”. Therefore, since this case involves a permanent disqualification action, the civil money penalty provision is not applicable to the present case.

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

### **CIVIL MONEY PENALTY**

As previously indicated, the September 3, 2020 determination letter advised the Appellant of the ineligibility for consideration for a trafficking civil money penalty according to the terms of Section 278.6(i) of the SNAP regulations. The letter of charges dated August 24, 2019 advised the Appellant that documentation of eligibility for that alternative sanction was to be provided within 10 days. The regulations specify that such documentation must, in part, establish that there was an effective compliance policy and training program and that both were in effect and implemented prior to the occurrence of violations. The letter indicates that no information was provided by the Appellant for consideration; therefore, on review the Retailer Operations Division’s determination that the Appellant firm is ineligible for the imposition of civil money penalties in lieu of disqualification is affirmed.

### **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 501 Deli Corp 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

November 4, 2020