

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

**5th & Spruce Market Inc,**

**Appellant,**

**v.**

**Retailer Operations Division,**

**Respondent.**

**Case Number: C0207161**

**FINAL AGENCY DECISION**

The U.S. Department of Agriculture, Food and Nutrition Service (FNS), finds that there is sufficient evidence to support the determination by the Retailer Operations Division to impose a permanent disqualification against 5th & Spruce Market Inc (hereinafter Appellant) from participating as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP).

**ISSUE**

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with Title 7 of the Code of Federal Regulations (CFR) § 278.6(a), (c) and (e)(1)(i), when it imposed a permanent disqualification against Appellant on June 20, 2018.

**AUTHORITY**

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

**CASE CHRONOLOGY**

By letter dated March 22, 2018, the Retailer Operations Division charged Appellant with trafficking based on a series of irregular SNAP transaction patterns that occurred in March 2017 through August 2017. The letter noted that the penalty for trafficking is permanent disqualification as provided by 7 CFR § 278.6(e)(1). The letter also noted that the Appellant could request a trafficking civil money penalty (CMP) in lieu of a permanent disqualification within ten days of receipt under the conditions specified in 7 CFR § 278.6(i).

Appellant, through counsel, responded to the charges in letters dated March 30 and April 11, 2018. These letters did not request a CMP nor was any evidence submitted to be considered in support of a CMP. The Retailer Operations Division notified Appellant by letter dated June 20, 2018, that the firm was permanently disqualified from participation as a SNAP retailer in accordance with 7 CFR § 278.6(c) and 278.6(e)(1) for trafficking violations. This letter also stated that Appellant was not eligible for the CMP because insufficient evidence was submitted to demonstrate that it had established and implemented an effective compliance policy and program to prevent SNAP violations.

By letter dated June 29, 2018, Appellant, through counsel, appealed the Retailer Operations Division's assessment and requested administrative review. The appeal was granted. No subsequent correspondence was received from Appellant.

### **STANDARD OF REVIEW**

In an appeal of an adverse action, Appellant bears the burden of proving by a preponderance of evidence that the administrative action should be reversed. That means Appellant has the burden of providing relevant evidence that a reasonable mind, considering the record as a whole, would accept as sufficient to support a conclusion that the argument asserted is more likely to be true than untrue.

### **CONTROLLING LAW**

The controlling law in this matter is contained in the Food and Nutrition Act of 2008, as amended (7 U.S.C. § 2021), and implemented through regulation under Title 7 CFR Part 278. In particular, 7 CFR Part 278.6(a) and Part 278.6(e)(1)(i) establish the authority upon which a permanent disqualification may be imposed against a retail food store or wholesale food concern in the event that personnel of the firm have engaged in trafficking SNAP benefits.

7 CFR § 278.6(a) states: "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."

7 CFR § 278.6(e)(1)(i) states: "FNS shall disqualify a firm permanently if personnel of the firm have trafficked as defined in § 271.2." Trafficking is defined in part as, "The buying, selling, stealing, or otherwise effecting an exchange of SNAP benefits for cash or consideration other than eligible food". Trafficking includes "Intentionally purchasing products originally purchased with SNAP benefits in exchange for cash or consideration other than eligible food".

7 CFR §278.6(i) states: "FNS may impose a civil money penalty in lieu of a permanent disqualification for trafficking . . . 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 of the Program.”

7 CFR §278.6(b)(2)(ii) states: “Firms that request consideration of a civil money penalty in lieu of a permanent disqualification for trafficking shall have the opportunity to submit to FNS information and evidence that establishes the firm’s eligibility for a civil money penalty in lieu of a permanent disqualification in accordance with the criteria included in §278.6(i). This information and evidence shall be submitted within 10 days, as specified in §278.6(b)(1).” Part 278.6(b)(2)(ii) further states that if a firm fails to request a civil money penalty in lieu of a permanent disqualification for trafficking and submit documentation and evidence of its eligibility within the specified 10 days, the firm shall not be eligible for such a penalty.

### **SUMMARY OF THE CHARGES**

The issue in this review is whether, through a preponderance of evidence, it is more likely true than not true that the questionable transactions were the result of trafficking. The charges on review were based on an analysis of SNAP EBT transaction data during the six month period of March 2017 through August 2017. This involved two patterns of EBT transaction characteristics indicative of trafficking:

1. There were an unusual number of transactions ending in a same cents value.
2. Excessively large purchase transactions were made from recipient accounts.

### **APPELLANT’S CONTENTIONS**

The following may represent a summary of Appellant’s contentions in this matter; however, in reaching a decision, full attention and consideration has been given to all contentions presented, including any not specifically recapitulated or specifically referenced herein:

- The store runs specials on meat and other frozen items with even numbered prices and very often customers will purchase these items alone. Some of the same cents transactions are the result of pure coincidence due to the pricing of certain items as shown by some of the sales receipts attached. Not all of the frozen meat and other items have even numbered prices and all non-special items have conventional pricing. An example of this is evidenced by the attached meat plans offered to customers. This confirms that large amounts of meats are sold resulting in higher sales than would be expected from a store of this size;
- Most, if not all of the excessively large transactions are related to purchases of frozen specials and/or the meat plans. The owner believes that the customer making the four largest transactions is an elderly/disabled person who lives nearby and fairly frequently purchases large amounts of food that he delivers to her due to her limited mobility. Most of the other large transactions are documented by the attached sales receipts which show that these usually include numerous items and/or meat plans and meat/frozen item specials;

- The majority of meat is stored at the owner's Cotton Street location as shown by photos of the cooler and storage areas. He brings what he can to the 5th & Spruce store and gets the rest as needed from Cotton Street. Sometimes when a customer places a large meat order, the meat gets delivered directly to the customer while other times it is brought to the 5th & Spruce store. Cotton Street also accepts EBT and the owner does not keep good track of what products purchased get sold by which store;
- The owner, more frequently than not, purchases goods for more than one store and since the stores are under single ownership, he does not keep track of which goods are sold from which location. The stores are located fairly close to each other and one has more storage area;
- The markup is 60-100 percent depending on the product and a price. There is no set markup schedule;
- The owner has no incentive to traffick as shown by the attached record of sales for March-August 2017 and the attached record of credit card and SNAP transactions for these same months that account for a third of sales. FNS records would show the exact dollar amount of SNAP transactions for these months and that SNAP makes-up a relatively small percentage of total sales; and,
- The owner is a hardworking, tax paying, and law abiding citizen who always tries to follow all of the rules and regulations which made him successful in all of his endeavors. He has never been interested in breaking the law to benefit his business.

Appellant submitted photos of the store, sales receipts, a listing of meat plans with prices, Z reports for March-August 2017, a statement showing credit card and SNAP sales totals by month for 2017, photos of the Cotton Street store, merchant processing statements, invoices from Quaker Valley Foods, the mark-up percentage, the owner's meat plan/deli menu, and meat invoices in support of these contentions.

### **ANALYSIS AND FINDINGS**

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. Nevertheless, transactions having such characteristics are sometimes valid and sufficient evidence that support that they were the result of legitimate purchases of eligible food items is provided. This is why opportunities are afforded to charged retailers to explain the questionable transactions cited and to provide evidence that they are legitimate.

The Retailer Operations Division presented a case that Appellant trafficked SNAP benefits. Each Attachment furnished with the letter of charges represents the questionable and unusual patterns of SNAP transactions indicative of trafficking which were conducted at Appellant's store during the review period. As patterns of unusual transactions appear across multiple Attachments, the case of trafficking becomes more convincing.

## Store Background and FNS Store Visit

FNS authorized the firm as a convenience store on May 10, 2013. The case file indicates that in reaching a disqualification determination, the Retailer Operations Division considered information obtained during a September 18, 2017, store visit conducted by a FNS contractor to observe the nature and scope of the firm's operation, stock, and facilities. This information was then used to ascertain if there were justifiable explanations for the firm's suspicious SNAP transactions. The store visit documented the following store size, description, and characteristics:

- The firm was a very small store offering a very minimal quantity and variety of staple foods and carrying no unique items or offering any distinctive services.
- The store primarily stocked traditional American brands, but also had a limited stock of Hispanic (e.g. Goya) products.
- The store visit report and photos showed no shopping carts or hand baskets for use by customers making it difficult for them to carry large amounts of food to the checkout.
- No food packages, bundles, case sales, bulk items, or other sales were evident that would explain the unusual transactions and no cased items were available for purchase other than beverages.
- The store visit report specifically noted that the firm was not a specialty store and that there were no meat bundles or fruit and vegetable boxes for sale. There was a flyer at the checkout listing meat plans and family pack items, but there was no other signage posted anywhere in the store advertising them and none of the listed items on the flyer were available for sale. A store employee noted that meats for meat bundles were stored at another store with the same owner.
- The sole checkout area was approximately 2.0 feet deep and 2.0 feet wide with many displays, a PIN pad, and newspapers taking up space on both sides leaving limited space for customers to place their purchases. The very small checkout area would make it problematic to process large orders. The checkout area had one cash register, no optical scanner, and a POS terminal as confirmed by a store employee.
- The store had a very minimal stock of staple foods that also included many single serving and pre-packaged items with a significant portion of inventory in soda, candy, snacks, and other drinks as well as many ineligible items.
- Interior signage advertised a wide variety of hot/cold, prepared, ready-to-eat foods that included hot/cold sandwiches, hot breakfast items, burgers, hot side orders, salads, and hot drinks. The store had a large deli display case and a sizeable commercial kitchen/ food prep area with a wide range of equipment that included a cooktop grill, deep fat fryer, commercial slicer, commercial exhaust hood, and prep area.
- Per a store employee, the food items used for making the hot/cold prepared foods are stored in the same coolers containing foods for purchase by customers.
- The store had no fresh unprocessed meat, no fresh unprocessed seafood, no frozen unprocessed meat, no frozen unprocessed seafood, a very limited quantity and variety of processed meats (jerky, canned meat/poultry/fish, deli meats, bacon, hot dogs, and jerky), no processed seafood, a typical selection of deli meats, no packaged lunch meats, no packaged lunch meats, only one frozen entree, no frozen dinners, eggs, a

- limited selection of fresh fruit and vegetables, only two frozen packages of peaches, no frozen vegetables, a limited stock of canned soups, a minimal quantity and variety of canned and packaged staple food items, a typical variety of deli cheeses, a minimal stock of packaged cheeses, no yogurt, no sour cream, no butter, margarine, a limited stock of baby cereals/foods/ juices, a very limited stock of infant formula, only two bags of flour, only two bags of corn meal, a minimal selection of bread/rolls/tortillas, no tostadas, no pita bread, and very few expensive staple food items.
- Ineligible items included: tobacco, lottery, hot foods, hot drinks, health and beauty items, household products, paper products, auto products, ATM, candles, newspapers, clothing, and diapers while accessory foods included: candy, spices, condiments, snacks, baked goods, coffee, cocoa, cooking oil, sugar, single serving ice cream, un/carbonated drinks, cake mixes, two frozen cakes, and cold ready-to-eat prepared foods.
  - Signage was in English and there were no SNAP posters (anti-fraud, eligible items, reporting trafficking, etc.) visible in the store.
  - The store's hours of operation were open 7 AM-10 PM Monday-Friday and 9 AM-10 PM weekends as confirmed by a store employee. The store employee also stated that the business did not take telephone or online orders, did not deliver groceries; and did not round prices up/down.
    - Note: These hours contradict the hours listed on Appellant's SNAP retailer reauthorization application submitted online on February 8, 2018.
  - Many food items were priced with all visible food prices ending in .x9 cents except for a very few items priced differently such as oranges priced at two for \$1.00, lettuce priced at \$2.00, and Chex Mix priced at two for \$3.00. Comments on the FNS store visit report by the contract reviewer specifically stated that most of the food prices ended in .x9 cents. A price ending in .x9 cents is the most common pricing structure for stores of this type.
  - The FNS store visit report listed the four most expensive food items costing more than \$5.00 for sale in the store as being a meat plan #4 priced at \$119.99, meat plan #3 priced at \$89.99, meat plan #2 priced at \$59.99, and tilapia fish priced at \$32.99 for 10 pounds. This listing of the most expensive items was provided by a store employee during the store visit.
  - While the firm did stock a limited selection of baby foods and infant formula, most SNAP households with infants or small children are WIC participants and therefore would be purchasing these products using WIC vouchers, not SNAP EBT.
    - Note: PA WIC did not report the firm as being a WIC vendor for FY 2017.
  - The store visit photos showed ice crystals on frozen foods and dust on stock both indicative of a slow turnover of stock.
  - The quantity and variety of the store's staple food inventory was much better than that seen during the subsequent FNS store visit on February 12, 2018.

### **Unusual numbers of transactions ending in a same cents value**

This attachment lists 82 transactions ending in the same cents value of .00 cents.

5 U.S.C. § 552 (b)(6) & (b)(7)(C). 5 U.S.C. § 552 (b)(6) & (b)(7)(C). When such repetitive

patterns are unsupported by special pricing structures they are a strong indicator of trafficking in SNAP benefits. The FNS store report and photos revealed no signs posted to indicate special food packages, bundles, case sales, or other sales that would explain the unusual number of transactions ending in these same cents values and no bulk items were available for purchase. Based on the contractor visit, the store's inventory contained almost exclusively inexpensive single-serving, prepared food items and accessory foods. As such, it is implausible that several of these relatively inexpensive items purchased together would routinely total to a purchase amount ending in .00 cents. The high percentage of same cent transactions combined with the large number of high dollar transactions is irregular and suspicious for this type store.

Appellant contends the store runs specials on meat and other frozen items with even numbered prices and very often customers will purchase these items alone. Some of the same cents transactions are the result of pure coincidence due to the pricing of certain items as shown by some of the sales receipts attached. Not all of the frozen meat and other items have even numbered prices and all non-special items have conventional pricing. An example of this is evidenced by the attached meat plans offered to customers. This confirms that large amounts of meats are sold resulting in higher sales than would be expected from a store of this size. As evidence of these specials, Appellant's March 30, 2018, reply to the charges included a photo of a handwritten sign on a cooler door listing regular fries at \$8.50, curly fries at \$9.50, onion rings at \$9.00, moz stocks at \$10.50, hamburger box at \$40.00, stake box [sic] at \$40.00, and meat ball at \$10.00.

The 2017 FNS store visit photos shows no signage of any kind on the cooler door. A second FNS store visit conducted on February 12, 2018, includes a photo taken just weeks before Appellant's photo was received of the same cooler door with a different handwritten sign. This sign only advertises onion rings at \$9.99, curly fries at \$12.99, and French fries at \$6.99. It is unusual and suspicious that two different signs posted on the same cooler door just a few weeks apart would list widely different food items and also that the prices for the food items listed on both signs would vary so greatly. It is also noted that the 2018 store visit inventory report and photos showed no hamburger boxes, stake boxes [sic], moz sticks, or meat balls available for purchase. FNS store visit reports include a section listing the most expensive items available for purchase costing more than \$5.00 at the time of the visit. This section of the 2018 store visit report was completed with information provided by the store owner and lists the following four items: curly fries at \$12.00, mozzarella sticks at \$12.98, family sized sandwiches at \$10.99, and onion rings at \$9.99. The owner's price listing of available expensive food items did not include any meat plans or family packs and also did not include any hamburger boxes, stake boxes [sic], or meatballs showing that these items were not available for purchase. Although Appellant claims that very often customers will purchase these special items alone, a review of the transactions listed in this Attachment shows only a single transaction **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** thus refuting Appellant's claim and providing further support that the photo of the sign listing purported specials was most likely fabricated in an attempt to explain the suspicious transactions.

The inventory report and photos from both the 2017 and 2018 FNS store visits show the Appellant firm offered a very minimal stock of staple foods that included an extremely small number of expensive staple food items making it questionable that such a large number of high dollar SNAP transactions could be for legitimate food purchases. The store visit reports

specifically note that Appellant's pricing structure has the majority of food prices ending in .x9 cents and this fact is reinforced by numerous photos of store stock. This pricing structure also applies to the four meat plans and seven family packs. The purchase of several items with prices ending in .x9 cents would most likely not result in a total ending in a same cents value of .00 cents as multiples of nine seldom have a value ending in this amount making it statistically impossible that this many store transactions would end in this amount with legitimate food purchases. Appellant offered no explanation or evidence to support the legitimacy of the 32 transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**.

While some of the transactions in this Attachment may have been for legitimate staple food purchases, particularly those in the lower dollar amounts, there is insufficient evidence that these repeating same cent transactions are legitimate. When many transactions end in a same cents amount, it appears that these transaction amounts are contrived and therefore, in the absence of compelling evidence to the contrary, are suggestive of trafficking. As such, the transactions in this Attachment have not been adequately documented as legitimate.

### **High Dollar Value Transactions**

This Attachment lists 150 individual EBT transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. The substantial number of high dollar transactions is uncharacteristic for a store of this size offering a very minimal stock of staple foods and calls into question the legitimacy of these transactions. The SNAP transactions listed are also substantially higher than the average SNAP transaction of \$8.64 for this store type in Berks County. This is unusual and indicative of trafficking.

The evidence under review shows that SNAP households shopping at the Appellant firm are also shopping at many full-line supermarkets and super stores, located nearby as well as at a distance from Appellant's location, that offer a greater quantity and variety of eligible foods items for better prices than customers can find at the Appellant firm. While households residing in areas with extremely limited grocery store options may conduct high dollar value transactions at convenience stores out of necessity, this is not the case when households have better alternatives. FNS records show 63 other retailers located within a 1.0 mile radius that includes two super stores and two supermarkets with the supermarkets located 0.41-0.44 miles from Appellant's location. Both of the supermarkets also offer meat plans and have an variety of fresh produce. There is also one medium grocery store and two small grocery stores located within 440 yards of Appellant's location with the medium grocery store located approximately three blocks away. These large dollar transactions remain questionable when considering the proximity of the other stores that would be better shopping options for consumers. Based on their shopping patterns, transportation does not appear to be an issue for these households. Yet, these recipients continue to shop and spend suspicious high dollar amounts at the Appellant firm, where the eligible food stock is limited, **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** of their purchases at larger food stores. It is also noted that the Appellant firm is located on a street with scheduled fixed route bus service that would facilitate shopping at other stores.

For example, one of the households whose shopping pattern was analyzed by the Retailer Operations Division conducted 10 of the 32 **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** transactions in this



Attachment. On multiple occasions this household shopped at a super store or supermarket often within minutes of conducting a larger dollar value transaction at Appellant's very minimally stocked convenience store. Two of the supermarkets patronized by this household are located within 0.44 miles of Appellant's location and both offer superior meat plans, ample produce, and a greater quantity and variety of staple foods most likely at lower prices. There is no legitimate reason why a household would spend so much of its SNAP allotment at a very minimally stocked convenience store when it clearly had access to and frequently shopped at supermarkets and super stores located nearby and at a distance. The more plausible explanation is that these households were trafficking at the firm. Other households analyzed by the Retailer Operations Division had similar suspicious shopping patterns indicative of trafficking.

The difference in the average SNAP transaction dollar amount, the total SNAP transaction dollar volume, and the total SNAP transaction count for Berks County convenience stores during the review months and at the Appellant firm is significant. 5 U.S.C. § 552 (b)(7)(E). The unusually high number of SNAP transactions is an indication the firm may be dividing larger transactions into multiple smaller transactions in an effort to circumvent detection. A comparison of Appellant's SNAP redemptions to that of nearby like type stores having redemptions for the review period shows that none exhibit the same suspicious transaction patterns listed in the charge letter for the Appellant firm even though all are located in proximity to Appellant's location and would therefore be expected to share the same SNAP customer base and shopping patterns. This is a further indication that the transactions in this Attachment and the others do not represent legitimate food purchases. The Retailer Operations Division considered all of these to be indicators of unusual and suspicious activity.

The firm also had irregular SNAP transaction data compared to like type stores in the County. A comparison of Appellant's redemption data to like type stores using ten dollar increments shows that Appellant's transaction count and dollar volume are significantly larger than the County average 5 U.S.C. § 552 (b)(6) & (b)(7)(C) at which point transactions stop. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). This unusual spike in both transaction numbers and dollar volume does not appear in the transaction count and dollar volume averages for other like type stores.

These large dollar value transactions are considered to be irregular and suspicious based on the firm's food inventory. The Retailer Operations Division determined there was no credible reason for the firm to have transactions at these dollar levels given the very minimal stock of staple foods and the lack of any specialty, bulk, or ethnic foods that might sell for large dollar amounts and therefore also considered this to be a strong indication of trafficking. None of Appellant's contentions explain these unusual and suspicious differences.

The SNAP transactions noted in this Attachment are not presumed to be trafficking because they exceed a set dollar amount; they are questionable because they are inconsistent for this type of store and the store's stock. An analysis of shopping patterns by the Retailer Operations Division shows that households in this Attachment are regularly shopping at much larger stores, and conducting transactions of large dollar amounts, yet are conducting comparable or higher dollar value transactions at the Appellant firm. It makes no sense for a household that regularly shops at larger stores and apparently has no transportation limitations to spend large dollar amounts at

the Appellant firm since its cost of goods is higher than that of larger stores such as supermarkets or super stores.

Appellant contends most, if not all, of the excessively large transactions are related to purchases of frozen specials and/or the meat plans. The owner believes the customer making the four largest transactions is an elderly/disabled person who lives nearby and fairly frequently purchases large amounts of food that are delivered to her due to her limited mobility. Most of the other large transactions are documented by the attached sales receipts which show that these usually include numerous items and/or meat plans and meat/frozen item specials. The majority of meat is stored at the owner's Cotton Street location as shown by photos of the cooler and storage areas. He brings what he can to the 5th & Spruce store and gets the rest as needed from Cotton Street. Sometimes when a customer places a large meat order, the meat gets delivered directly to the customer while other times it is brought to the 5th & Spruce store. Cotton Street also accepts EBT and the owner does not keep good track of what products purchased get sold by which store. The owner, more frequently than not, purchases goods for more than one store and since the stores are under single ownership, he does not keep track of which goods are sold from which location. The stores are located fairly close to each other and one has more storage area. The owner uses a markup of 60-100 percent depending on the product and a price. There is no set markup schedule. Lastly, the owner has no incentive to traffick as SNAP makes-up a relatively small percentage of total sales.

While Appellant claims the meat plans and/or the frozen specials account for most of the high dollar value transactions listed in this Attachment, a review of the 2017 FNS store visit report shows that other than a flyer laying on the rear of the checkout counter, there is no other signage posted anywhere in the store advertising meat plans or family pack items. Since there is no way for customers to know about the meat plans and family packs it is unlikely that they would have purchased them in any great quantity. The legitimacy of the firm actually having frozen specials was previously discussed and discounted. It also makes no sense that customers would order meat plans as claimed by Appellant and would then have to wait for the owner to go to the other store at some point and bring back the meats when the household could have simply gone to the other store and received the meats upon purchase or they could have purchased a superior meat plan from one of the two nearby supermarkets where they are already shopping. The owner also states in the 2018 store visit report that the firm does not deliver which contradicts the contention that the firm sometimes delivers a large meat order directly to the customer. What Appellant is claiming as an explanation for the transactions in this Attachment defies common sense and is not supported by the evidence. Additionally, none of Appellant's contentions provide any explanation for the 32 transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** that are not supported by the firm's pricing structure or food inventory.

The analysis of the transaction history for the household cited by the store owner shows that it is a single person household as evidenced by its monthly SNAP allotment **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. It further shows that this household shopped at two different supermarkets and spent less than it spent at Appellant's very minimally stocked store. **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. During the next three months this household conducted two transactions on the day of receipt at the Appellant firm exhausting its SNAP benefits. It is unusual that a single person household would exhaust its entire monthly allotment for multiple

consecutive months in two transactions on the day of receipt. It's even more unusual that the benefits would be expended at a very minimally stocked convenience store that does not stock fresh or frozen unprocessed meat or seafood. This unusual behavior is suspicious and indicative of trafficking.

Higher food prices make it even more unlikely that SNAP recipients, with very limited food benefits, would want to spend a considerable part of their benefits in a store that does not address all of their food shopping needs when they are already shopping at larger, fully-stocked stores that would offer a greater variety of foods at lower prices. Many of these stores would also offer store brand products at lower prices, offer weekly specials, and have shopping carts and checkouts with built-in scanners and conveyor belts to facilitate processing purchases quickly. Additionally, Appellant furnished no itemized cash register and EBT receipts for the period under review to document the legitimacy of these excessively large transactions. While Appellant did submit many sales receipts for the review period, these were not itemized. A review of the receipts by the Retailer Operations Division also identified inconsistencies with the receipts that question their legitimacy such as a receipt showing sales tax was charged and other receipts listing expensive items that do not match any of Appellant's stock. The firm also has a very small checkout area and no shopping carts thereby making it difficult to facilitate the great quantities of eligible food items required to make up these large dollar transactions. Therefore, it is improbable that the food items purchased in these high dollar amounts could be carried to the register without the use of carts and more likely that the amounts were contrived. It is also noted that the 2017 store visit photos and report show ice crystals on frozen foods and dust on shelved foods both indicative of a slow turnover of stock. Lastly, the quantity and variety of the store's staple food inventory during the 2017 store visit was much better than that seen during the subsequent FNS store visit on February 12, 2018.

A detailed analysis of the invoices submitted for inventory purchases was conducted by the Retailer Operations Division and the dollar amount of eligible food purchases compared to SNAP redemptions at the firm for the period March-May 2017, the months with the largest number of invoices, using an 80 percent markup based on the average of the markup range provided. The Retailer Operations Division did not include invoices dated outside of the review period and tried to exclude all nonfood items. In those instances where the item description was vague, the amount was included to give the retailer the benefit of the doubt. Two Frito Lay invoices that had been altered were also excluded. Their analysis shows that the invoices provided were sufficient to account for SNAP redemptions for the months of March and April 2017, but not May 2017. This analysis does not take into account credit card or cash sales for the period. The analysis shows the firm was not purchasing expensive foods and that the vast majority of the invoices were for the purchase of snack foods, large quantities of soda and other beverages, candy, and chips. They also show the purchase of significant quantities of various varieties of deli meats and cheeses along with French fries, onion rings, and other chicken and beef products to support the hot/prepared food sales at the firm. While this analysis does show sufficient inventory purchases to cover SNAP redemptions in two of the three months reviewed, sufficient inventory alone does not explain the suspicious pattern of SNAP transactions cited in the FNS charge letter. It is further noted that the invoices for meat purchases account for only a small fraction of SNAP redemptions. April 2017 had the largest number of Quaker Valley Foods invoices and yet meat purchases only cover 25 percent of SNAP redemptions for the month. The

item numbers on the Quaker Valley Foods invoices were verified using the wholesaler's online catalog and further confirm that the majority of food purchased for the firm supports the hot/prepared food sales not meat plan sales refuting Appellant's claim of meat plans accounting for the transactions listed in this Attachment.

Appellant's photos do not provide any valid basis for dismissing the charges or for mitigating the penalty. The FNS store visit report and photos show that the firm has a very minimal stock of staple food items and sells a large quantity and variety of accessory foods such as drinks, snacks, and candy as well as many hot and prepared foods. It is noted that the 2017 store visit report states that the food items used for making the hot/cold prepared foods are stored in the same coolers containing foods for purchase by customers. The Z reports, the 2017 third party processor statement, and the merchant processing statements also provide no relevant evidence related to the suspicious transactions at the Appellant firm. While SNAP sales may represent a relatively small percentage of total sales at the Appellant firm, this does not explain the suspicious transactions nor does it constitute acceptable evidence that the firm did not traffick SNAP benefits.

It is further noted that SNAP redemptions at the Appellant firm decreased unusually following the store visit on February 12, 2018, and receipt of the charge letter on March 23, 2018. The volume of SNAP redemptions at the Appellant firm decreased 29.93 percent from January 2018 to April 2018 while the number of SNAP transactions decreased 24.96 percent and the average SNAP transaction dollar amount decreased 6.61 percent during the same period. A pronounced decrease in SNAP redemptions following the store visit and receipt of the charge letter is a clear indication of trafficking since, if trafficking were not occurring, there would be no abnormal fluctuations in redemption amounts.

Based on this discussion, Appellant did not provide adequate evidence to support the legitimacy of the excessively large transactions in this Attachment.

### **Other Contentions**

In an appeal of an adverse action, the Appellant bears the burden of proving by a preponderance of evidence that the administrative action should be reversed. That means the Appellant has the burden of providing relevant evidence that a reasonable mind, considering the record as a whole, would accept as sufficient to support a conclusion that the argument asserted is more likely to be true than untrue. Assertions that the firm has not violated program rules, by themselves and without supporting evidence and rationale, do not constitute valid grounds for dismissal of the current charges of violations or for mitigating their impact. A record of participation in SNAP with no previously documented instance of violations or assertions that the firm has not violated program rules, by themselves and without supporting evidence and rationale, do not constitute valid grounds for dismissal of the current charges or for mitigating the impact of those charges.

The owner and the firm were charged with trafficking based on a computer analysis of the store's transactions for the months of March 2017 through August 2017. The charges do not derive from the use of a confidential informant or independent investigator who visited the store and

made illegal purchases to support findings of trafficking, but by a computer program used by SNAP Administrators. While traditional undercover operations are still in use by USDA, for many years federal regulations have also authorized the use of evidence consisting of EBT transaction data in investigations of SNAP retail stores to determine if trafficking is occurring and U.S. District Courts have long upheld the validity of EBT transaction data.

The issue under review involves a charge of trafficking SNAP benefits based on EBT transaction data. EBT transaction data is covered in SNAP regulations at 7 CFR § 278.6(a) and is addressed below. Trafficking is always considered to be the most serious violation even if it is a first offense therefore a temporary suspension or lesser penalty would not be applicable. SNAP regulations at 278.6(e)(1) clearly state that, “FNS shall disqualify a firm permanently if personnel of the firm have trafficked as defined in § 271.2.” SNAP regulations at 7 CFR § 271.2, define trafficking as, “The buying, selling, stealing, or otherwise effecting an exchange of SNAP benefits for cash or consideration other than eligible food”. SNAP regulations at 7 CFR § 278.6(a) clearly 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, 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”. In the present case, the data presented in the Attachments is solely based on the SNAP EBT transactions conducted at the Appellant firm during the review period. This firm was selected as a result of a series of complex algorithms that make numerous data comparisons with other like type firms during the review period. All of the transactions were then reviewed and analyzed by the Retailer Operations Division staff before the decision was made to issue a charge letter. This investigative process included a detailed examination of information obtained from various sources, including, but not limited to the inventory report and photos from the FNS store visit, a transaction comparison and analysis of like type and larger stores, and analysis of shopping patterns for recipient households conducting transactions at the Appellant firm during the review period. This analysis included a review of the firm to ensure its store classification was correct and the data comparisons with like type firms valid. Additionally, there are nearby like type stores whose transaction data does not form these suspicious patterns and are therefore not at risk of disqualification for trafficking. There is also no regulatory requirement that trafficking disqualifications be based solely on on-site undercover operations.

Based on this empirical data, and in the absence of sufficient evidence for the legitimacy of 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 charge letter evidence trafficking as the most likely explanation for the questionable transactions listed in the charge letter Attachments. It is herein determined that Appellant did not provide a preponderance of evidence demonstrating that the transactions contained in the charge letter were more likely due to eligible food sales than not. Under review, the evidence more substantially supports a conclusion that the transaction activity in the charge letter Attachments is due primarily to trafficking in SNAP benefits.

The Food and Nutrition Act of 2008, as amended, and the regulations issued pursuant thereto do not 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 the most serious violation, even when the exchange of SNAP benefits for cash is dollar-for-dollar or is conducted by a non-managerial store clerk. This is reflected in the Food and Nutrition Act, which reads, in part, that disqualification “shall be permanent upon the first occasion of a disqualification based on trafficking by a retail food store.” In keeping with this legislative mandate, Section 278.6(e)(1)(i) of the SNAP regulations states that FNS shall 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 and second chances are not an authorized option under existing regulations.

### **CIVIL MONEY PENALTY**

A CMP for hardship to SNAP households may not be imposed in lieu of a permanent disqualification as specified in SNAP regulations at 7 CFR § 278.6(f). Trafficking is a permanent disqualification so Appellant is not eligible for a hardship CMP.

The Retailer Operations Division determined that the Appellant was not eligible for a trafficking CMP in lieu of a disqualification under 7 CFR 278.6(i) because Appellant failed to request or to submit sufficient evidence to demonstrate that the firm had established and implemented an effective compliance policy and program to prevent SNAP violations within the specified timeframe. As such, the Retailer Operations Division determined that Appellant was not eligible for a trafficking CMP in lieu of permanent disqualification.

Based on the above discussion and the evidence under review, Appellant failed to meet the regulatory standard for a trafficking CMP as it did not provide substantial evidence that it met all four criteria required by 7 CFR §278.6(i). Accordingly, the Retailer Operations Division’s decision not to impose a CMP in lieu of disqualification is sustained as appropriate pursuant to 7 CFR §278.6(i).

### **CONCLUSION**

The Retailer Operations Division presented a case that Appellant has likely trafficked in SNAP benefits. Their analysis of Appellant’s EBT transaction record was the primary basis for its determination to permanently disqualify Appellant. This data provided substantial evidence that the questionable transactions during the review period had characteristics consistent with trafficking violations in SNAP benefits. This is evidenced by: the suspicious patterns in two Attachments of EBT transaction data, the inadequacy of the store’s staple food stock as observed during the store visit to support large transactions in short time frames, the lack of adequate evidence for customer spending habits given that there are other SNAP authorized stores located within proximity to Appellant that likely offer a greater selection of eligible food items at competitive prices, and the irregular SNAP transaction data of Appellant as compared to other like type and larger stores in the county and state.

The retailer has not provided sufficient evidence to rebut the case that Appellant most likely trafficked in SNAP benefits. Therefore, based on a review of all of the evidence in this case, it is more likely true than not true that program violations did, in fact, occur as charged. Based on the discussion above, the determination to impose a permanent disqualification against Appellant is sustained. Furthermore, the Retailer Operations Division properly determined that Appellant was not eligible for a trafficking CMP according to Section 278.6(i) of the SNAP regulations.

### **RIGHTS AND REMEDIES**

Applicable rights to a judicial review of this decision are set forth in 7 U.S.C. § 2023 and 7 CFR § 279.7. If a judicial review is desired, the complaint must be filed in the U.S. District Court for the district in which Appellant's owner resides, is engaged in business, or in any court of record of the State having competent jurisdiction. This complaint, naming the United States as the defendant, must be filed within thirty (30) days of receipt of this decision.

Under the Freedom of Information Act, we are releasing this information in a redacted format as appropriate. FNS will protect, to the extent provided by law, personal information that could constitute an unwarranted invasion of privacy.

ROBERT T. DEEGAN  
Administrative Review Officer

November 19, 2018