

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

**American Pride,**

**Appellant,**

**v.**

**Retailer Operations Division,**

**Respondent.**

**Case Number: C0222953**

**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 American Pride (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 American Pride on January 16, 2020.

**AUTHORITY**

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

**CASE CHRONOLOGY**

In a letter dated November 22, 2019, the Retailer Operations Division informed the Appellant that American Pride 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 December 9, 2019 and December 12, 2019, 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 Appellant also requested the imposition of a civil money penalty in lieu of a permanent SNAP disqualification claiming that the firm had implemented an effective compliance program to prevent violations of the SNAP regulations at Sections 278.6(c) and 278.6(e)(1).

After considering the Appellant's replies and the evidence in the case, the Retailer Operations Division issued a Determination Letter dated January 16, 2020, informing the Appellant that American Pride 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 January 27, 2020, the Appellant 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 February 3, 2020. In a letter postmarked February 19, 2020, the Appellant submitted additional information in support of the request for administrative review.

### **STANDARD OF REVIEW**

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

### **CONTROLLING LAW**

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

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

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

7 CFR § 278.6(a) states, inter alia:

FNS may disqualify any authorized retail food store ... if the firm fails to comply with the Food and Nutrition Act of 2008, as amended, or this part. Such disqualification shall result from a finding of a violation on the basis of evidence that may include facts established through on-site investigations, inconsistent redemption data, evidence obtained through a transaction report under an electronic benefit transfer system ... [Emphasis added].

7 CFR § 278.6(e)(1)(i) states:

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

7 CFR § 271.2 states, inter alia:

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

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

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

7 CFR § 278.6(i) states, inter alia:

FNS may impose a civil money penalty in lieu of a permanent disqualification for trafficking as defined in § 271.2 if the firm timely submits to FNS substantial evidence which demonstrates that the firm had established and implemented an effective compliance policy and program to prevent violations ...

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

- (ii) Firms that request consideration of a civil money penalty in lieu of a permanent disqualification for trafficking shall have the opportunity to submit to FNS information and evidence as specified in § 278.6(i), that establishes the firm's eligibility for a civil money penalty in lieu of a permanent disqualification in accordance with the criteria included in § 278.6(i). This information and evidence shall be submitted within 10 days, as specified in § 278.6(b)(1). [Emphasis added].
- (iii) If a firm fails to request consideration for a civil money penalty in lieu of a permanent disqualification for trafficking and submit documentation and evidence of its

eligibility within the 10 days specified in § 278.6(b)(1), the firm shall not be eligible for such penalty. [Emphasis added].

### **SUMMARY OF CHARGES**

The Appellant was charged and determined to be trafficking based on an analysis of EBT transaction data from 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:

- Under Section 278.6(2)(d) of the SNAP regulations, the owner and/or its employees have not violated SNAP law. The transactions are based on the sale of qualified merchandise.
- The owner and his two employees were the only employees during the review period.
- The Appellant holds itself as a fully functioning grocery store and gas station. Most of the Appellant's customers buy groceries for their entire household as would a customer at a grocery store. Each SNAP card can be used numerous times throughout the day for the reason that there are numerous individuals in each large family and there are also numerous individuals in each large family. There are also a significant number of unemployed customers that frequent the store.
- The Appellant has been authorized to participate in the SNAP since October, 2010. Since the opening of the business, there have not been any violations of the SNAP. The Appellant has never violated any laws related to Section 278.6(e)(1) and 272.2.
- With regard to the transactions documented in Charge Letter Attachment 1, the behavior of the Appellant's customers is impulsive and generally unplanned. For this reason, when a SNAP recipient visits the store, the customer will make a purchase. After realizing how much money they have left on their EBT card, they will make another purchase. Having larger than average family sizes, the store's customers shop with a few people from their household. As individuals look around the store and see other desired

items, they make numerous purchases during one visit. Again, if four household members are shopping during one visit, they often make four separate purchases. In addition, as the area experiences a high amount of theft and shoplifting, the Appellant has his employees begin ringing up customers as the line gets extremely long thus making purchases close together as well. Further, some customers prefer to have two separate receipts so they will make two separate purchases. Customers also want to know what their balance is prior to making bigger purchases. The Appellant's customers are not monetarily savvy nor do many of them understand basic personal financial habits. One cannot hold these individuals to a standard that would compel them to shop at cheaper discount stores. They voluntarily choose to shop at the Appellant firm. Customers are sometimes bound by transportation issues or health issues resulting in them shopping only at the subject store. Traditional grocery stores such as 5 U.S.C. § 552 (b)(6) & (b)(7)(C) and 5 U.S.C. § 552 (b)(6) & (b)(7)(C) are not readily available in the surrounding neighborhood. For this reason, the Appellant's customers are accustomed to paying the higher prices offered in smaller stores such as the Appellant firm which do not have the ability to take advantage of economies of scale compared to stores such as 5 U.S.C. § 552 (b)(6) & (b)(7)(C) and 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Not being a large volume retailer such as these stores, the Appellant's business can only survive with higher mark-ups on its products since it does not focus on volume sales. Per unit sales must be highly profitable for it to stay in business.

- With regard to the transactions documented in Charge Letter Attachment 2, many of the larger transactions happen at the beginning of the month and the Appellant gives these customers special pricing. The Appellant has many items of high value that justify higher than normal purchases. These items include, but are not limited to, cases of water, Monster drinks, Red Bull, and soda products. EBT qualified items are purchased at wholesale at a high volume. Wholesale purchases normally have a mark-up of 30% to 40%.
- A permanent SNAP disqualification will cause undue hardship to the Appellant. For the past two years, the owner was not able to focus on the store due to severe injuries/illness of two of his children. These tragedies cost the owner a lot of money and he had to use almost all of his savings to pay for medical expenses. Also, all of his family's expenses, including studies of three children, are met with the business. A SNAP disqualification will so adversely affect the business that the owner may have to close it. The Appellant requests that a warning letter be issued in lieu of a permanent SNAP disqualification.
- A permanent SNAP disqualification will cause undue hardship to customers that solely depend on the Appellant for all of their needs.
- The Appellant requests the imposition of a minimal civil money penalty in lieu of a permanent SNAP disqualification. The Appellant had implemented an effective compliance program to prevent violations of the SNAP prior to the SNAP violations as outlined in Sections 278.6(c) and 278.6(e)(1) of the SNAP regulations. This was in effect prior to the SNAP violations. In-store training has been provided and a copy of the SNAP Retailer Training Guide has been provided to each of the Appellant's employees. The Guide is discussed and reviewed with employees and partners of the business on a semi-annual basis. Issues concerning EBT processing are addressed as questions and issues arise.

- The Appellant sites the following provisions of the SNAP manual to be adhered to at the detriment of its license suspension: (1) Respect SNAP customers (page 7 of the manual)—Store owners are not allowed to restrict the time or purchase amount of its customers; and (2) Making the sale (page 10 of the manual)—When making the sale, retailers should encourage customers to pay the remainder of the bill by cash if they do not have enough money left on their EBT card. The Appellant helps its customers in taking their first step by making a smaller purchase followed by a larger or similar purchase once it is determined how much money they have remaining on their card.
- With regard to Criterion 1 of Section 278.6(i)(1), since being authorized to participate in the SNAP, the Appellant has been active in ensuring full compliance with employees and their obligations to USDA/FNS. The Appellant’s compliance policy clearly states and employees are reminded of the following: (1) There is no exchange for cash for EBT card swipes; (2) There is no store credit allowed for EBT transactions; (3) Do not allow other individuals to share a card; and (4) Only sell qualified EBT grocery items to customers. With regard to Criterion 2, since the Charge Letter was received, the Appellant discourages customers from checking their balances prior to them using their SNAP card. They have since stopped this practice after consulting with legal counsel. Secondly, the Appellant has also stopped customers from making purchases of large volumes of EBT qualified products during a single transaction. With regard to Criterion 3, a training program implemented by the Appellant includes review of the FNS Handbook with each new employee and instructions to call USDA or the store owner if any questions arise.

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

- Employment Agreement & SNAP Acceptance Affidavits of store owner and employees;
- Training log;
- EBT cash register receipts;
- Witt Wholesale Co., Inc. purchase invoices;
- Sam’s Club purchase receipts;
- Hand-written inventory list with sales mark-ups;
- Three photos of food stock;
- Affidavit of store owner;
- Affidavit of the manager/supervisor; and
- Medical records.

## **ANALYSIS AND FINDINGS**

### **Store Characteristics**

FNS authorized American Pride as a convenience store on August 26, 2010. The case file indicates that in reaching a disqualification determination, the Retailer Operations Division considered information obtained during a June 6, 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 1,600 square feet in size with no additional storage outside of public view;
- No shopping carts or hand-held baskets available for customer use;
- Two cash registers; however, one is used only for cash purchases or during power outages;
- 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;
- No signs posted or flyers available advertising the availability of bulk foods offered at a discounted rate to include meats in bulk, foods sold by the case, and grocery package deals;
- No meat/seafood specials or bundles or fruit/vegetable boxes that might sell for high prices;
- No evidence of a wholesale business such as posted prices or separate entrances for wholesale customers;
- No indication from the store visit report that the firm has a special pricing structure, such as prices ending in \$x.x9 and/or \$x.00;
- Transaction totals are not rounded up or down at the checkout counter;
- Telephone and on-line orders were not taken and delivery was not offered;
- Had some scantily filled shelves;
- Only one expensive (i.e., costing \$5.00 and above) food item in stock which was Red Bull at \$7.99 per 4 pack (6 units in stock);
- No fresh or frozen meats, poultry, or seafood;
- Deli meats and cheeses were not sold by the pound;
- No kitchen and hot foods were not sold;
- Meat items included units of eggs, canned fish, canned/potted meat, packaged lunch meat, and meat jerky;
- Dairy included milk, margarine, and cheese;
- No fresh produce;
- Other staple foods available for purchase included such items as juice, pasta, cereal, loaf bread, flour, corn meal, and canned goods;
- Much of the remaining food stock consisted of accessory foods such as candy, carbonated and non-carbonated drinks, snack foods, ice cream, and condiments; and
- Ineligible nonfood items included tobacco products, paper products, household cleaning supplies, automotive supplies, alcohol, lottery tickets, gasoline, pet food, electronic gaming machines, charcoal, and clothing.

The available inventory of SNAP eligible food at the time of the store visit showed food stock that would be typical of a 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.

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

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

This Charge Letter Attachment documents 14 sets of transactions (58 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 completed by seven (7) 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.

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 Appellant contends that having larger than average family sizes, the store's customers shop with a few people from their household. As individuals look around the store and see other desired items, they make numerous purchases during one visit. Again, if four household members are shopping during one visit, they often make four separate purchases. However, these transaction sets do not contain the characteristics associated with a household purchasing a forgotten item right after checking-out or different household members shopping together

making separate purchases as 11 of the 14 transactions sets 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The transaction sets also do not contain the characteristics of a household returning later in the day to purchase a forgotten item or two as all of the sets have subsequent transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C)6 with 13 of the 14 sets having subsequent transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C), far more than the cost of a forgotten item or two.

The Appellant contends that it holds itself as a fully functioning grocery store and gas station. Most of the Appellant's customers buy groceries for their entire household as would a customer at a grocery store. Each SNAP card can be used numerous times throughout the day for the reason that there are numerous individuals in each large family and there are also numerous individuals in each large family. There are also a significant number of unemployed customers that frequent the store.

However, the report and photographs from the store visit offer no explanation as to why SNAP customers would routinely shop at American Pride 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 and one cash register and one EBT POS device for SNAP purchases. There were no shopping carts or hand-held baskets available to customers for transporting food within the store. There were no scanners or conveyor belts to expedite high dollar or rapid consecutive purchases.

The store visit observations indicate that the majority of the store stock appears to be typical convenience store items such as drinks, snacks, and canned/package items. In addition, the store visit report notes that the store had some scantily filled shelves. This calls into question the veracity of the statement that customers do the majority of their food shopping at the subject firm. There is a supermarket located 0.6 miles away that would carry the items found at American Pride, likely at lower prices.

The Appellant contends that as the area experiences a high amount of theft and shoplifting, it has its employees begin ringing up customers as the line gets extremely long thus making purchases close together as well. Further, some customers prefer to have two separate receipts so they will make two separate purchases. The Appellant's assertion that store clerks begin to "ring up" customer transactions as customers shop does not seem efficient. Although it is documented on the store visit survey that the subject store has two cash registers for grocery purchases, the report also indicates that the second register is only used for cash purchases or during power outages. Therefore, it is unlikely that a store clerk would ring up purchase items (occupying the register for an unknown period of time) while a SNAP recipient continues to shop; thus, not allowing them to ring up purchases made by other customers during the same timeframe.

In addition, while it is possible that some SNAP customers prefer separate receipts and therefore make separate purchases in a short timeframe, unfortunately that is not a plausible explanation for a majority of the transaction sets cited in the Attachment as most transaction sets 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

The Appellant contends that the behavior of the Appellant's customers is impulsive and generally unplanned. For this reason, when a SNAP recipient visits the store, the customer will make a purchase. Customers also want to know what their balance is prior to making bigger purchases. The Appellant's customers are not monetarily savvy nor do many of them understand basic personal financial habits. One cannot hold these individuals to a standard that would compel them to shop at cheaper discount stores. They voluntarily choose to shop at the Appellant firm. However, the Appellant's contentions are unfounded. The EBT point-of-sale device is programmed to permit immediate inquiries without having to first process a purchase. There is also a toll-free 800 telephone number that can be called to find out account balances. Therefore, it is not necessary for customers to make a purchase just to find out the balance on their SNAP benefit cards.

The Appellant contends that customers are sometimes bound by transportation issues or health issues resulting in them shopping only at the subject store. Traditional grocery stores such as 5 U.S.C. § 552 (b)(6) & (b)(7)(C) and 5 U.S.C. § 552 (b)(6) & (b)(7)(C) are not readily available in the surrounding neighborhood. For this reason, the Appellant's customers are accustomed to paying the higher prices offered in smaller stores such as the Appellant firm which do not have the ability to take advantage of economies of scale compared to stores such as 5 U.S.C. § 552 (b)(6) & (b)(7)(C) and 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Not being a large volume retailer such as these stores, the Appellant's business can only survive with higher mark-ups on its products since it does not focus on volume sales. Per unit sales must be highly profitable for it to stay in business.

It is recognized that sometimes a firm may have unusual transaction patterns due to a recipient's lack of access to other SNAP authorized stores. However, there are 24 SNAP authorized retailers (including a supermarket located within 0.6 miles, an additional 3 supermarkets located within 2.01 miles, and a super store located within 2.06 miles) located within a 3.0 mile radius of American Pride that can meet the nutritional needs of SNAP customers. Some of these authorized SNAP stores are larger than American Pride and offer a greater quantity and variety of food products at comparable or better prices as compared to the subject store. These larger stores would offer a much greater quantity and variety of foods at lower prices than the Appellant firm and their proximity would make it unlikely that any SNAP recipient would consider the Appellant firm as their primary source for groceries.

The record indicates that SNAP customers who shopped at American Pride 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.

A review of the cash register receipts provided by the Appellant indicates that a cash register receipt was submitted to account for all 14 transactions sets cited in Attachment 1. In addition, a cash register receipt was submitted for a majority (all but 7 transactions) of the transactions cited in Attachment 2 of the Charge Letter. At issue are the items identified as purchase items on the various receipts submitted. In particular, the transactions conducted by one SNAP household were highly suspect. For example, on April 7, 2019, the household conducted eight (8) separate

5 U.S.C. § 552 (b)(6) & (b)(7)(C) transactions. The cash register receipts submitted by the Appellant indicate that the household purchased “R Drink” (which is assumed that this item is a case of energy drinks, per the inventory list submitted by the Appellant). Per the invoices and inventory receipts submitted by the Appellant and the store visit observations documented on June 6, 2019, it does not appear that the Appellant had a sufficient inventory of these items to account for such purchases by the household (see “Inventory Analysis” section of the Final Agency Decision).

In addition, on May 7, 2019 and May 8, 2019, the household made several (mostly high dollar) purchases at the subject store (a single transaction on May 8, 2019). Each of the transactions include the purchase of “R Drink” at various price points that do not coincide with the pricing data submitted by the Appellant on the inventory list or data retrieved during the store visit of June 6, 2019. Also, on September 5, 2019 and September 6, 2019, the household made several (mostly high dollar) purchases at the subject store (two transactions were conducted on September 6, 2019). Most of the transactions include the purchase of “R Drink” at various price points that do not coincide with the pricing data submitted by the Appellant on the inventory list or data retrieved during the store visit. All of these transactions are highly suspicious and are typically and indication of trafficking.

Additional review of the itemized cash register receipts show two patterns that call into question the authenticity of the submitted receipts. The first issue is that on multiple occasions, the Appellant submitted two different receipts for the same transaction. The second pattern is that the transaction number on the submitted itemized receipts does not appear to follow a consecutive numbering pattern.

Addressing the first issue raised, on multiple occasions, the firm submitted two different itemized receipts for the exact same transaction. This is likely because the transaction appeared in both Attachments 1 and 2 of the Charge Letter. For example, two different itemized receipts were submitted for the transaction total 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The transaction totals and date are the same; however, the items purchased, time and transaction number are different (inexplicably, so is the Tax Credit). Both itemized receipts show that they were EBT purchases. However, a review of the store transaction activity for the review period shows the firm only conducted one transaction 5 U.S.C. § 552 (b)(6) & (b)(7)(C) during the entire review period. Because the firm did not have two transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C) during the review period, at least one of the itemized receipts submitted by the Appellant appears to be contrived.

Another example are the two different cash register receipts provided by the Appellant for the transaction total 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Again, the transaction totals and date are the same, however the time and transaction number are different. A review of the firm’s transactions in ALERT revealed the firm only completed one transaction 5 U.S.C. § 552 (b)(6) & (b)(7)(C) during the review period. A review of the store’s transactions was completed to ensure that there were no refunds or voids completed at the firm during the review period that could explain the duplicate receipts. However, there were no refunds or voids for these transaction totals during the review period. Because both itemized receipts submitted by the firm show that EBT was used, if a second transaction was completed for the total it would

show in the store transactions history in ALERT. Therefore, it is likely that the itemized receipts were contrived in effort to support the Appellant's contentions.

As noted above, the transaction numbering on the itemized receipts submitted by the Appellant also calls into question the authenticity of the receipts. Almost all of the receipts submitted had clear dates, times, drawer numbers, cashier numbers, and transaction numbers in addition to the transaction total. Of important note is that every itemized receipt submitted by the Appellant was completed by cashier 4 on drawer 1. This supports the store visit findings that the firm only uses a different cash register in rare occasions. The firm may also only use one cashier number.

However, the transaction numbers on the receipts do not appear to follow a consecutive numbering pattern. On the 61 unique itemized receipts received by the retailer, there were 58 unique transaction numbers visible (this information was cut off on some of the receipts). The transaction numbers ranged in value from 5 U.S.C. § 552 (b)(6) & (b)(7)(C) but did not appear to follow a consecutive numbering system. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). It is possible this was the result of a system issue on the Appellant's side, but in light of the contrived receipts discovered above, this appears to be further evidence that the receipts were contrived in an effort to support the Appellant's contentions.

5 U.S.C. § 552 (b)(7)(E).

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

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

This Charge Letter Attachment lists 51 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 recorded food stock. The frequency of high dollar purchases in the review period calls into question the legitimacy of these transactions.

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 these large transactions are not the result of trafficking of SNAP benefits. However, it is rare for a convenience store such as American Pride to have purchases like those included in this Attachment to the Charge Letter. This Attachment cites 51 EBT transactions during the six month period of review 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

The FNS store visit report and photos of June 6, 2019 show that American Pride 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. In addition, some of the store's shelves were scantily filled. The store visit observations also show that 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 Appellant contends that many of the larger transactions happen at the beginning of the month and the Appellant gives these customers special pricing. The Appellant has many items of high value that justify higher than normal purchases. These items include, but are not limited to, cases of water, Monster drinks, Red Bull, and soda products. EBT qualified items are purchased at wholesale at a high volume. Wholesale purchases normally have a mark-up of 30% to 40%.

A review of the inventory list provided by the Appellant indicates that the firm sells 40 count cases of water for \$24.99, Monster Drink for \$50.00 per 24 count case, Red Bull (8 ounce cans) for \$50.00 (assuming per 24 count case, although the photo of this item provided by the Appellant shows \$35.00 per case of 12 ounce cans) and 2 liter “soda products” for \$14.99 (unknown count). However, the store visit report and photos of June 6, 2019 (i.e., the beginning of the month when the Appellant claims that it gives customers special pricing) 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.

In addition, the store visit report and photos indicate that the Appellant firm stocked only one expensive food item (i.e., costing \$5.00 and above) which was Red Bull at \$7.99 per 4 pack and that there were only 6 units in stock. The Retailer Operations Division compared the June 6, 2019 store visit photos to the Appellant’s food stock photos (which show cases of water, Monster Drink, Red Bull, and soda products). The store visit photos indicate that in the location where these food items were stocked (as pictured in the Appellant’s photos), there were several electronic gaming machines. Per the photographs submitted by the Appellant, the gaming stations have been removed and bulk beverage items have been stocked in their place. It appears that the Appellant’s documentation of the store’s “high value” stock was contrived in an effort to support its contentions and does not reflect the firm’s daily stock during the review period.

In addition, a review of the purchase invoices provided from Witt Wholesale Co., Inc. indicates that there is no evidence to suggest that the Appellant purchased bulk beverage items such as cases of water, Monster or Red Bull energy drink and 2 liter sodas. In addition, a review of the purchase receipts provided from Sam’s Club indicates that there were only two purchases of “energy drink” or “Deer Park bottled water” (4 cases and 2 cases respectively). It appears that such limited purchases of such sale items are more likely than not for individual can and bottle purchases, not for bulk purchases by the case as the Appellant has indicated. It is also important to note that it is not logical to believe that households would regularly purchase large quantities of energy drinks at the subject store on a regular basis at the price point documented by the Appellant.

**5 U.S.C. § 552 (b)(7)(E).**

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

As noted previously, there are 24 SNAP authorized retailers (including a supermarket located within 0.6 miles, an additional 3 supermarkets located within 2.01 miles, and a super store located within 2.06 miles) located within a 3.0 mile radius of American Pride that can meet the nutritional needs of SNAP customers. Some of these authorized SNAP stores are larger than American Pride and offer a greater quantity and variety of food products at comparable or better prices as compared to the subject store. These larger stores would offer a much greater quantity and variety of foods at lower prices than the Appellant firm and their proximity would make it unlikely that any SNAP recipient would consider the Appellant firm as their primary source for groceries.

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 American Pride 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 American Pride does offer some staple food items, SNAP recipients are already shopping at other larger SNAP retailers located in proximity to the Appellant's business offering a greater quantity and variety of products, including fresh meats/seafood and produce, at lower prices.

**5 U.S.C. § 552 (b)(7)(E).**

While some households may have conducted legitimate SNAP transactions at the Appellant, insufficient evidence was presented to support this argument. The vendor invoices of eligible items acquired in inventory (see "Invoice Analysis" section of the Final Agency Decision) do not cover the Appellant's SNAP redemption volume during the review period. The itemized cash register tapes do not validate that trafficking did not occur. No federal business tax returns or state tax filings were provided, and no business banking statements were submitted. No recipient affidavits were offered in evidence as to shopping behaviors at the firm. While FNS is sympathetic to the store owner's circumstances, the medical records provided for review have no bearing on this case. Thus, the owner has not provided a preponderance of evidence that the transactions in the Attachments are for eligible foods rather than the result of trafficking.

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.

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

### **First Time Violator**

The Appellant contends that it has been authorized to participate in the SNAP since October, 2010. Since the opening of the business, there have not been any violations of the SNAP. The Appellant has never violated any laws related to Section 278.6(e)1 and 272.2. However, this is an untrue statement as the Retailer Operations Division sent a warning letter to the Appellant dated February 22, 2019 noting that during an investigation of the compliance of American Pride with Federal SNAP law and regulations, the Appellant accepted SNAP benefits in exchange for merchandise which included ineligible nonfood items in violation of 7 CFR § 278.2(a). Regardless, even if the Appellant had not been cited for SNAP violations prior to receipt of the November 22, 2019 Charge Letter, a record of program participation with no previously documented violations does not constitute valid grounds for mitigating the impact of the present serious determination of trafficking.

Neither the Food and Nutrition Act of 2008, as amended, nor the accompanying regulations cite any minimum dollar amount of cash or SNAP benefits, or number of occurrences, for such exchanges to be defined as trafficking. Nor do they cite any degrees of seriousness pertaining to trafficking of SNAP benefits. Trafficking is always considered to be extremely serious, even when the exchange of SNAP benefits for cash is dollar-for-dollar or is conducted by a 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, § 278.6(e)(1)(i) of the SNAP regulations states that FNS must disqualify a firm permanently if personnel of the firm have trafficked. There is no agency discretion in the matter of what sanction is to be imposed when trafficking is involved.

## **Financial Hardship**

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

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

## **Customer Hardship**

With regard to the Appellant's contentions that a permanent SNAP disqualification will cause undue hardship to SNAP customers, 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.

## **Invoice Analysis**

In support of its contentions that the questionable SNAP transactions included in the Charge Letter Attachments are legitimate food purchases and not the result of trafficking of SNAP benefits, the Appellant provided FNS with numerous vendor invoices/receipts for food and other nonfood item purchases from Witt Wholesale Co., Inc. and Sam's Club. The Appellant also submitted an inventory list with sales mark-up.

FNS conducted an analysis of the invoices provided by the Appellant. Per the Appellant's inventory list plus mark-up, it was determined that the firm's calculated mark-up is 37.49%. FNS used a 40% sales mark-up percentage for the purpose of the invoice analysis. **5 U.S.C. § 552 (b)(7)(E)**. The Appellant has failed to establish a sufficient food inventory to account for both its estimated cash/credit/debit card sales and EBT redemptions for the review period. This is a strong indication that trafficking occurred at the subject store during the review period.

## CIVIL MONEY PENALTY

In the November 22, 2019 Charge Letter the Appellant was informed by the Retailer Operations Division that, under certain conditions, FNS may impose a civil money penalty (CMP) of up to \$59,000 in lieu of permanent disqualification of a firm for trafficking. Per Section 278.6(i) of the SNAP regulations, four criteria must be met in order to be considered for a trafficking civil money penalty. If requesting a trafficking CMP, an Appellant must meet each of the four criteria listed and provide the documentation as specified within ten days of the Appellant's receipt of their Charge Letter. As specified in 7 CFR § 278.6(i), in determining the minimum standards of eligibility of a firm for a civil money penalty in lieu of trafficking, the firm shall, at a minimum, establish by substantial evidence its fulfillment of each of the following four criteria:

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

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

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

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

If the Appellant's request for a trafficking CMP and the required documentation are not submitted on time, it will lose its right for any further consideration for a trafficking CMP. The SNAP regulations are specific at 7 CFR §278.6(b)(2)(iii) that "if a firm fails to request consideration for a civil money penalty in lieu of a permanent disqualification for trafficking and submit documentation and evidence of its eligibility within the 10 days specified, the firm shall not be eligible for such a penalty". The regulations do not provide the agency discretion to extend the time within which documentation and evidence in support of a trafficking civil money penalty may be submitted.

In the replies to the Charge Letter, in the request for administrative review, and in subsequent correspondence, the Appellant requested consideration of a minimal civil money penalty in lieu of a permanent SNAP disqualification. The Appellant contends that it had implemented an effective compliance program to prevent violations of the SNAP prior to the SNAP violations as outlined in Sections 278.6(c) and 278.6(e)(1) of the SNAP regulations. This was in effect prior to the SNAP violations. In support of its contention that it is eligible for a CMP, the Appellant submitted Employment Agreement & SNAP Acceptance Affidavits (which describes its compliance policy and program) of store owner and employees, a training log, and affidavits of the store owner and manager/supervisor.

However, the various documentation provided by the Appellant is not "substantial evidence" that fulfills each of the four criteria of 7 CFR § 278.6(i), demonstrating "that the firm had established and implemented an effective compliance policy and program to prevent violations." 5 U.S.C. § 552 (b)(7)(E).

The standards of eligibility for a trafficking CMP are high. They require substantial proof that a compliance policy and program was established and implemented prior to the occurrence of violations. These standards exist to thwart attempts to falsely present compliance policies and programs that were not actually implemented prior to violations. Although these standards are high, they are required by the regulations and the Appellant must be held to them during the course of this review.

The size of a firm, or its number of personnel, is not a consideration in determining eligibility for a civil money penalty in lieu of permanent disqualification for trafficking. It might require significant effort to develop and maintain a compliance policy and program. Yet, even substantial effort does not lessen the consequences if the firm fails to meet the requirements. As noted, the criteria for eligibility for a civil money penalty in lieu of permanent disqualification are clearly stated as minimum standards below which eligibility is precluded.

As the Appellant did not provide the required supporting documentation, the Retailer Operations Division did not assess a CMP. According to the requirements stated in 7 CFR § 278.6(b)(1), § 278.6(b)(2)(ii and iii), and § 278.6(i), the Appellant is not eligible for a CMP in lieu of a permanent disqualification from participation as an authorized retailer in the SNAP. The determination by the Retailer Operations Division to deny the Appellant a civil money penalty is sustained.

## **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 American Pride is sustained.

## **RIGHTS AND REMEDIES**

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

competent jurisdiction. If any Complaint is filed, it must be filed within thirty (30) days of receipt of this Decision.

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

LORIE L. CONNEEN  
ADMINISTRATIVE REVIEW OFFICER

March 24, 2020