

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

**Andres Food Corp,**

**Appellant,**

**v.**

**Retailer Operations Division,**

**Respondent.**

**Case Number: C0214056**

**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 Andres Food Corp (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 March 26, 2019.

**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 February 22, 2019, the Retailer Operations Division charged Appellant with trafficking based on a series of irregular SNAP transaction patterns that occurred in April 2018 through September 2018. 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 responded to the charges in a letter dated March 5, 2019, and submitted via fax that admitted to offering credit and requested an extension of time to respond to the charges. This

response did request a CMP in the event the permanent disqualification was sustained, but it did not include any documentation in support of a CMP. Appellant was approved for an extension of time until March 16, 2019, to submit a response. Upon receipt of the March 5, 2019, letter admitting to offering credit, the Retailer Operations Division requested evidence of credit accounts by letter dated March 6, 2019, and received by Appellant on March 7, 2019. Appellant responded in a letter dated March 14, 2019, and submitted via fax on March 18, 2019, stating that the owner had no records that would support the existence of credit accounts at the firm. The Retailer Operations Division notified Appellant by letter dated March 26, 2019, that the firm was permanently disqualified from participation as a SNAP retailer in SNAP 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 April 2, 2019, Appellant appealed the Retailer Operations Division's assessment and requested administrative review. The appeal was granted. No subsequent correspondence was received.

### **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 § 278.2(f) states, inter alia: “Coupons [SNAP benefits] shall not be accepted by an authorized retail food store in payment for items sold to a household on credit.”

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 April 2018 through September 2018. This involved two patterns of EBT transaction characteristics indicative of trafficking:

1. Multiple transactions were made from individual benefit accounts in unusually short time frames.
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 large purchases were made by three households that were allowed to use credit;
- The owner is still gathering inventory printouts from the firm’s vendors since there was a flood in the firm’s cellar and the majority of receipts were damaged or destroyed. Due to the flooding, the owner no longer has verification of credit being offered to the three households;
- The firm offers a large variety of groceries including deli meats, produce, bread, eggs, milk, fruits, vegetables, yogurts, juices, etc. The firm also replenishes stock on a daily basis so needed items, including fresh merchandise, are always in stock. It would be very easy for a recipient to spend a large part or even all of their SNAP benefits at the store;
- Employees are well trained on how to process EBT transactions and are well aware of the importance of observing SNAP rules and regulations as the firm depends on its EBT

permit to stay in business. The owner does not allow any trafficking or rule breaking at the firm as it would jeopardize the SNAP license that the firm depends on to stay open. The firm would not survive a disqualification and would be forced to close like the majority of businesses in the area; and,

- If the permanent disqualification is sustained, then a CMP is requested in lieu of the disqualification.

Appellant submitted printouts covering the period April-September 2018 from Jetro Cash & Carry, F & J Master Sales, AAA Wholesale Distributors Corp, and two invoices from Goya 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 initially authorized the firm on April 7, 2011. The case file indicates that in reaching a disqualification determination, the Retailer Operations Division considered information obtained during an October 29, 2018, 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 small grocery store offering a minimal quantity and variety of staple foods and carrying no unique items or offering any distinctive services.
- The store stocked traditional American brands as well as a limited variety of canned and packaged Hispanic foods, primarily Goya products. There were no other ethnic or specialty food items.
- The store visit report and photos showed no shopping carts or hand baskets for customer use thus severely limiting the amounts of food that could be moved to the checkout.
- No food packages, bundles, case sales, or other sales were evident that would explain the unusual transactions and the only bulk items available for purchase were three 25 LB bags of rice.

- The store visit report specifically noted that the firm was not a specialty store and that there were no meat bundles, seafood specials, or fruit/vegetable boxes for sale.
- There was only one checkout area that was approximately 2.0 feet wide and 1.5 feet deep with displays on both sides leaving a very limited area for customers to place their purchases. There also was a large ice cream freezer directly in front of the checkout area that customers must reach over in order to place their purchases onto the checkout counter and combined with the very small checkout area would make it problematic to process large orders. The checkout area had one cash register, a POS terminal, and no optical scanner as confirmed by a store employee.
- The firm had a minimal stock of staple foods that also included many single serving and pre-packaged items with a significant portion of inventory in drinks, candy, snacks, and baked goods as well as many ineligible items, particularly hot/cold prepared food items.
- There was a commercial kitchen/food preparation area with equipment that included a cooktop grill, deep fat fryer, sandwich press, microwave oven, commercial slicer and scale, stainless steel prep tables, and a commercial exhaust hood. There also was a large refrigerated deli case with a smaller heated display case on top. Per the store employee, store staple food stock is used in the preparation of the hot/cold, ready-to-eat prepared foods making it difficult to determine if a food item is actually for sale or for use in hot/cold food preparation. There was no posted menu listing the available hot/cold foods, but there was a posted price list with the per pound prices for the deli meats and cheeses.
- The firm had no fresh unprocessed meat, three packages of unprocessed seafood, no frozen unprocessed meat or seafood, a minimal selection of processed meat or seafood (canned items, jerky, deli meats, sausages, salami, and bacon), no hot dogs, no packaged lunch meats, no frozen entrees, no frozen dinners, several cartons of eggs, a moderate quantity and variety of fresh fruit and vegetables, no frozen fruit or vegetables, dried fruit, dried beans, fruit cups, 100 percent fruit juices, 100 percent vegetable juices, single serving nuts, a limited selection of canned soups, a minimal stock of canned or packaged staple food items, deli cheese, packaged cheese, no cheese dips, single serving yogurt, no sour cream, butter, margarine, a moderate stock of canned milk, several single serving milk drinks, several containers of fresh milk, coconut milk, Lactaid milk, Silk almond milk, bread, rolls, no pitas, tortillas, no tostadas, corn meal, flour, sugar, rice, hot cereals, cold cereals, single serving cold cereals, single serving Ramen noodle soups, canned pasta, single serving pasta, dry pasta, no dry noodles, pancake mixes, baking mixes, mac&cheese, no frozen foods, cooking oil, no coffee, tea, cocoa, a limited selection of baby foods, no infant formula, and few expensive staple food items.
- Ineligible items included: tobacco, lottery, alcohol, phone accessories, lottery, hot food, hot drinks, household and paper products, auto products, health and beauty items, ATM, and diapers while accessory foods included: candy, condiments, snacks, baked goods, cooking oil, sugar, single serving ice cream, spices, baking mixes, tea, cocoa, and un/carbonated drinks.
- The firm's hours of operation, as confirmed by the store employee, were 6 AM-12 AM Sunday-Thursday and 6 AM-2 AM Friday-Saturday. The store employee also stated that the firm did not take online grocery orders, did take phone grocery orders, did deliver groceries, and did not round transaction totals up/down.
- Signage was in English and there were no SNAP posters (anti-fraud, eligible items, reporting trafficking, etc.) visible in the store.

- Most food items were priced and comments on the FNS store visit report, completed in conjunction with the store employee, specifically stated that most food prices end in .x9 cents. A review of store visit photos confirmed the pricing structure of .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 three 25 LB bags of Jasmine rice priced at \$26.90, four 1.25 gallon containers of Wesson oil priced at \$14.99, one pound of deli meat priced at \$9.99 per pound, and one pound of deli cheese priced at \$7.99 per pound. This listing of the most expensive items was provided by the store employee during the store visit.
- While the firm did stock a limited selection of baby foods, it was not a WIC vendor. Most SNAP households with infants or small children are WIC participants and therefore would be purchasing these baby foods, formula, and other WIC products using WIC vouchers at a WIC vendor, not SNAP EBT at the Appellant firm.

### **Multiple transactions in unusually short time frames**

This Attachment documents 53 individual transactions in 24 sets of two or more transactions conducted by 14 different households in a short period of time.

5 U.S.C. § 552 (b)(6) & (b)(7)(C). The dollar amounts of subsequent transactions in each set are substantial and nearly equal or exceed the dollar amount of the initial transaction in 21 of the 24 sets. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Five sets are comprised of three individual transactions while the remaining 19 sets each have two individual transactions. It is not a usual shopping pattern to see so many purchases, in a short period of time, by the same recipients as documented in this Attachment. Multiple transactions conducted by the same household within a short period of time is a method which violating stores use to avoid single high dollar transactions that cannot be supported by store inventory and structure. These sets of transactions appear to be in amounts which are indicative of trafficking.

Appellant provided no documentation or explanation to support the legitimacy of the listed transactions in this Attachment.

Contrary to Appellant's claim of the firm offering a large variety of groceries and it being very easy for a recipient to spend a large part or even all of their SNAP benefits at the store, the FNS store visit report and photos show the firm offers a minimal quantity and variety of staple foods with no fresh unprocessed meat, only three packages of unprocessed seafood, no frozen unprocessed meat or seafood, and a minimal selection of processed meat or seafood. The fact that there is a medium grocery store less than one block away and a supermarket within two blocks that specializes in fresh meats and produce makes it unlikely that SNAP recipients would consider this firm as their primary source for groceries.

SNAP households have no limit on the number of times they may use their benefits or the dollar value of eligible food they may purchase. The SNAP transactions listed in this Attachment 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 a grocery store's stock and facilities and are thus indicative of trafficking. These transaction sets do not contain the characteristics associated with a household purchasing a forgotten item right after checking-out,

of household members/friends shopping together and making separate purchases, or of households making a purchase before or after paying-off their credit balance as all of the 24 transaction sets 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The transaction sets also do not contain the characteristics of a household returning later in the day or sending their child to purchase a forgotten item or two as all of the sets have subsequent transactions in amounts 5 U.S.C. § 552 (b)(6) & (b)(7)(C), far more than the cost of a forgotten item or two. Appellant offers no explanation as to why households would conduct up to three sizeable transactions at the Appellant firm within a short period of time.

It is certainly not unusual for a small number of SNAP households to conduct multiple transactions in a short period of time. However, it is unusual that subsequent transaction dollar amounts are substantial in these transaction sets and that all of the sets in this Attachment total 5 U.S.C. § 552 (b)(6) & (b)(7)(C) when the comparable average small grocery store SNAP transaction amount in Bronx County during the review period was \$9.45. These multiple transactions indicate that the amounts were contrived in an attempt to avoid suspiciously high transactions that would be indicative of trafficking by breaking them into multiple, smaller amounts. FNS transaction data shows that this same pattern of multiple transactions in unusually short time frames is not evident at other nearby like type grocery stores further supporting that trafficking was occurring at the Appellant firm during the period under review.

The Retailer Operation Division's analysis of shopping patterns for households listed in this Attachment shows they have ready access to transportation as evidenced by their shopping at a variety of larger food stores located nearby and at a distance from Appellant's location, including super stores and supermarkets. Appellant fails to offer any explanation or rationale as to why households who are shopping and spending large dollar amounts at many larger and better stocked stores would conduct multiple purchases totaling to high dollar values at a minimally stocked store. Common sense dictates that it is improbable that households would choose to spend large dollar amounts at the Appellant firm if their purchases consisted solely of eligible food items that could be purchased at any of the super stores and/or supermarkets they were already regularly shopping at and therefore more likely than not that these households were trafficking SNAP benefits at the Appellant firm.

There may be legitimate reasons why a SNAP household might return to a store during a short period of time, but the examples in this Attachment indicate a series of SNAP purchases that total to large dollar amounts. Multiple transactions over a short period of time, especially those of high dollar values, are indicative of attempts to obscure trafficking by dividing a large dollar value transaction into a series of smaller dollar value transactions and are a method which violating stores use to avoid high dollar transactions that cannot be supported.

### **High Dollar Value Transactions**

This Attachment lists 252 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 offering a minimal stock of staple foods and calls into question the legitimacy of these transactions. The transactions are also substantially higher than the average SNAP transaction amount of \$9.45 for similar Bronx County stores. This is unusual and indicative of trafficking.

The evidence under review shows that SNAP households shopping at the Appellant firm are also shopping at 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 SNAP eligible foods for better prices than can be found at the Appellant firm. The high dollar transactions remain questionable when considering the proximity of these 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 minimal, 5 U.S.C. § 552 (b)(6) & (b)(7)(C) of their purchases at larger food stores.

While households residing in areas with extremely limited grocery store options may conduct high dollar transactions at smaller stores out of necessity, this is not the case when they have better alternatives. FNS records show there are 52 comparably sized or larger SNAP retailers and specialty food stores located within a 0.46 mile radius of the Appellant firm that includes a medium grocery store located less than one block from Appellant's location and a supermarket less than two blocks away that specializes in fresh meats and produce. There also is a super store and another supermarket located less than five blocks from Appellant's location. All of these larger stores would offer greater quantities and varieties of staple foods at lower prices than would be found at a minimally stocked small grocery store offering no fresh or frozen unprocessed meats or seafood except for a few packages of Pollock.

The difference in the average SNAP transaction dollar amount, the total SNAP transaction dollar volume, and the total SNAP transaction count for Bronx County small grocery stores during the review months and at the Appellant firm is significant. Appellant's SNAP transaction dollar volume is 38.53 percent larger than that of Bronx County small grocery stores and its total SNAP transaction count is 38.98 percent larger than the County average while its average SNAP transaction dollar amount is almost the same as the County average. The extremely high number of SNAP transactions combined with the low average SNAP transaction dollar amount is an indication the firm may be dividing larger transactions into multiple smaller transactions in an effort to circumvent detection as previously discussed. 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 further indication that the transactions in this Attachment and the previous 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 has irregular SNAP transaction data compared to like type Bronx County stores. A comparison of Appellant's redemption data to Bronx County small grocery stores using 5 U.S.C. § 552 (b)(6) & (b)(7)(C) increments shows that Appellant's transaction count and dollar volume significantly exceeds that of like type stores in all ranges 5 U.S.C. § 552 (b)(6) & (b)(7)(C) at which point transactions stop. It is worth noting that Bronx County small grocery stores begin averaging less than one transaction in each range 5 U.S.C. § 552 (b)(6) & (b)(7)(C) while the Appellant firm does not stop having transactions



5 U.S.C. § 552 (b)(6) & (b)(7)(C), double the average for like type stores. The Appellant firm also has unusual spikes in the number and dollar volume of transactions

5 U.S.C. § 552 (b)(6) & (b)(7)(C). 5 U.S.C. § 552 (b)(6) & (b)(7)(C). This transaction pattern and the unusual spikes in both transaction numbers and dollar volume do not appear in the transaction patterns or in the transaction count and dollar volume averages for other like type stores. These large dollar 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 minimal stock of staple foods and the lack of any specialty, bulk, or ethnic foods that might sell for large dollar amounts and also considered this to be a strong indication of trafficking. Appellant offered no contentions to explain these unusual and suspicious differences.

Appellant contends the large purchases were made by three households that were allowed to use credit and that the firm offers a large variety of groceries including deli meats, produce, bread, eggs, milk, fruits, vegetables, yogurts, juices, etc. The firm also replenishes stock on a daily basis so needed items, including fresh merchandise, are always in stock. It would be very easy for a recipient to spend a large part or even all of their SNAP benefits at the store. Appellant submitted printouts covering the period April-September 2018 from Jetco Cash & Carry, F & J Master Sales, AAA Wholesale Distributors Corp, and two invoices from Goya for inventory purchases to support the legitimacy of the listed transactions in this Attachment and stated that the majority of invoices/receipts were damaged or destroyed by a flood in the firm's cellar. Appellant's contentions pertaining to credit will be discussed in greater detail later in this decision. However, it is noted that 14 households conducted the transactions in the first Attachment and 106 households conducted the transactions in this Attachment; far more than the three households claimed by Appellant.

No evidence, such as an insurance claim or photos, were offered by Appellant to substantiate its claim of a flood occurring.

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 store stock. A shopping pattern analysis by the Retailer Operations Division shows that households in this Attachment are regularly shopping at much larger stores, and conducting high dollar transactions, yet are conducting comparable or higher dollar 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.

Information obtained during the October 29, 2018, FNS store visit shows that the Appellant firm offers a minimal stock of staple foods that also includes many single serving and pre-packaged items with a significant portion of inventory in drinks, candy, snacks, and baked goods as well as many ineligible items, particularly hot/cold prepared food items. The fact that tobacco, lottery, alcohol, phone accessories, lottery, hot food, hot drinks, household and paper products, auto products, health and beauty items, ATM, and diapers are not eligible for purchase with SNAP benefits also provides no justification for the high transaction amounts.

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 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 also offer store brand products at lower prices, 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 review period to document the legitimacy of these excessively large transactions. The firm also has a very small checkout area and no shopping carts or hand baskets thereby making it extremely difficult to facilitate the great quantities of eligible food items required to make up these large dollar transactions. The fact that the firm carries a minimal stock of staple food items also makes it improbable that the food items purchased in the high dollar transactions in this Attachment were for the purchase of eligible food items and more likely that the amounts were contrived.

A detailed analysis of printouts and invoices submitted for inventory purchases was conducted by the Retailer Operations Division and the dollar amount of eligible food purchases plus markup compared to the firm's SNAP redemptions for the review period. The information provided supports that the firm primarily offers a wide variety of accessory foods, hot and/or cold prepared foods, and ineligible nonfood items. The Retailer Operations Division analyzed the information provided and after applying a 40 percent markup determined that the firm had insufficient stock to support SNAP redemptions and cash/credit card sales at the Appellant firm during the months under review. Insufficient inventory is an indication of trafficking.

It is further noted that SNAP redemptions at the Appellant firm fluctuated unusually following the FNS store visit on October 29, 2018. The average SNAP transaction dollar amount decreased 6.12 percent from October 2018 to November 2018 while the volume of SNAP redemptions decreased 16.86 percent and the number of SNAP transactions decreased 11.36 percent over the same period. The opposite occurred when March 2019 redemptions abruptly climbed sharply following receipt of the FNS charge letter on February 25, 2019. A pronounced fluctuation in SNAP redemptions following the store visit or 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.

### **Credit Contentions**

Appellant contends the firm allows credit accounts, a violation of SNAP regulations at Section 278.2(f), as evidenced by the Appellant's written statements. Appellant also claims it does not allow any trafficking or rule breaking at the firm as it would jeopardize the SNAP license that the firm depends on to stay open.

While store ownership may or may not have personally conducted the violative transactions, SNAP rules and regulations state that regardless of whom store ownership may utilize to handle store business or their degree of involvement in store operations, the owner is accountable for the

proper training of staff and the monitoring and handling of all SNAP benefit transactions. When the owner signed the certification page of the SNAP retailer application to begin operating as a SNAP retailer, s/he confirmed s/he understood and agreed to abide by program rules and regulatory provisions. S/he agreed to accept responsibility for SNAP including those committed by any of the firm's employees, paid or unpaid, new, full-time or part-time. This certification page specifically cites violations such as accepting SNAP benefits as payment on credit accounts or loans. The certification is clear that store ownership understood by signing the document that violations of program rules can result in administrative actions such as fines, sanctions, withdrawal, or disqualification from the SNAP. Despite agreeing to abide by SNAP rules and regulations, ownership now admits that the firm allowed credit accounts, a clear violation of SNAP regulations and rules. Additionally, the SNAP Retailer Training Guide and the training video, provided to all retailers upon initial authorization, are also available on the same web site used by store owners to submit online SNAP retailer applications. Both the guide and video cite credit accounts as violating SNAP regulations. Had store ownership reviewed the SNAP training materials provided by FNS or trained his employees using these materials, it is inconceivable that s/he could not have been aware that credit accounts violate SNAP regulations.

The owner's admission to extending credit is documented in the case file under review and is not contested. Accepting SNAP benefits for payment on credit is a violation of Section 278.2(f) and warrants a one year disqualification period as specified by Section 278.6(e)(4). It is the agency's position that credit violations constitute owner or management involvement and that a one year disqualification is the base sanction. To refute charges of trafficking, the retailer must provide adequate proof that credit accounts existed at the time the suspicious transactions occurred so that a comparison can be made with transactions outlined in the charge letter. A level of detail regarding the legitimacy of credit accounts is necessary since retailers have long admitted to credit in an attempt to garner a lesser penalty after committing more egregious violative acts. Credit transactions must be accounted for with substantive evidence such as the dates credit was extended, to whom, for what amount, and for what items. If such exculpatory evidence is not advanced, the appropriate penalty is permanent disqualification.

Appellant was unable to provide any documentation supporting the existence of credit accounts at the firm.

Since Appellant was unable to account for any of the charge letter transactions as being due to credit, the original determination made by the Retailer Operations Division was evaluated to determine if trafficking occurred. The transactions showed clear and repetitive patterns of unusual, irregular, and inexplicable SNAP activity indicative of trafficking as previously discussed.

### **Other Contentions**

Regarding Appellant's denial of trafficking, the purpose of this review is to either validate or to invalidate the earlier decision of the Retailer Operations Division and is limited to what circumstances were at the basis of the action at the time such action was made. 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. When the store owner signed the certification page of the SNAP retailer authorization application to become a SNAP retailer, s/he confirmed s/he understood and agreed to abide by program rules and regulatory provisions. S/he also agreed to accept responsibility on behalf of the firm for violations of the SNAP including those committed by any of the firm's employees, paid or unpaid, new, full-time or part-time. The certification is clear that store ownership understood by signing the document that violations of program rules can result in administrative actions such as fines, sanctions, withdrawal, or disqualification from the SNAP.

Appellant's claim that store ownership does not allow any trafficking or rule breaking at the firm is repudiated by the firm's WIC vendor agreement being terminated in 2017 due to multiple program violations. The fact that store ownership freely stated it allowed the use of credit accounts at the firm with the balances being paid-off using SNAP benefits also refutes this claim of no rule breaking. As previously stated, both the Retailer Training Guide and the FNS video cite credit accounts as violating SNAP regulations so Appellant's contention is without foundation.

The owner and the firm were charged with trafficking based on a computer analysis of the store's transactions for the review period. 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 an analysis of shopping patterns for recipient households conducting transactions at the Appellant firm during the review period. This analysis also 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. 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.

It is recognized that some degree of economic hardship is a likely consequence whenever a store is disqualified from participation in SNAP. However, there is no provision in the SNAP regulations for waiver or reduction of an administrative penalty assessment on the basis of possible economic hardship to the firm or to ownership resulting from imposition of such penalty. To allow ownership to be excused from an assessed administrative penalty based on purported economic hardship to the firm would render virtually meaningless the enforcement provisions of the Food and Nutrition Act of 2008, as amended, and the enforcement efforts of the USDA. Furthermore, 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, ownership’s contention that the firm may incur economic hardship based on the assessment of an administrative penalty does not

provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

### **CIVIL MONEY PENALTY**

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 a CMP 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). Based on the above, 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

July 22, 2019