

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

**Chen Sunrise Mini Market Inc,**

**Appellant,**

**v.**

**Retailer Operations Division,**

**Respondent.**

**Case Number: C0215750**

**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 Chen Sunrise Mini Market Inc (hereinafter Appellant) from participating as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP).

**ISSUE**

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with Title 7 of the Code of Federal Regulations (CFR) § 278.6(a), (c) and (e)(1)(i), when it imposed a permanent disqualification against Appellant on June 11, 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 April 11, 2019, the Retailer Operations Division charged Appellant with trafficking based on a series of irregular SNAP transaction patterns that occurred in July through December 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 April 15, 2019, that did not contain a request for a CMP or any documentation in support of one. The Retailer Operations Division notified

Appellant by letter dated June 11, 2019, that the firm was permanently disqualified from participation as a SNAP retailer in accordance with 7 CFR § 278.6(c) and 278.6(e)(1) for trafficking violations. This letter also stated that Appellant was not eligible for the CMP because insufficient evidence was submitted to demonstrate that it had established and implemented an effective compliance policy and program to prevent SNAP violations.

By letter dated June 17, 2019, Appellant appealed the Retailer Operations Division's assessment and requested administrative review. The appeal was granted. 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 §278.6(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 July through December 2018. This involved two patterns of EBT transaction characteristics indicative of trafficking:

1. An excessive number of manually keyed EBT transactions were made from the firm.
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 manual transactions are because the firm’s EBT machine is old and some customer’s cards are hard to swipe. Two customers provided written statements explaining why the owner has to input transactions manually;
- The large transactions are because the store has a special offer on two cases of Similac Pro-Advance for \$125.00 or one case for \$62.50. Three cases are \$187.50, four cases are \$250.00, and five cases are \$312.50. A baby usually drinks three to five cases of formula every month so the store was purchasing a lot of formula;
- The WIC Vendor Monitoring Form dated April 20, 2018, shows the firm sells the 12.5 ounce Enfamil powdered formula for \$18.12 and the firm has a lot of receipts for the formula. The owner believes that transactions #121 (5 U.S.C. § 552 (b)(6) & (b)(7)(C)) and #131 (5 U.S.C. § 552 (b)(6) & (b)(7)(C)) are for four and three cans of formula; and,
- The store sells lots of expensive things as shown by the receipts provided.

Appellant submitted two customer statements; a copy of a WIC Vendor Food Sales Information form dated June 14, 2019; copies of New York State Sales and Use Tax Returns for June-August 2018, September-November 2018, and December 2018-February 2019; a WIC Vendor Monitoring Form dated April 20, 2018; receipts for Enfamil Infant formula purchases; photos of Enfamil and Similac Infant Formula; receipts for Similac Infant formula purchases from March 2018-December 2018; and a printout showing items ordered from Amazon in 2018 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 August 19, 2013. The case file indicates that in reaching a disqualification determination, the Retailer Operations Division considered information obtained during a February 19, 2019, 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 an extremely limited quantity and variety of staple foods and carrying no other unique items or offering any distinctive services. The store stocked traditional American brands and there were little or no ethnic or specialty food items.
- The store visit report and photos showed no shopping carts and only two small handheld 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 no cased items were available for purchase with the exception of drinks. The firm did stock six 20 pound bags of rice priced at \$10.00, but had no other bulk items.
- The store visit report specifically noted that the firm was not a specialty store and that there were no meat packages, fish specials, or fruit and vegetable boxes for sale.
- There was only one checkout area that was approximately 1.5 feet wide and 1.5 feet deep leaving a very limited area for customers to place their purchases. The very small checkout area would make it problematic to process large orders. The checkout area had one cash register, one POS terminal, and no optical scanner as confirmed by the store owner.
- The firm had an extremely limited stock of staple foods that also included many single serving and pre-packaged items with a significant portion of inventory in soda, candy, snacks, other drinks, and many ineligible items.

- The firm had no fresh or frozen unprocessed meat, no fresh or frozen unprocessed seafood, an extremely limited quantity and variety of processed meats and seafood (canned meat, poultry, and fish), no hot dogs, no sausages, no bacon, no deli meats, no jerky, no packaged lunch meats, no frozen entrees, no frozen dinners, eight cartons of eggs, a very limited selection of fresh fruit and vegetables, no frozen fruits or vegetables, dried beans, no other dried fruit or vegetables, no packaged nuts, a limited stock of single serving nuts, 100 percent fruit juices, no 100 percent vegetable juices, a minimal selection of canned soups, a minimal quantity and variety of canned and packaged staple food items, no deli cheese, a very limited selection of packaged cheese, no yogurt, no single serving yogurt, no butter, no margarine, no sour cream, fresh milk, no canned milk, no coconut milk, no soy milk, no Lactaid milk, no powdered milk, no single serving milk drinks, no cream cheese, one loaf of bread, no rolls, no tortillas, no pitas, no tostadas, no corn meal, no flour, four small boxes of sugar, a moderate stock of rice, cold cereal, no single serving cold cereal, no hot cereal, single serving Ramen noodle soups, no canned pasta, no single serving pasta, dry pasta, no dry noodles, no pancake mixes, no baking mixes, no frozen or refrigerated foods other than single serving sizes of ice cream, several mac&cheese, no single serving mac&cheese, no spices, cooking oil, three coffee, one tea, no cocoa, a moderate stock of baby foods, eight infant cereals, milk based infant formula, no soy infant formula, and no expensive staple food items outside of infant formula.
- Ineligible items included: lottery, alcohol, household products, paper products, health and beauty items, diapers, phone cards, clothing, shoes, party supplies, candles, electronics accessories, office/school supplies, woven baskets, keys, and door locksets while accessory foods included: candy, condiments, snacks, cooking oil, sugar, single serving ice cream, coffee, tea, and un/carbonated drinks.
- The firm's hours of operation, as confirmed by the store owner, were open 11:00 AM-8:00 PM daily. The owner also stated that the firm did not take phone or online orders, did not deliver groceries, and did not round transaction totals up or 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 individually priced and comments on the FNS store visit report, completed in conjunction with the store owner, specifically stated that most food prices end in .x9. A price ending in .x9 cents is the most common pricing structure for stores of this type.
- The FNS store visit report listed the four most expensive food items costing more than \$5.00 for sale in the store as being: a 40 ounce container of Similac Advance Infant Formula priced at \$35.00, a 30.8 ounce container of Similac Advance Infant Formula priced at \$29.00, a 21 ounce container of Enfamil Premium Infant Formula priced at \$22.00, and a 12.5 ounce container of Enfamil Infant Formula priced at \$18.99. It was noted that there were only six containers of the Enfamil Premium Infant Formula, one container of the 40 ounce Similac Advance Infant Formula, and two containers of the 30.8 ounce Similac Advance Infant Formula in stock. This listing of the most expensive items was provided by the store owner during the store visit.
- Although the firm was a WIC vendor, most SNAP households with infants or small children are WIC participants and therefore would be purchasing these products using WIC vouchers, not SNAP EBT benefits.

- The store visit report and photos showed many empty or minimally stocked shelves and coolers. The quantity and variety of the store's staple food inventory was also considerably less than that seen during the previous FNS store visit just 11 months earlier on March 26, 2018.

### **Excessive Numbers of Manually Keyed EBT Transactions**

This Attachment documents 58 manually keyed SNAP transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** conducted by 18 different households at the Appellant firm that is an unusually high number and accounts for one out of every three SNAP transactions during the review period. There are also 38 transactions ending in the same cents amount of .00 cents and 15 ending in the same cents amount of .50 cents that are not supported by the store pricing structure. **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**.

Appellant contends the manual transactions are because the firm's EBT machine is old and some customer's cards are hard to swipe. Two customers provided written statements explaining why the owner has to input transactions manually.

Manually keyed transactions are those in which the magnetic strip on the back of an EBT card is not being read by the store's POS device and the clerk must manually key enter the lengthy EBT card number. When the magnetic strip on an EBT card fails, it can no longer be swiped and replacement EBT cards contain different identification numbers. On-site investigations into trafficking at retailers have found it is not uncommon for retailers to have a SNAP recipient's PIN and EBT card number in order to facilitate trafficking SNAP benefits in exchange for cash without the need for the recipient to be physically present. The retailer key enters the EBT card number manually as the recipient has the actual EBT card and then enters the PIN. A review of other EBT transactions shows that the Appellant firm's POS device was functioning properly as there were swipe transactions before and after the manual transactions. A SNAP recipient's EBT card having a worn or malfunctioning strip is the only possible reason, outside of trafficking, for these excessive numbers of manual transactions. An analysis of the transaction data in this Attachment identified transactions by multiple households which do not fit the pattern of an EBT card having a worn or malfunctioning strip and therefore are indicative of trafficking. Specifically, the Retailer Operations Division identified numerous households that conducted manually keyed transactions at the Appellant business even though the household's EBT card was being swiped at other stores. In many instances, a recipient's EBT card was manually keyed **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** before or after a swiped transaction at another business. A pattern of manually keyed and swiped transactions using the same EBT card is indicative of trafficking.

If the store's POS device were old and hard to operate, it would be expected that the percentages of transactions having to be manually keyed would be the same for all dollar ranges as the dollar amount of a transaction would have no bearing on the terminal's operation. However, an analysis of all SNAP transactions at the Appellant firm shows that more than 70.0 percent of the transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** were manually keyed while only 18 percent of the transactions for less **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** were manually keyed. This difference

cannot be explained unless the manually keyed transactions were deliberately done in order to traffick.

A review of the transactions conducted by the two SNAP customers who provided written statements shows that only one recipient statement mentions purchasing infant formula at the Appellant firm. Both of these recipients also shopped at many larger stores, primarily super markets and super stores, located nearby as well as at a significant distance from Appellant's location. The first recipient shopped at the Appellant firm 16 times throughout the six month review period and had manually keyed transactions each time, but had 118 transactions at 44 other stores with only one other manually keyed transaction. The vast majority of this recipient's transactions (29 of the 44 other stores) occurred more than 6.9 miles away in Manhattan or the Bronx indicating that this household likely does not reside near the Appellant firm, yet travelled more than 13 miles round trip out of its way to shop there. The second recipient shopped at the Appellant firm only five times throughout the six month review period and had manually keyed transactions each time. All, but two of the 19 other stores where the second recipient regularly shopped, as evidenced by the 130 transactions at them, were located more than a mile away with most located 1.4-2.8 miles away from Appellant's location meaning that this recipient was also travelling miles out of her way to shop at the Appellant firm. Both recipients had swiped transactions before and after each of their manually keyed transactions showing that there were no problems with the magnetic strip on their EBT cards. There is no legitimate reason why these households would spend so much of their SNAP allotment at a very poorly stocked grocery store when they clearly had access to and frequently shopped at supermarkets and super stores located nearby and at a distance. The more plausible explanation is that these households were trafficking at the firm. Other households analyzed exhibited similar shopping patterns indicative of trafficking.

Appellant failed to offer any explanation or rationale as to why households who are regularly shopping and spending large dollar amounts at many larger and better stocked stores would conduct multiple purchases often totaling to comparable or higher dollar amounts at a very poorly stocked grocery 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 the more plausible explanation is that these households were trafficking SNAP benefits at the Appellant firm.

Lastly, this Attachment contained two transactions posted outside of the store's reported business hours **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** with the earliest transaction posted at 10:29 AM. Both of these transactions occurred before the 11:00 AM opening time reported on the firm's SNAP reauthorization application dated February 15, 2018, and as confirmed by the store owner during the FNS store visit conducted on February 19, 2019. Appellant offered no explanation for these afterhours transactions. It is an indication of trafficking when transactions occur outside of the store's business hours.

## High Dollar Value Transactions

This Attachment lists 81 individual EBT transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. The substantial number of high dollar transactions is uncharacteristic for a grocery store offering an extremely limited 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 \$10.66 for this store type in Kings County. This is unusual and indicative of trafficking.

The evidence under review shows that SNAP households shopping at the Appellant firm are also shopping at many full-line supermarkets and super stores, located nearby as well as at a distance from Appellant's location that offer a greater quantity and variety of SNAP eligible foods items for better prices than customers can find at the Appellant firm. These high dollar value transactions remain questionable when considering the proximity of the other stores that would be better shopping options for consumers. Based on their shopping patterns, transportation does not appear to be an issue for these households. Yet, they continue to shop and spend suspicious high dollar amounts at the Appellant firm, where the eligible food stock is very limited, **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 small grocery stores out of necessity, this is not the case when they have better alternatives. FNS records show there are 42 comparably sized or larger SNAP retailers located within a 0.5 mile radius of the Appellant firm that includes four super stores, four supermarkets, two large grocery stores, 10 medium grocery stores, and 21 small grocery stores. The two closest super stores are located one and five blocks away while the closest large grocery store is two blocks away; the large grocery store is also a WIC vendor. The larger stores would offer greater quantities and varieties of staple food items at lower prices than would be found at a very poorly stocked small grocery store offering no fresh or frozen unprocessed meats or seafood and a very limited selection of fresh fruit and vegetables. The proximity of the super stores and supermarkets combined with Appellant's extremely limited stock of staple foods makes it unlikely that any SNAP recipient would consider the Appellant firm as their primary source for groceries.

The difference in the average SNAP transaction amount, the total SNAP transaction dollar volume, and the total SNAP transaction count for Kings County small grocery stores during the review months and at the Appellant firm is significant. Appellant's average SNAP transaction amount is **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** larger than that of Kings County small grocery stores while its average SNAP transaction dollar volume is 60.24 percent smaller and its total SNAP transaction count is 94.55 percent smaller than the County average. 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 had irregular SNAP transaction data compared to like type stores in Kings County. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). This transaction pattern and the unusual spikes in both transaction number 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 extremely limited 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. None of Appellant's contentions explain these unusual and suspicious differences.

The SNAP transactions noted in this Attachment are not presumed to be trafficking because they exceed a set dollar amount; they are questionable because they are inconsistent for this type of store and 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.

Appellant contends the large transactions are because the store has a special offer on two cases of Similac Pro-Advance for \$125.00 or one case for \$62.50. Three cases are \$187.50, four cases are \$250.00, and five cases are \$312.50. A baby usually drinks three to five cases of formula every month so the store was purchasing a lot of formula. The WIC Vendor Monitoring Form dated April 20, 2018, shows the firm sells the 12.5 ounce Enfamil powdered formula for \$18.12 and the firm has a lot of receipts for the formula. The owner believes that transactions #121 (5 U.S.C. § 552 (b)(6) & (b)(7)(C)) and #131 (5 U.S.C. § 552 (b)(6) & (b)(7)(C)) are for four and three cans of Enfamil formula. The store also sells lots of expensive things as shown by the receipts provided. Appellant submitted a copy of a WIC Vendor Food Sales Information form dated June 14, 2019; copies of New York State Sales and Use Tax Returns for June-August 2018, September-November 2018, and December 2018-February 2019; a WIC Vendor Monitoring Form dated April 20, 2018; receipts for Enfamil Infant formula purchases; photos of Enfamil and Similac Infant Formula; receipts for Similac Infant formula purchases; and a printout showing items ordered from Amazon in 2018 in support of these contentions.

Information obtained during the FNS store visit on February 19, 2019, shows that the Appellant firm offers an extremely limited quantity and variety of SNAP eligible staple food items, many accessory foods, and many ineligible items. Much of the inventory for sale consists of inexpensive snacks, candy, drinks, and various single serving foods as well as many ineligible items. The fact that lottery, alcohol, household products, paper products, health and beauty items, diapers, phone cards, clothing, shoes, party supplies, candles, electronics accessories, office/school supplies, woven baskets, keys, and door locksets are not eligible for purchase with SNAP benefits also provides no justification for the high transaction amounts. Although the firm was a WIC vendor, most SNAP households with infants or small children are WIC participants and therefore would be purchasing baby foods, formula, and other staple food items using WIC

vouchers, not SNAP EBT benefits. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The New York WIC State Agency authorized the Appellant firm to sell Enfamil infant formula, but not Similac infant formula. The WIC Monitoring Form dated April 20, 2018, shows the firm was only authorized to sell the 13 ounce Enfamil concentrate and the 12.5 ounce Enfamil powdered formula under the WIC program with the concentrate priced at \$5.45 and the powder priced at \$18.12. During the FNS store visit on February 19, 2019, these items were priced at \$5.99 and \$18.99, respectively. While the store owner cited two transactions listed in this Attachment as being for purchases of four and three containers of Enfamil 12.5 ounce powdered formula based on pricing of \$18.12, which is possible, it would not make sense for SNAP recipients to use their limited SNAP benefits to purchase very expensive items such as infant formula that could be acquired with WIC benefits at no cost. It is also noted that if the powdered formula were priced at \$18.99 or some other amount greater than \$18.12, that purchases of four or three cans would not equal the same amounts. It is also significant that the quantity and variety of the Appellant firm's staple food inventory during the store visit was considerably less than that seen during the previous store visit just 11 months earlier on March 26, 2018. Furthermore, the store visit report includes a section listing the four most expensive food items costing more than \$5.00 for sale in the store. This section, as well as the rest of the store visit report, was completed in conjunction with the store owner and reflected the higher prices for the Enfamil formula, but most significantly, it did not list any case prices or specials for Similac formula. It was not until the store owner responded to the FNS charge letter on April 15, 2019, that any mention was made of cases of Similac being offered at a special price. The many store visit report photos also did not show any cases of Similac for sale further disputing Appellant's claim.

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 period under review to document the legitimacy of these excessively large transactions. The firm also has a very small checkout area and no shopping carts 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 an extremely limited stock of staple food items also makes it improbable that the high dollar transactions in this Attachment were for the purchase of eligible food items and more likely that the amounts were contrived.

An analysis of invoices submitted for inventory purchases was conducted by the Retailer Operations Division and the dollar amount of eligible food purchases compared to the firm's SNAP/WIC redemptions for the review period. Many of the invoices submitted were excluded as they were duplicates of previously submitted invoices, were dated outside of the review period, were undated (summary invoices covering an entire year), or did not list what was purchased. The Similac invoices submitted by Appellant 5 U.S.C. § 552 (b)(6) & (b)(7)(C) so even if 100 percent of the Similac was purchased with SNAP, which is highly unlikely, it would still account for less than half of the SNAP redemptions listed in this Attachment. It should also be noted that if the WIC redemptions 5 U.S.C. § 552 (b)(6) & (b)(7)(C) are added to the SNAP

redemptions 5 U.S.C. § 552 (b)(6) & (b)(7)(C), the store's extremely limited food stock would not have supported these sales. Therefore, there was insufficient food stock to support SNAP and WIC redemptions during the months under review. Insufficient inventory is an indication of trafficking.

SNAP redemptions at the Appellant firm fluctuated unusually following the store visit on February 19, 2019, as well as after receipt of the charge letter on April 12, 2019. The volume of SNAP redemptions at the Appellant firm decreased 72.78 percent from January 2019 to February 2019 while the number of SNAP transactions decreased 63.16 percent and the average SNAP transaction amount decreased 26.11 percent during this same period of time. The volume, number, and average dollar amount of SNAP transactions also decreased following receipt of the charge letter on April 12, 2019. A pronounced fluctuation in SNAP redemptions following the store visit and receipt of the charge letter is a clear indication of trafficking since, if trafficking were not occurring, there would be no abnormal fluctuations in redemption amounts.

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

### **Other Contentions**

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, it confirmed it understood and agreed to abide by program rules and regulatory provisions. It 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.

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 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.

### **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 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 request or 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

October 8, 2019