

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

**E S Wholesome Foods Of Brooklyn  
Corp.,**

**Appellant,**

**v.**

**Retailer Operations Division,**

**Respondent.**

**Case Number: C0191771**

**FINAL AGENCY DECISION**

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS), that there is sufficient evidence to support a finding that a Permanent Disqualification from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP) was properly imposed against E S Wholesome Foods Of Brooklyn Corp. (hereinafter “Wholesome Foods”) by the Retailer Operations Division of FNS.

**ISSUE**

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR § 278.6(e)(1)(i) in its administration of the SNAP, when it imposed a Permanent Disqualification against Wholesome Foods on April 11, 2018.

**AUTHORITY**

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

**CASE CHRONOLOGY**

In a letter dated July 27, 2016, the Retailer Operations Division informed the Appellant that Wholesome Foods was in violation of the terms and conditions of the SNAP regulations, 7 CFR § 270 –282, based on EBT SNAP benefit transactions that "establish clear and repetitive patterns of unusual, irregular, and inexplicable SNAP activity for your type of firm."

In telephone and written responses to the Retailer Operations Division dated August 5, 2016, August 26, 2016, December 14, 2016, January 26, 2018, February 26, 2018, March 6, 2018, and March 16, 2018, the Appellant, through counsel, denied the trafficking allegations and provided

various explanations for the questionable SNAP transactions that were outlined in the July 27, 2016 Charge Letter.

It is important to note that in response to the Charge Letter dated July 27, 2016, the Appellant's counsel also requested information and documentation from FNS with regard to the agency's case against Wholesome Foods pursuant to the Freedom of Information Act (FOIA) in a letter dated August 26, 2016. The record indicates that FNS issued a response to counsel's FOIA request on September 15, 2016. The Appellant's counsel then appealed the FOIA information with correspondence dated December 14, 2016. The record indicates that FNS issued a response to counsel's FOIA appeal on January 23, 2018.

After considering the Appellant's replies and the evidence in the case, the Retailer Operations Division issued a Determination Letter dated April 11, 2018, informing the Appellant that Wholesome Foods was being permanently disqualified from participation in the SNAP in accordance with 7 CFR § 278.6(e)(1) for trafficking violations.

In a letter postmarked April 17, 2018, the Appellant, through counsel, requested an administrative review of the Retailer Operations Division's decision to permanently disqualify the firm from participation in the SNAP. FNS granted the Appellant's request for administrative review by letter dated April 30, 2018.

### **STANDARD OF REVIEW**

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

### **CONTROLLING LAW**

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

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

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

7 CFR § 278.6(a) states, inter alia:

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

7 CFR § 278.6(e)(1)(i) states:

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

7 CFR § 271.2 states, inter alia:

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

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

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

7 CFR § 278.6(i) states, inter alia:

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

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

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

(iii) If a firm fails to request consideration for a civil money penalty in lieu of a permanent disqualification for trafficking and submit documentation and evidence of its

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

### **SUMMARY OF CHARGES**

The Appellant was charged and determined to be trafficking based on an analysis of EBT transaction data from January 2016 through June 2016. This involved the following SNAP transactions patterns which are indicative of trafficking:

- There were an unusual number of transactions ending in a same cents value;
- There were multiple purchase transactions made from individual benefit accounts in unusually short timeframes;
- There were transactions in which the majority or all of individual recipient benefits were exhausted in unusually short periods of time; and
- There were excessively large purchase transactions made from recipient accounts.

### **APPELLANT'S CONTENTIONS**

The following represents a brief summary of the Appellant's contentions in this matter. Please be assured, however, that in reaching a decision, full attention and consideration was given to all contentions presented, including any not specifically recapitulated or specifically referenced herein.

In the replies to the Charge Letter and in the review request postmarked April 17, 2018, and in a subsequent correspondence dated June 13, 2018, the Appellant, through counsel, stated the following summarized contentions, in relevant part:

- The Appellant denies that trafficking of SNAP benefits took place at Wholesome Foods.
- The charges of SNAP benefit trafficking are solely based upon numbers generated by a computer generated statistical program. Therefore, the decision to permanently disqualify Wholesome Foods from the SNAP is based on circumstantial and inadequate evidence and is a flawed approach to use as the basis for enforcing permanent disqualification of retailers.
- There is evidence from the agency's on-site undercover investigation of Wholesome Foods that trafficking never occurred at the store. On each of the four store visits, store personnel refused to traffick SNAP benefits. Therefore, it is illogical that FNS sustained trafficking allegations based upon computer statistics when direct evidence is available and directly contradicts those computer statistics. According to the 2017 SNAP Retailer Management Year End Summary, "Completed FNS Undercover Retailer Investigations" chart, only 313 times was trafficking found to have occurred out of 5,557 attempts during under-cover investigations of retail stores. This amounts to five percent of the in-store investigations resulting in trafficking.
- Much of the information in the agency's record is inaccurate and contradictory as indicated in different store visits of Wholesome Foods. For example:
  - The store visit report from March 18, 2015 stated that the subject store is 5,000 square feet in size. The store visit report from June 24, 2016 stated that the store

is 1,100 square feet in size. The actual size of the store is 3,000 square feet according to the Floor Plans provided to FNS. FNS used the report that strengthened its case against the firm. Wholesome Foods also stores additional inventory in the basement.

- The store visit report from March 18, 2015 indicates that the subject firm had shopping carts available for customers. The store visited report from June 24, 2016 indicates that there were no shopping carts available. The photos provided by the Appellant show that there are six shopping carts available in the subject store. FNS drew conclusions based on false information provided in the store visit of June 24, 2016.
- FNS repeatedly failed to disclose the information requested by the Appellant's counsel with regard to counsel's FOIA request. The agency forwarded completely redacted, blank pages or incomplete pages from the agency's investigation with significant portions of those pages redacted. As such, information that remains undisclosed to the Appellant must not be considered by FNS when enforcing a permanent disqualification penalty since the agency precluded the Appellant's ability to challenge or defend itself against an undisclosed accusation statistic and/or conclusion. FNS failed to provide the information requested yet uses the ALERT system data as the only circumstantial evidence to penalize the Appellant.
- The Appellant readily admits in his affidavit that he extended credit to SNAP customers as he could not turn away hungry people. This accounts for many of the large purchases in that the credit was repaid by the SNAP customers. The Appellant did not realize that credit extension was a violation of the SNAP rules. The Appellant has since instructed all store employees that credit extension must be ceased. The method for keeping track of the customers that were extended credit was to keep a notebook at the checkout counter. When a customer requested credit, the purchase was written down along with the customer's name, date, and dollar amount owed. Once the customer paid off the credit account, employees discarded that page of the notebook. Since the Appellant did not realize that extending credit was a SNAP violation, he did not save any of these "credit receipt" sheets. Many of the customers that once purchased on credit have since ceased shopping at the store. They became angry when the store would no longer offer credit and vowed never to shop there again. The Appellant has sought to obtain signatures and affidavits from the few customers that continue to shop at the store. However, they are all afraid to admit to purchasing on credit because they do not want to lose their SNAP benefits. The Appellant provided affidavits from two SNAP customers who attested that credit was extended to them by Wholesome Foods.
- With regard to the unusual number of transactions ending in a same cents value, the Appellant provided FNS with a hand-written list of 82 eligible food items that end in \$x.00 and \$x.50 and nearly every combination of any of the items identified or quantity purchased by a SNAP customer would result in a total cost of transaction ending in \$x.00. Wholesome Foods has a 16 foot long deli area with an assortment of meats, sausages, chicken, and cheese that are freshly prepared as sandwiches, paninis, or wraps in fixed dollar amounts. The retailer's deli business is an important portion of its income and has grown on a continuous basis. In Federal case, Duchimaza and Cecilia's Market, LLC vs. United States of America, No. 3:14-cv-00887 (MPS), the United States District Court, District of Connecticut explained that a retailers list of eligible

food items ending in \$.00, \$.50 and \$.25, would create a genuine issue of material fact to rebut the charge of "an unusual number of transactions ending in a same cents value".

- With regard to the multiple transactions made from individual benefit accounts in unusually short timeframes, Wholesome Foods is located in the center of dozens of six story apartment complexes and various 20 plus story high rise project buildings where thousands of residents live within a short walking distance from the store. The building in which Wholesome Foods is located alone reside more than 50 families. The SNAP households who reside in the apartment complexes and public housing projects also patronize the subject store. SNAP recipients who frequent the Brooklyn Botanical Gardens and the Brooklyn Museum are also in close proximity to Wholesome Foods. A fact sheet from the United States Census Bureau shows that the population for Brooklyn, New York in 2016 to be estimated at 2,629,150. The total number of SNAP recipients in New York City in January 2016 was 1,676,822 as indicated by the New York City Department of Social Services. The nearest markets to Wholesome Foods are approximately five blocks away. Thousands of SNAP customers shop at the subject store because they are unable to travel long distances due to disabilities, old age and inconvenience. The Appellant also cited the 2004 Court of Appeals case, Idias vs. United States of America, et all, 359 F. 3d 695 in support of this contention. Many of the submitted customer affidavits state that they shop more than once a day at Wholesome Foods. These signed affidavits from various SNAP customers are direct evidence that trafficking did not occur at the subject store. In addition, there are no guidelines or standards delineating specific timeframes within which Wholesome Foods must prohibit or allow transactions to be made by the same SNAP recipient, nor is there a standard for multiple transactions within a specific timeframe from the same EBT card if the card is utilized by multiple family members. In district court case, Skyson USA, LLC v. United States, No. 09-00278 BMK, D.Haw. (2010), the Review Officer for FNS noted in her Final Agency Decision that "it is not unreasonable for a customer or household to shop at any given store one or more times during a day." The propensity of local SNAP recipients making multiple transactions in short periods of time is high. Wholesome Foods' location is unique and the above factors should be considered with great weight when comparing the subject store to other local Brooklyn-based grocery markets.
- With regards to the transactions in which the majority or all of individual recipient benefits were exhausted in unusually short periods of time, SNAP benefits are replenished each month in accordance with the "Monthly Benefit Issuance Schedule". According to New York's Monthly Benefit Schedule and promulgated by FNS on the agency's website, New York City customers received their SNAP benefits spread out over a 13 day period (excluding Sundays and holidays) during the first two and a half weeks of each month. SNAP recipients are permitted to use their EBT benefits anywhere that is accepted. The convenience that Wholesome Foods offers its customers by carrying all food products and being located only a short walk away from thousands of residents are all reasons why SNAP recipients chose to shop at the subject store. Wholesome Foods is a large store and it contains multiple aisles along with a large variety of eligible food items for SNAP customers. In connection with the SNAP transactions listed in Attachment 3, it would coincide that high dollar purchases at the

subject store increase the chances that a SNAP recipient would exhaust all or a majority of their benefits in one transaction. SNAP recipients are permitted to use their EBT cards anywhere that it is accepted.

- Regarding the excessively large purchase transactions, copies of invoices provided to FNS from various vendors dated during the review period indicate that purchases of foods significantly exceeded the redemption of SNAP benefits. The photos provided to FNS substantiate that Wholesome Foods has a substantial amount of inventory that would support large volume transactions. Wholesome Foods provide shopping carts to its customers, has a delivery service, and many customers bring their own shopping carts to the store. District court case, Skysen USA, LLC v. United States, No. 09-00278 BMK, D.Haw. (2010), states that “It is also common for SNAP recipients with multiple family members to make large purchases within five days of receiving their SNAP benefits and to spend the rest of their benefits on perishable food throughout the remainder of the month”. A great majority of the high dollar transactions in Attachment 4 occur within the first 20 days of the month. Therefore, SNAP recipients will receive their EBT benefits during the first 15 days of the month and many SNAP recipients will make high dollar transactions and large purchases within 5 days of receiving their SNAP benefits. Many of the submitted customer affidavits state that their purchases at Wholesome Foods are often for large dollar amounts.
- The Appellant requests that FNS dismiss the permanent SNAP disqualification imposed on Wholesome Foods.

In support of the Appellant’s contentions, the following documents were submitted to FNS:

- Vendor invoices for foods purchased for Wholesome Foods during the six month review period;
- Photos of the food items stocked at Wholesome Foods as well as photos of the physical layout of the store;
- Photographs of the buildings surrounding Wholesome Foods;
- A hand-written list of foods with prices that end in \$x.00 and \$x.50;
- Signed affidavits/letters from 22 SNAP households attesting their support for Wholesome Foods;
- A signed affidavit from the Appellant attesting that trafficking has never occurred at Wholesome Foods;
- Investigative Transaction Report of previous under-cover investigation of Wholesome Foods;
- Floor plan for Wholesome Foods;
- New York’s Monthly Benefit Schedule for 2016;
- Population information for Nashville, North Carolina downloaded from [www.city-data.com](http://www.city-data.com); and
- United States Census Bureau information for Nashville, North Carolina.

## ANALYSIS AND FINDINGS

### Store Characteristics

FNS authorized Wholesome Foods as a medium grocery store on March 24, 2015. The case file indicates that in reaching a disqualification determination, the Retailer Operations Division considered information obtained during a June 24, 2016 store visit conducted by a FNS contractor to observe the nature and scope of the firm's operation, stock, and facilities. This information obtained from the store visit was also used to ascertain if there were justifiable explanations for the firm's irregular SNAP transactions. The store visit report and photographs documented the following store size, description, and characteristics:

- Approximately 1,100 square feet in size and it does not have a storage area/room outside of public view;
- No shopping carts and six hand-held baskets available for customer use;
- Two cash registers and only one EBT point-of-sale (POS) device for use in ringing-up SNAP transactions;
- No optical scanners;
- No meat/seafood specials or vegetable bundles that might sell for high prices;
- Not a WIC Program vendor; however, at the time of the store visit the store stocked infant fruits/vegetables/juices, infant cereal, infant meats, and only two cans of infant formula;
- No specialty or ethnic foods in stock;
- It does not appear from the store visit observations that the store extends credit to customers;
- No signs posted or flyers available advertising the availability of bulk foods offered at a discounted rate to include grocery package deals;
- Limited checkout counter area and it has many miscellaneous items stocked there. As such, the checkout counter does not provide adequate space for the large amounts of individual food items necessary to make up many of the large transactions cited in the Charge Letter Attachments;
- Frozen food items include a limited amount and variety of meats including processed chicken, pork sausage, and fish; a limited amount and variety of vegetables and fruits; a limited amount and variety of individual frozen meals; and ice cream;
- No fresh unprocessed meats, poultry, or seafood;
- No frozen unprocessed meats or poultry;
- A deli case/section in which deli meats and cheeses are sold by the pound as well as prepared salads;
- Other meat items include pork bacon, beef sausage, canned/potted meat, canned fish, meat jerky, and eggs;
- A kitchen in which hot and cold prepared, ready-to-eat foods that are intended for immediate consumption and require no additional preparation are prepared and sold. Examples of these foods include omelets, eggs, french toast, pancakes, sandwiches (33 different varieties available), quesadillas (7 different varieties available), paninis (9



different varieties available), chicken wings, hot wings, chicken nuggets, crab cakes, hash browns, french fries, etc.;

- A moderate variety of fresh produce;
- Other staple foods available for purchase include such items as milk, margarine, yogurt, soup, pasta, rice, cereal, flour, corn meal, grits, cakes/pastries, snack foods, etc.;
- Much of the remaining food stock consists of accessory foods such as carbonated and non-carbonated drinks, condiments, coffee, candy, and spices; and
- A good supply of ineligible nonfood items such as tobacco products, health and beauty aids, paper products, household items, household cleaning supplies, over-the-counter medications, lottery tickets, alcohol, candles, pet food, etc.

This documentation reflects that the firm is a typically stocked medium grocery store in all relevant aspects. It is worth noting that the average SNAP purchase in a medium grocery store in Kings County, New York (the county in which Wholesome Foods is located) during the analysis period was \$16.83, reflecting that large purchases are not routinely made in such stores.

On review, the investigative materials provided by the Retailer Operations Division, including computer printouts of transaction data available from Federal records, store visit observations, information regarding area competitor firms, and household shopping patterns, were analyzed.

Government analyses of stores caught in trafficking violations during on-site investigations have found that transactions involving trafficking consistently display particular characteristics or patterns. These patterns include, in part, those cited in the letter of charges. Based on this empirical data, and in the absence of any reasonable explanations for such transaction patterns, a conclusion can be drawn through a preponderance of evidence that the most likely explanation for “unusual, irregular, and inexplicable” transactions and patterns cited in the letter of charges is trafficking. Transactions having such characteristics sometimes do have valid explanations that support that they were the result of legitimate purchases of eligible food items. This is why opportunities are afforded to charged retailers to explain the questionable transactions cited. In this case, the Retailer Operations Division determined that the Appellant’s contentions did not outweigh the evidence. The issue in this review is whether, through a preponderance of evidence, it is more likely true than not true that questionable transactions were the result of trafficking. As patterns of unusual transactions appear across multiple Attachments, the case of trafficking becomes more convincing.

### **Denial of Trafficking Charges**

Regarding the Appellant’s contention that he denies the trafficking allegations, this review encompasses and documents the examination of the primary and relevant information in this case, the purpose of which is, as noted above, to determine whether the Appellant demonstrates by a preponderance of the evidence that the permanent disqualification should be reversed. In this case, therefore, if the Appellant demonstrates by a preponderance of the evidence that trafficking did not occur in the Appellant’s firm, then trafficking will be considered not to have occurred and the disqualification reversed. If this is not demonstrated the case is to be sustained. 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.

### **Charges Based on Computer Program**

The Appellant contends that the charges of SNAP benefit trafficking are solely based upon numbers generated by a computer generated statistical program. Therefore, the decision to permanently disqualify Wholesome Foods from the SNAP is based on circumstantial and inadequate evidence and is a flawed approach to use as the basis for enforcing permanent disqualification of retailers. Firms are chosen for analytical investigation based upon numerous detailed and rigorous mathematical algorithms. This data presents the Retailer Operations Division with a statistically valid prima facie indication of highly unusual transaction activity; the activity therein identified is not marginally aberrant, but markedly so. Properly analyzed and interpreted, the Retailer Operations Division does not contend that EBT transactions are overtly suspicious when they occur on an occasional or intermittent basis, but when such transactions form repetitive patterns, on a comparative basis, over a period of time that ensures such activity is not simply intermittent, such activity is identified for further analysis.

Once such firms have been identified as potential compliance cases, from approximately 263,105 authorized firms nationwide, the Retailer Operations Division undertakes a detailed examination of the available transaction data and obtains further relevant information regarding the firm's business operations such as the level and condition of staple food stock maintained by the firm, the presence or absence of the firm's logistical retail wherewithal and numerous other factors pertinent to the firm's ability to legitimately process the transaction activity for which the firm has been flagged. Agency policy and procedures direct that only after a careful, comprehensive and complete analysis, from which appropriate conclusions are logically derived, will the firm be issued a Charge Letter. The firm is then given the opportunity to reply to those charges and provide any information it deems appropriate in justifying as legitimate the transaction activity detailed in the Charge Letter. In the present case, these policies and procedures are shown by the record to have been duly performed in all relevant and pertinent detail. Moreover, 7 CFR § 278.6(a), noted above, established the authority upon which FNS may disqualify any authorized retail food store on the basis of evidence obtained through a transaction report under an electronic benefit transfer system. The Retailer Operations Division's use of transaction data and other reports, in addition to store visit observations and an analysis of household shopping behavior and other relevant data and information, in rendering a finding that trafficking is the most likely explanation of the transaction activity, is as valid a means of establishing evidence as that obtained through an on-site investigation and the eye witnessing of trafficking. Accordingly, the Appellant's contention that the charges are circumstantial, inadequate and based solely upon a computer generated analysis is not compelling.

### **On-Site Investigation**

The Appellant contends that there is evidence from the agency's on-site undercover investigation of Wholesome that trafficking never occurred at the store. On each of the four store visits, store personnel refused to traffick SNAP benefits. Therefore, it is illogical that FNS sustained trafficking allegations based upon computer statistics when direct evidence is available and

directly contradicts those computer statistics. According to the 2017 SNAP Retailer Management Year End Summary, “Completed FNS Undercover Retailer Investigations” chart, only 313 times was trafficking found to have occurred out of 5,557 attempts during under-cover investigations of retail stores. This amounts to five percent of the in-store investigations resulting in trafficking.

While the results of a previous on-site undercover investigation of Wholesome Foods were negative for trafficking of SNAP benefits, this only indicates that on the day(s) that the investigator visited Wholesome Foods, store employee(s) refused to violate the SNAP rules at that time. It is often the case that authorized stores will traffick SNAP benefits only to customers that are known to the store. The 2017 SNAP Retailer Management Year End Summary, “Completed FNS Undercover Retailer Investigations” chart identified by the Appellant is not germane to this case as the subject case is based on EBT SNAP benefit transactions that "establish clear and repetitive patterns of unusual, irregular, and inexplicable SNAP activity for your type of firm." As such, the Appellant’s contention is not supported by available evidence.

### **Record Discrepancies**

The Appellant contends that much of the information in the agency’s record is inaccurate and contradictory as indicated in different store visits of Wholesome Foods. For example:

- The store visit report from March 18, 2015 stated that the subject store is 5,000 square feet in size. The store visit report from June 24, 2016 stated that the store is 1,100 square feet in size. The actual size of the store is 3,000 square feet according to the Floor Plans provided to FNS. FNS used the report that strengthened its case against the firm. Wholesome Foods also stores additional inventory in the basement.
- The store visit report from March 18, 2015 indicates that the subject firm had shopping carts available for customers. The store visited report from June 24, 2016 indicates that there were no shopping carts available. The photos provided by the Appellant show that there are six shopping carts available in the subject store. FNS drew conclusions based on false information provided in the store visit of June 24, 2016.

Regarding the differences in noted square footages of Wholesome Foods, the contracted Reviewers for each store visit estimated the square footage of the subject store. The Reviewers’ findings in each instance were not exact—they were an approximation. In reaching a disqualification determination in this case, the Retailer Operations Division considered information obtained during a June 24, 2016 store visit conducted by a FNS contractor to observe the nature and scope of the firm’s operation, stock, and facilities. This information obtained from the store visit was also used to ascertain if there were justifiable explanations for the firm’s irregular SNAP transactions. The June 24, 2016 store visit observations and photos indicate that Wholesome Foods is approximately 1,100 square feet in size.

The store visit observations and photos also show that Wholesome Foods had no shopping carts and only six hand-held baskets available for customer use. While the Appellant’s photos may indicate that the store has six shopping carts and six hand-held baskets for customer use, these photos were taken this calendar year, almost 19 months after the issuance of the Charge Letter

and facilities and infrastructure at the store could have changed. The Appellant's photos do not validate the actual store offerings during the six month review period and could have been staged in an effort to support his contention.

It is also important to note that the disqualification determination was not made based only upon the store's square footage approximation or the number of shopping carts available to customers. As indicated previously, the investigative materials provided by the Retailer Operations Division, including computer printouts of transaction data available from Federal records, store visit observations, information regarding area competitor firms, and household shopping patterns, were analyzed when rendering a decision in this case.

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. Based on this empirical data, and in the absence of any reasonable explanations for such transaction patterns, a conclusion can be drawn through a preponderance of evidence that the most likely explanation for "unusual, irregular, and inexplicable" transactions and patterns cited in the letter of charges is trafficking. Transactions having such characteristics sometimes do have valid explanations that support that they were the result of legitimate purchases of eligible food items. This is why opportunities are afforded to charged retailers to explain the questionable transactions cited. In this case, the Retailer Operations Division determined that the Appellant's contentions did not outweigh the evidence. The issue in this review is whether, through a preponderance of evidence, it is more likely true than not true that questionable transactions were the result of trafficking. As patterns of unusual transactions appear across multiple Attachments, the case of trafficking becomes more convincing.

### **FOIA Request and Appeal**

The Appellant contends that FNS repeatedly failed to disclose the information requested by the Appellant's counsel with regard to counsel's FOIA request. The agency forwarded completely redacted, blank pages or incomplete pages from the agency's investigation with significant portions of those pages redacted. As such, information that remains undisclosed to the Appellant must not be considered by FNS when enforcing a permanent disqualification penalty since the agency precluded the Appellant's ability to challenge or defend itself against an undisclosed accusation statistic and/or conclusion. FNS failed to provide the information requested yet uses the ALERT system data as the only circumstantial evidence to penalize the Appellant.

With regard to the Appellant's contentions regarding the FOIA request and appeal, certain information, such as the names of case investigators/reviewers and specific information with regard to ALERT data, is exempt from closure under the Freedom of Information Act as such disclosure is deemed an invasion of privacy or reveal information regarding investigative techniques. It should be noted that Constitutional challenges or considerations of legal precedent through FOIA requests/Appeals is beyond the scope of this review. Instead this administrative review is limited to whether the Retailer Operations Division appropriately followed the Food and Nutrition Act of 2008, as amended, and the regulations promulgated under the Act, and whether the action taken is sustainable by a preponderance of the evidence. Therefore, any

Constitutional challenges or application of a supposed judicial precedent would best be addressed in a judicial review in a court of law. Accordingly, no further findings or conclusions are rendered in this regard.

With regard to the Appellant's contention regarding the limited applicability of the ALERT system to retailer sanctions, it should be noted that the ALERT system is a computerized fraud detection tool to identify SNAP transactions that form patterns having characteristics indicative of trafficking. However, this tool does not by itself determine or conclude that trafficking has occurred. The Retailer Operations Division must still conduct an extensive analysis of the transaction data and patterns, often with other factors such as, in this case, observations from store visits, an analysis of customer shopping behaviors and a comparison of stores in the area, and render a determination whether the questionable transactions were, more likely than not, the result of trafficking. Lastly, the Appellant is always given the chance to explain the specific transaction patterns before the Determination Letter is issued and during the administrative review.

The legality of this method is supported by 7 CFR § 278.6(a) which states, inter alia, "FNS may disqualify any authorized retail food store . . . if the firm fails to comply with the Food and Nutrition Act of 2008, as amended, or this part. Such disqualification shall result from a finding of a violation on the basis of evidence that may include facts established through on-site investigations, inconsistent redemption data, evidence obtained through a transaction report under an electronic benefit transfer system . . . [Emphasis added]."

### **Credit Transactions**

The Appellant readily admits in his affidavit that he extended credit to SNAP customers as he could not turn away hungry people. This accounts for many of the large purchases in that the credit was repaid by the SNAP customers. The Appellant did not realize that credit extension was a violation of the SNAP rules. The Appellant has since instructed all store employees that credit extension must be ceased. The method for keeping track of the customers that were extended credit was to keep a notebook at the checkout counter. When a customer requested credit, the purchase was written down along with the customer's name, date, and dollar amount owed. Once the customer paid off the credit account, employees discarded that page of the notebook. Since the Appellant did not realize that extending credit was a SNAP violation, he did not save any of these "credit receipt" sheets. Many of the customers that once purchased on credit have since ceased shopping at the store. They became angry when the store would no longer offer credit and vowed never to shop there again. The Appellant has sought to obtain signatures and affidavits from the few customers that continue to shop at the store. However, they are all afraid to admit to purchasing on credit because they do not want to lose their SNAP benefits. The Appellant provided affidavits from two SNAP customers who attested that credit was extended to them by Wholesome Foods.

When a retailer claims it maintains credit accounts to explain irregular SNAP transactions and data patterns, FNS requires a level of detail regarding the legitimacy of the claim. This is because retailers have often made false admissions of credit in an attempt to obtain a lesser penalty after committing more egregious violations such as trafficking. 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.

In support of his contention that Wholesome Foods had extended credit to SNAP customers during the six month review period, the Appellant provided FNS with his own affidavit attesting that he has extended credit to SNAP customers as well as affidavits of two SNAP customers who attested that that credit was extended to them by Wholesome Foods.

FNS reviewed the information/documentation provided from the Appellant and properly determined that the information was insufficient to support the Appellant's credit extension contention for the following reasons:

- The Appellant provided no documentation to validate that Creekside Grocery had issued credit to SNAP customers other than his own affidavit and the affidavit of two SNAP customers. While these affidavits purport to establish that the questionable transactions were legitimate and that no trafficking occurred, the truth of such declarations can neither be confirmed nor denied. Although such affidavits may be sworn to and notarized, that does not mean that they are necessarily truthful. One would not expect SNAP retailers and SNAP clients to admit that questionable transactions were not legitimate, were it really so. On the contrary, one would expect that any retailer or client affidavit provided would attest to questionable transactions being legitimate.
- The Appellant did not provide FNS with SNAP recipient identifiable information for the SNAP customers to whom credit had been extended. The Appellant provided affidavits from only two customers attesting that credit had been extended to them by the subject firm. However, the FNS Charge Letter identifies 123 SNAP households responsible for the 607 SNAP transactions listed in the Charge Letter Attachments. The two SNAP customer affidavits provided to FNS did not provide any other information such as an address, 16-digit EBT card number, or household identification number to identify these two individuals as actually being SNAP recipients who frequented the firm and indeed had credit extended to them. In addition, a review of the New York Administrative Terminal for the customer names provided on the two affidavits indicates that there are numerous persons with the names provided.
- The Appellant provided no documentation/information that FNS could use to match the questionable SNAP transactions outlined in the Charge Letter to individual credit purchases;
- There was no documentation provided listing the individual foods that were purchased on credit and by which SNAP customer;
- No documents were provided that validate whether the alleged credit was paid off by cash, credit card or SNAP benefits;
- No documentation was provided that indicates when the food items were purchased on credit and when the credit was paid off;
- No documentation was provided that validates that the credit extended to each SNAP customer was done so during the six month review period; and
- No documentation was provided that validates the amount of credit that was extended to each customer during the six month review period.

In conclusion, although Wholesome Foods may have, on a rare occasion, accepted SNAP benefits as repayment on credit accounts, there was no evidence submitted to support the Appellant's contention that some of the irregular SNAP transactions listed in the Charge Letter are due to repayment on credit accounts.

With regard to the Appellant's claim that he did not realize that credit extension was a violation of the SNAP rules, the Appellant, upon being authorized by FNS to participate in the SNAP on March 24, 2015, received the same Authorization Kit that is sent to all retail food stores when they are newly authorized in the SNAP, including various information booklets, signs and posters indicating the Do's and Don'ts, rules of the SNAP available in several different languages, a copy of the SNAP regulations and a training video. Moreover, periodic newsletters have been sent to all retail food stores participating in the SNAP with a reminder in almost every newsletter sent that accepting nutrition assistance program benefits for payment on credit accounts is a violation. In accordance with 7 CFR § 278.2(f) . . . SNAP benefits "may not be accepted by an authorized retail food store in payment for any eligible food sold to a household on credit". As such, the Appellant's contention is unfounded.

### **Same Cents Transactions**

Charge Letter Attachment 1 lists 111 transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. Consequently, when there are a disproportional amount of transactions that end in a same cent value, it appears that these transaction amounts are contrived and therefore, in the absence of any compelling rationale to the contrary, are indicative of trafficking.

The Appellant contends that with regard to the unusual number of transactions ending in a same cents value, he provided FNS with a hand-written list of 82 eligible food items that end in \$x.00 and \$x.50 and nearly every combination of any of the items identified or quantity purchased by a SNAP customer would result in a total cost of transaction ending in \$x.00. Wholesome Foods has a 16 foot long deli area with an assortment of meats, sausages, chicken, and cheese that are freshly prepared as sandwiches, paninis, or wraps in fixed dollar amounts. The retailer's deli business is an important portion of its income and has grown on a continuous basis. In Federal case, Duchimaza and Cecilia's Market, LLC vs. United States of America, No. 3:14-cv-00887 (MPS), the United States District Court, District of Connecticut explained that a retailers list of eligible food items ending in \$.00, \$.50 and \$.25, would create a genuine issue of material fact to rebut the charge of "an unusual number of transactions ending in a same cents value".

A review of the notes and photographs from the FNS store visit of June 24, 2016 reveal a pricing structure for a large number of the store's foods that ends in \$x.x9 (9 cents). For example, the deli meats and cheeses offered at the store have prices that end in \$x.49 and \$x.99. Depending on the deli meat or cheese variety, the prices are \$7.99, \$8.49, \$8.99, \$9.99, and \$10.99. The Appellant himself stated that Wholesome Foods has a 16 foot long deli area with an assortment of meats, sausages, chicken, and cheese and that the deli business is an important portion of its income and has grown on a continuous basis. Other examples of food items that have prices that end in \$x.x9 include \$1.49 for bottle water, \$7.99 for boxes of frozen corn dogs, \$6.99 for boxes

of frozen chicken nuggets, \$2.49 for bread, \$3.59 for broccoli cuts, and \$2.99 for frozen edamame.

The store visit observations also indicate that Wholesome Foods offers a large variety of hot/prepared foods for sale which advertised on a menu board in the store. All of the hot/prepared food items listed on the store's menu board have prices that end in "00", "50", or "75". A majority of the foods advertised on the menu board are hot foods (including the sandwiches, wraps, heroes, etc.) and, therefore, cannot be purchased with SNAP benefits per the SNAP regulations. The Appellant himself noted that Wholesome Foods has a 16 foot long deli area with an assortment of meats, sausages, chicken, and cheese that are freshly prepared as **sandwiches, paninis, or wraps in fixed dollar amounts.**

The Appellant provided FNS with a hand-written list of 82 eligible food items that have prices that end in \$x.00 and \$x.50. The Appellant contends that every combination of any of the items identified or quantity purchased by a SNAP customer would result in a total cost of transaction ending in \$x.00. However, the Appellant did not provide any evidence or documentation that supports his contention. There is no way to validate the prices of the food items listed on the Appellant's list. The Appellant could have easily fabricated the price list in an effort to support his contention. It is also important to note that while the Appellant's food examples might explain transactions below a certain dollar threshold, the Retailer Operations Division identified 111 transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** with repetitive price values of \$x.00. The Appellant's explanation does not explain the 111 transactions identified in Attachment 1.

It is implausible that several of the eligible food items displayed in the store visit photographs purchased together would routinely total to a purchase amount ending in 00 cents. Transaction amounts are dependent on the quantity of items of being purchase and price per pound/unit and given this firm does carry some high dollar items, when SNAP households purchase multiple food items, resulting in moderate/high dollar amounts, the total transaction amount is more likely to result in a more random statistical spread of ending cent ranges from 00 to 99 cents. Consequently, when there are a disproportional amount of transactions that end in a same cents value, it appears that these transaction amounts are contrived and therefore, in the absence of any compelling rationale to the contrary, are a strong indicator that the firm is trafficking in SNAP benefits. A preponderance of the evidence indicates that the irregular transaction purchases ending in \$x.00 cited in Charge Letter Attachment 1 are more likely than not a result of the store trafficking in SNAP benefits.

Regarding the case laws cited by the Appellant for all relevant contentions in this case, it should be noted that considerations of legal precedent through case law, or the lack thereof in relation to the present case, is beyond the scope of this review. Instead this administrative review is limited to whether the Retailer Operations Division appropriately followed the Food and Nutrition Act of 2008, as amended, and the regulations promulgated under the Act, and whether the action taken is sustainable by a preponderance of the evidence. Therefore, any application of a supposed judicial precedent would best be addressed in a judicial review in a court of law. Accordingly, no further findings or conclusions are rendered in this regard.



## Repeat Transactions by the Same Household

Charge Letter Attachment 2 lists 50 transaction sets (110 total transactions)

5 U.S.C. § 552 (b)(6) & (b)(7)(C). 5 U.S.C. § 552 (b)(6) & (b)(7)(C). It is not credible that the subject store would have so many suspicious SNAP transactions greatly exceeding the average SNAP transaction for medium grocery stores in Kings County during the review period. Violating stores often conduct multiple transactions from the same household account to avoid detection of single high dollar transactions that cannot be supported by the firm's food inventory and infrastructure.

The Appellant contends that with regard to the multiple transactions made from individual benefit accounts in unusually short timeframes, Wholesome Foods is located in the center of dozens of six story apartment complexes and various 20 plus story high rise project buildings where thousands of residents live within a short walking distance from the store. The building in which Wholesome Foods is located alone reside more than 50 families. The SNAP households who reside in the apartment complexes and public housing projects also patronize the subject store. SNAP recipients who frequent the Brooklyn Botanical Gardens and the Brooklyn Museum are also in close proximity to Wholesome Foods. A fact sheet from the United States Census Bureau shows that the population for Brooklyn, New York in 2016 to be estimated at 2,629,150. The total number of SNAP recipients in New York City in January 2016 was 1,676,822 as indicated by the New York City Department of Social Services. The nearest markets to Wholesome Foods are approximately five blocks away. Thousands of SNAP customers shop at the subject store because they are unable to travel long distances due to disabilities, old age and inconvenience. The Appellant also cited the 2004 Court of Appeals case, Idias vs. United States of America, et all, 359 F. 3d 695 in support of this contention. Many of the submitted customer affidavits state that they shop more than once a day at Wholesome Foods. These signed affidavits from various SNAP customers are direct evidence that trafficking did not occur at the subject store. In addition, there are no guidelines or standards delineating specific timeframes within which Wholesome Foods must prohibit or allow transactions to be made by the same SNAP recipient, nor is there a standard for multiple transactions within a specific timeframe from the same EBT card if the card is utilized by multiple family members. In district court case, Skyson USA, LLC v. United States, No. 09-00278 BMK, D.Haw. (2010), the Review Officer for FNS noted in her Final Agency Decision that "it is not unreasonable for a customer or household to shop at any given store one or more times during a day." The propensity of local SNAP recipients making multiple transactions in short periods of time is high. Wholesome Foods' location is unique and the above factors should be considered with great weight when comparing the subject store to other local Brooklyn-based grocery markets. However, the Appellant's contentions are not supported by available evidence.

The Appellant contends that Wholesome Foods is located in the center of dozens of six story apartment complexes and various 20 plus story high rise project buildings where thousands of residents live within a short walking distance from the store. The building in which Wholesome Foods is located alone reside more than 50 families. The SNAP households who reside in the apartment complexes and public housing projects patronize the subject store. SNAP recipients who frequent the Brooklyn Botanical Gardens and the Brooklyn Museum would also be in close

proximity to Wholesome Foods. The Appellant provided a fact sheet from the United States Census Bureau shows that the population for Brooklyn, New York in 2016 to be estimated at 2,629,150. The total number of SNAP recipients in New York City in January 2016 was 1,676,822 as indicated by the New York City Department of Social Services.

With regards to the Appellant's contentions, FNS does not dispute the Appellant's claim about the socio-economic factor of the location of Wholesome Foods nor does the agency dispute the Appellant's claim that there are several multi-family apartment complexes and public housing projects surrounding the subject store and that customers who frequent the Brooklyn Botanical Gardens and the Brooklyn Museum are in close proximity to Wholesome Foods. In support of his contentions, the Appellant provided FNS with population information for Nashville, North Carolina downloaded from [www.city-data.com](http://www.city-data.com) and information from the United States Census Bureau for Nashville, North Carolina. However, the statistical information/data provided by the Appellant has no bearing on the case at hand.

While there are no limits on the number of times EBT cards may be used or the amount of eligible foods that may be purchased, the SNAP transactions noted in this Charge Letter Attachment are questionable because they display characteristics of use inconsistent with the nature and extent of the store's stock and facilities and are indicative of trafficking. Although it is not uncommon for customers to conduct more than one transaction per day, it is not common that such multiple transactions are for large dollar amounts. Wholesome Foods is not set up to provide for all of one's food needs with no fresh unprocessed meats, poultry, or seafood, only one variety of frozen unprocessed seafood in minimal quantities, no frozen unprocessed meats or poultry, and a minimal variety and amount of frozen fruits and vegetables. Also, the store visit observations indicate that there is no evidence of a price advantage or custom or special services rendered at the subject store that are not offered at other authorized SNAP stores in the area. It is irregular for medium grocery stores to have purchases such as those cited, especially when Wholesome Foods stocks only a few high priced food items so the majority of food items stocked at the store are low priced items.

The Appellant contends that thousands of SNAP customers shop at Wholesome Foods because they are unable to travel long distances due to disabilities, old age and inconvenience. In addition, Wholesome Foods' location is unique and the above listed factors should be considered with great weight when comparing the subject store to other local Brooklyn-based grocery markets. However, a review of client shopping data for the review period shows that clients shopping at Wholesome Foods are also shopping at other area grocery stores, as well as full-line supermarkets and super stores that most likely offer customers a much larger quantity and variety of eligible food items for better prices. Based on these shopping patterns, transportation to other stores is not an issue for these SNAP customers. Yet, these customers continue to shop and spend suspicious high dollar amounts in short timeframes at Wholesome Foods, where the eligible food stock is limited, 5 U.S.C. § 552 (b)(6) & (b)(7)(C) of their purchases at better stocked stores. This is a strong indicator of trafficking.

The Appellant contends that the nearest markets to Wholesome Foods are approximately five blocks away. With regard to this contention, sometimes a firm may have unusual transaction patterns due to a recipient's lack of access to other SNAP authorized stores. However, there are

43 SNAP authorized retailers located within a 1.0 mile radius of the subject firm that are of a comparable or larger size than the subject firm that can meet the nutritional needs of customers. These stores include two full-service supermarkets located 0.12 and 0.22 miles from Wholesome Foods. As indicated, several of these area authorized SNAP stores are larger than Wholesome Foods and offer a greater quantity and variety of food products at comparable or better prices as compared to the subject store. The SNAP households who reside in the apartment complexes and public housing projects referenced by the Appellant would also have access these comparable and superiorly stocked retail food stores. SNAP recipients who frequent the Brooklyn Botanical Gardens and the Brooklyn Museum (as noted by the Appellant) would also be in close proximity to these other area retail food stores. As mentioned previously, SNAP customers who shopped at Wholesome Foods during the six month review period also shopped at other area grocery stores and, therefore, transportation to other stores is not an issue for these customers. Therefore, lack of access to other authorized stores does not appear to be an explanation for Wholesome Foods' abnormally high SNAP transaction amounts conducted within a short timeframe of each other.

The Appellant contends that many of these questionable SNAP transactions are the result of the same EBT card being utilized by multiple family members. However, this contention is without merit. When households are certified for SNAP participation, if there are multiple families living in one household and every member of the household purchases, prepares, and eats food together, the benefits are issued for the entire household. If there are multiple individuals living under one roof, and they purchase, store, prepare, and eat their meals separately, their benefits are issued as a separate household, each with their own EBT card. Households that purchase, prepare, and eat meals separately are considered separate households. It is also very unlikely that a family relying on SNAP to supplement their nutritional needs would routinely share these benefits amongst each other while purchasing their food separately.

The Appellant contends that many of the submitted customer affidavits attest that they shop more than once a day at Wholesome Foods. These signed affidavits from various SNAP customers are direct evidence that trafficking did not occur at the subject store. With regard to the SNAP customer affidavits that purport to establish that the questionable transactions were legitimate and that no trafficking occurred, the truth of such declarations can neither be confirmed nor denied. Although such affidavits may be sworn to and notarized, that does not mean that they are necessarily truthful. One would not expect SNAP clients to admit that questionable transactions were not legitimate, were it really so. On the contrary, one would expect that any client affidavit provided would attest to questionable transactions being legitimate.

The Appellant did not provide any compelling justification as to why SNAP households are conducting multiple transactions at Wholesome Foods or evidence that all of the irregular transactions cited in the Charge Letter were for eligible food items only. Based on the analysis above and in the absence of any other reasonable explanation, the irregular transaction patterns are more likely than not to be a result of trafficking in SNAP benefits.

## SNAP Benefits Exhausted in Short Periods of Time

Charge Letter Attachment 3 lists 22 suspicious sets of transactions (41 total transactions) that were conducted by 13 different SNAP households. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Depleting the household's entire allotment in one or a few transactions, or within one or two days, leaving little or no benefits for the rest of the month is inconsistent with the normal shopping behavior of SNAP benefit households. Therefore, transactions in which SNAP benefits are exhausted in unusually short periods of time are indicative of trafficking.

The Appellant contends that with regard to the transactions in which the majority or all of individual recipient benefits were exhausted in unusually short periods of time, SNAP benefits are replenished each month in accordance with the "Monthly Benefit Issuance Schedule". According to New York's Monthly Benefit Schedule and promulgated by FNS on the agency's website, New York City customers received their SNAP benefits spread out over a 13 day period (excluding Sundays and holidays) during the first two and a half weeks of each month. SNAP recipients are permitted to use their EBT benefits anywhere that is accepted. The convenience that Wholesome Foods offers its customers by carrying all food products and being located only a short walk away from thousands of residents are all reasons why SNAP recipients chose to shop at the subject store. Wholesome Foods is a large store and it contains multiple aisles along with a large variety of eligible food items for SNAP customers. In connection with the SNAP transactions listed in Attachment 3, it would coincide that high dollar purchases at the subject store increase the chances that a SNAP recipient would exhaust all or a majority of their benefits in one transaction. SNAP recipients are permitted to use their EBT cards anywhere that it is accepted. However, the Appellant's contentions are unsubstantiated.

With regard to the Appellant's contentions, a June 2006 study entitled "An Analysis of Food Stamp Benefit Redemption Patterns" prepared by USDA FNS, typical EBT purchases are small (about 71 percent 5 U.S.C. § 552 (b)(6) & (b)(7)(C)) and SNAP benefits are spent throughout a given month--63 percent of SNAP households use more than half of their benefits in the first week after issuance and over half (56 percent) use more than 90 percent of the household benefits within two weeks after issuance. The study also found that "Supermarkets accounted for over 64 percent of all EBT transactions and 83 percent of the total value of EBT purchases" while "less than 6 percent never shopped at supermarkets."

5 U.S.C. § 552 (b)(6) & (b)(7)(C).

5 U.S.C. § 552 (b)(6) & (b)(7)(C)

As indicated in Figure 2 below, SNAP participants use their SNAP benefits quickly and have little left at the end of a month. In fact, most households (63 percent) use more than half of their benefits within the first week of issuance and over half (56 percent) use more than 90 percent of their benefits within two weeks of issuance. About 80 percent of all SNAP benefits are redeemed within two weeks of issuance and 97 percent are redeemed by the end of the month.

5 U.S.C. § 552 (b)(6) & (b)(7)(C)

However, the USDA study also indicates that most SNAP benefits are redeemed at supermarkets. Supermarkets generally provide the widest range of high-quality foods at reasonable prices. Although access to supermarkets may be limited in some areas, most low-income shoppers redeem most of their SNAP benefits in supermarkets. As indicated in Figure 3 below, supermarkets accounted for over 64 percent of all EBT transactions and 83 percent of the total value of EBT purchases. Large and small grocery stores accounted for about 8 to 10 percent of EBT transactions and 4 to 6 percent of the total value of benefits redeemed. Over 46 percent of SNAP households shopped exclusively at supermarkets; less than 6 percent never shopped at supermarkets.

#### 5 U.S.C. § 552 (b)(6) & (b)(7)(C)

The results found in this study directly contradict the transactions cited in this Attachment. It is very unusual for EBT recipients to redeem a majority or all of the household's monthly benefits in a single transaction or in a single day. Most households make small transactions and redeem their benefits throughout the month. In addition, most recipients redeem a majority of their household benefits at supermarkets and very few avoid supermarkets all together. Considering that the subject store is a medium grocery store with moderate food stock, the transactions cited in Charge Letter Attachment 2 are highly unusual.

Although many households do shop early in the month as opposed to later in the month, most households do not spend all or a majority of their monthly benefit allotment in only a few transactions or in a single day. Depleting one's entire allotment in one or two days or in a single day, especially in a moderately stocked medium grocery store, leaving no benefits for the remainder of the month, is inconsistent with the normal shopping behavior of SNAP households. Rather, large single transactions, or multiple and high cumulative transactions which diminish balances over a short period of time soon after benefit issuance, are indicative of SNAP benefit trafficking and attempts to diminish attention to signs of the same. In addition, there are 43 stores of a comparable size or larger than the subject store located within a 1.0 mile radius of Wholesome Foods that are authorized to participate in the SNAP where SNAP households can and do shop. However, these other authorized SNAP stores do not display EBT transaction patterns similar to those displayed by Wholesome Foods.

The June 24, 2016 store visit photos and the photos provided by the Appellant do not display, show, or highlight any unique or particular food items offered at Wholesome Foods which would not be offered at the four authorized supermarkets and one authorized super store located within a half mile of the subject firm. While it is plausible and reasonable that SNAP households would transact some portion of their benefits at the subject firm given the overall available food stock, it is highly questionable that a SNAP recipient or household would transact all or nearly all their benefits in a single large transaction or through multiple transactions within one to two calendar days at the subject firm.

The Appellant did not provide any compelling justification as to why SNAP households are spending the majority or all of their SNAP benefits in short periods of time at Wholesome Foods or evidence that all of the irregular transactions cited in Charge Letter Attachment 3 were for eligible food items only. Based on the analysis above and in the absence of any other reasonable

explanation, the irregular transaction patterns are more likely than not to be a result of trafficking in SNAP benefits.

### **Excessively Large Purchase Transactions**

Charge Letter Attachment 4 lists 345 SNAP transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. As noted previously, there is no indication from the store visit report that Wholesome Foods would be likely to have SNAP redemption patterns significantly different from similar-sized competitors offering similar food items.

The Appellant contends that with regard to the excessively large purchase transactions, copies of invoices provided to FNS from various vendors dated during the review period indicate that purchases of foods significantly exceeded the redemption of SNAP benefits. The photos provided to FNS substantiate that Wholesome Foods has a substantial amount of inventory that would support large volume transactions. Wholesome Foods provide shopping carts to its customers, has a delivery service, and many customers bring their own shopping carts to the store. District court case, Skyson USA, LLC v. United States, No. 09-00278 BMK, D.Haw. (2010), states that “It is also common for SNAP recipients with multiple family members to make large purchases within five days of receiving their SNAP benefits and to spend the rest of their benefits on perishable food throughout the remainder of the month”. A great majority of the high dollar transactions in Attachment 4 occur within the first 20 days of the month. Therefore, SNAP recipients will receive their EBT benefits during the first 15 days of the month and many SNAP recipients will make high dollar transactions and large purchases within 5 days of receiving their SNAP benefits. Many of the submitted customer affidavits state that their purchases at Wholesome Foods are often for large dollar amounts. However, the Appellant’s contentions are not supported by available evidence.

In support of these contentions, the Appellant provided FNS with various black and white photos of the food items stocked at Wholesome Foods as well as photos of the physical layout of the store and a floor plan/blue print for the store. It is important to note that many of the Appellant’s photographs were distorted. However, the Retailer Operations Division determined that the photos indicate that Wholesome Foods is moderately stocked with fresh, perishable, canned, and packaged food items. The deli counter shows the firm is also amply stocked with various varieties of deli meats and cheeses along with prepared/cook ready to eat items. The refrigeration and freezer units appear to show that the only fresh or perishable non-deli meat meats appear to be frozen sausages, patties, and chicken nuggets. However, due to the nature of the photographs, the Retailer Operations Division was not able to identify any fresh poultry, pork, beef, or seafood products.

The Appellant’s food stock photos and photos of the store layout do not show or identify any excess storage space for excess inventory nor does the floor plan/blue print provided by the Appellant distinguish or highlight any excess storage area such as a basement. The check-out counter appears to still house two cash registers. In the Appellant’s photos, the check-out counter does not appear to be cluttered with various food and non-food items as in the store visit photos of June 24, 2016. The Appellant’s photos also show that the firm has six shopping carts and six hand-held baskets available for customer use. It should be noted that the photos provided

by the Appellant were most likely taken this calendar year, almost 19 months after the issuance of the Charge Letter and the facilities and infrastructure at the firm could have changed.

As indicated previously, a Reviewer noted the nature, scope, and extent of the facilities and infrastructure at Wholesome Foods during the store visit of June 24, 2016. The Reviewer noted that the check-out counter is comprised of two cash registers and one EBT point-of-sale machine and that there are no optical scanners to aide in the processing of transactions. Also noted was a scale to aide in the weighing of items; however, this scale is located on the deli counter and not next to the cash registers. The check-out counter appears to be “L” shaped and is littered with many eligible food items such as fresh avocados, jerky meats, snack bars, and various candies along with other miscellaneous items. There are six hand-held baskets but no shopping carts available for customer use. There is no additional or excess space at the subject firm for storage of excess inventory. In addition, Wholesome Foods does not offer or appear to advertise any grocery specials, deals, bundles, or bulk items; the firm does offer hot foods and foods for on-site consumption.

Further, the Appellant stated that “*the store stocks and sells an assortment of staple household eligible food items such as cereals, cold-cut meats, chicken and cheeses cut to order, sandwiches, and array of canned foods, pasta, breads, baby formula, fresh fruits, fresh vegetables, bags of rice, chips, candy, salads, an entire organic food line, and various condiments*”. The Appellant’s own description of the overall available food stock would appear to support the Retailer Operations Division’s conclusion that the firm does not offer any unique, particular, or distinguishing item(s) which would entice SNAP households or recipients to transact multiple and repeated large transactions at the subject firm. Based on the Retailer Operations Division’s examination and evaluation of the store visit report and photos, Wholesome Foods does not appear to offer any unique or particular item which would entice SNAP households to transact large portions of their SNAP benefits at the firm. Further, the firm does not appear to offer any ethnic or specialty items catered to any particular SNAP population.

The store visit report and photos show that wholesome Foods was stocked with a moderate quantity and variety of staple foods as it stocked with no fresh unprocessed meats, poultry, or seafood, only one variety of frozen unprocessed seafood in minimal quantities, no frozen unprocessed meats or poultry, and a minimal variety and amount of frozen fruits and vegetables. The inventory report and photos also show only a few expensive eligible foods in stock that would account for these large amounts as well as showing the store has a limited checkout counter space, no optical scanners, and no shopping carts and only six hand-held baskets in which to transport the large number of items required to make up these large transaction amounts. Without a sufficient number of these, it is unlikely that such large dollar value transactions could be for actual food purchases and more likely they are trafficking. The record shows that there are 43 SNAP authorized retailers located within a 1.0 mile radius of Wholesome Foods that are of a comparable or larger size than the subject firm that can meet the nutritional needs of customers. These stores include two full-service supermarkets located 0.12 and 0.22 miles from Wholesome Foods. As indicated, several of these area authorized SNAP stores are larger than Wholesome Foods and offer a greater quantity and variety of food products at comparable or better prices as compared to the subject store. An analysis of the shopping patterns for all of the SNAP households listed in this Attachment shows that the majority of the

households shopping at Wholesome Foods have access to transportation and that all are regularly shopping at a variety of larger stores, including super stores and/or supermarkets, located a few miles distance from the Appellant's location. While delivery service to customers may be a unique offering of Wholesome Foods, SNAP recipients are already shopping at other larger SNAP retailers located within a few miles of the Appellant's business offering a greater quantity and variety of products, including fresh meats/seafood and produce, at lower prices.

With regard to the Appellant's contention that SNAP recipients will receive their EBT benefits during the first 15 days of the month and many SNAP recipients will make high dollar transactions and large purchases within 5 days of receiving their SNAP benefits, please see the information previously discussed regarding the June 2006 study entitled "An Analysis of Food Stamp Benefit Redemption Patterns" prepared by USDA FNS.

The Appellant provided FNS with signed affidavits/letters from 22 SNAP households in support of his case. The Appellant contends that many of these customer affidavits indicate that their purchases at Wholesome Foods are often for large dollar amounts. A review of the 22 customer affidavits by the Retailer Operations Division indicates that nine households either did not conduct any transactions which were listed as violations in the Charge Letter Attachments; did not conduct any transactions at Wholesome Foods during the six month review period; or were not known to the state of New York Administrative terminal. The shopping histories of five SNAP households indicate that these households almost exclusively utilized the subject firm as their primary firm to meet their grocery needs. However, these five households had 126 flagged transactions in ALERT for the review period which produced 82 violations listed in the Charge Letter Attachments. The preponderance of evidence suggests these violations are bona-fide legitimate transactions and not indicators of trafficking.

The shopping histories of the remaining eight SNAP households are contradictory towards their signed statements. The shopping histories of two households indicate that these households are transacting more of their SNAP benefits at authorized supermarkets or super stores which, again, contradict their signed statements. Further, these eight households are using a combination of firms to complete their grocery needs and are not exclusively transacting the majority of their benefits at Wholesome Foods alone.

The Charge Letter Attachments list 607 violations conducted by 123 unique SNAP households. Five of the 22 household statements explain 82 violations as bona-fide legitimate transactions which account for 13.5% of the transactions listed in the Charge Letter Attachments. There are still 525 (86.5%) violations conducted by 110 other SNAP households which are unaccounted for by the Appellant.

FNS compared the SNAP transaction activity of Wholesome Foods during the review period to the SNAP transaction activity of medium grocery stores in Kings County, New York. As illustrated in the below graph, Wholesome Foods (represented by the red bar/on the left) has a higher average transaction amount for the review period than the medium grocery store type average in Kings County, New York (represented by the blue bar/on the right).

**5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. This is an indicator of trafficking at the subject store.



5 U.S.C. § 552 (b)(6) & (b)(7)(C)

The below graph and supporting table below show that Wholesome Foods (red bars/on the left) has higher than normal average transaction amounts compared to the medium grocery store type average in Kings County, New York (blue bars/on the right). 5 U.S.C. § 552 (b)(6) & (b)(7)(C). It is unlikely that the subject firm would have so many more transactions in these price ranges than the average county medium grocery store, especially given the fact that Wholesome Foods does not appear to stock meat plans, bulk items, or special “deals” that would be priced at these price points.

5 U.S.C. § 552 (b)(6) & (b)(7)(C)

5 U.S.C. § 552 (b)(6) & (b)(7)(C)

FNS compared the SNAP transaction activity of Wholesome Foods during the review period to the SNAP transaction activity of the four closest medium grocery stores that did not have an open or pending compliance case associated with them. Wholesome Foods had a higher ALERT rank for the review period than all of the comparison stores. This is an indicator of trafficking at the subject store. Wholesome Foods also had a higher Scan A transaction count (i.e., unusual number of transactions ending in a same cents value) for the review period than all of the comparison stores. It is important to note that three of the comparison stores had no Scan A hits at all during the review period. This is an indicator of trafficking at the subject store. Wholesome Foods had a much higher Scan B2 transaction count (i.e., multiple purchase transactions made from individual benefit accounts in unusually short timeframes) for the review period than all of the comparison stores. It is important to note that two of the comparison stores had no Scan B2 hits at all during the review period. This is a strong indicator of trafficking at the subject store.

In addition, Wholesome Foods had a much higher Scan C transaction count (i.e., transactions in which the majority or all of individual recipient benefits were exhausted in unusually short periods of time) for the review period than all of the comparison stores. Of note is that three of the comparison stores had no Scan C hits at all during the review period. This is an indicator of trafficking at the subject store. It is not reasonable that SNAP customers would be spending their SNAP allotment at the subject store so much more than at other nearby medium grocery stores. Wholesome Foods is moderately stocked with foods but it has no fresh meats or poultry items, meat packs, bulk foods, or special “deals” that would entice customers to spend all of their limited SNAP benefits at this store. Wholesome Foods also had a much higher Scan F transaction count (i.e., excessively large purchase transactions) for the review period than any of the comparison medium grocery stores. Wholesome Foods had 379 Scan F hits during the review period. The next closest comparison store had only 33 Scan F hits meaning that the subject store had over 11 times more Scan F hits than its next closest competitor. This high Scan F count is yet another strong indicator of trafficking at the subject store.

The Appellant contends that the invoices provided to FNS from various vendors dated during the review period indicate that purchases of foods significantly exceeded the redemption of SNAP benefits. FNS conducted an analysis of the vendor invoices provided for the months of February

2016, April 2016, and June 2016 which included a 40 percent mark-up compared to the SNAP redemptions for the same period. The following table notes the results of the vendor invoice analysis.

5 U.S.C. § 552 (b)(6) & (b)(7)(C)

Wholesome Foods appears to have purchased enough eligible food stock to support the redemptions for February 2016, April 2016, and June 2016. The Retailer Operations Division examined the vendor invoices provided by the Appellant to assess the nature of the eligible food products purchased by the firm. The firm appears to have purchased varieties and quantities of dairy, fruits and vegetables, bread and cereals, and meats/seafood products; however, it is notable that the firm appears to have not purchased any *fresh* poultry, beef, pork, and seafood products.

The invoices also show that the bulk of the meat products purchased by the Appellant were primarily various varieties of deli meats, sausages, frozen patties, and frozen chicken nuggets. The chicken referenced by the Appellant appears to be cooked and mainly to support the prepared food portion of the subject business. The store photographs dated June 24, 2016 show that the meat items stocked at Wholesome Foods are primarily deli products which are also used in the preparation of foods advertised on the prepared foods menu board. As indicated previously, the majority of the foods advertised on the menu board are hot foods (including the sandwiches, wraps, heroes, etc.) and, therefore, cannot be purchased with SNAP benefits per the SNAP regulations. Wholesome Foods does not stock any unique food items (as validated by the store visit photos of June 24, 2016 and the photos provided by the Appellant) which are not available at the two authorized supermarkets located less than a quarter mile away from the subject firm.

It is important to note that even though the vendor invoices provided by the Appellant indicate that sufficient food inventory had been purchased to account for the firm's SNAP redemption volume, sufficient inventory alone does not explain the suspicious patterns of SNAP transactions such as an unusual number of transactions ending in a same cents value, rapid and consecutive transactions by individuals during the same store visit or in a single day, and transactions which were exhausted, or mostly exhausted, in unusually short periods of time. Even the large dollar transactions would remain questionable if there were sufficient food inventory to support such transactions when consideration is made of there being only a moderate variety of stock in the store, no fresh unprocessed meats, poultry, or seafood, only one variety of frozen unprocessed seafood in minimal quantities, no frozen unprocessed meats or poultry, a minimal variety and amount of frozen fruits and vegetables, a greater variety of foods at comparable or lower prices at other stores, no shopping carts and only six hand-held baskets available for customer use, and little counter space to place food for purchase at the checkout counter. Even if there were sufficient food stock at Wholesome Foods to mathematically support high dollar transactions, there does not appear to be anything that would reasonably attract SNAP households to shop there, a medium grocery store, in some cases traveling a few miles to do so, and spend substantial amounts of their SNAP benefits.

Lastly, the case record documents that the Retailer Operations Division conducted a detailed analysis of five SNAP households identified in the Charge Letter to analyze their shopping patterns at Wholesome Foods compared to their shopping patterns at other SNAP authorized stores. Each of these households had access to, and shopped at larger stores including super stores and/or supermarkets. It is obvious that these SNAP households had transportation available to them to reach these other authorized stores. However, despite this access to better stocked stores, these sampled households conducted excessively large transactions at Wholesome Foods often **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** of shopping at the larger stores where they conducted much smaller SNAP purchases. It is highly unlikely that a medium grocery store with moderate staple foods would have legitimate SNAP transactions greater than these larger and better stocked stores.

In summary, the store's layout, infrastructure, and food inventory do not support a high percentage of transactions markedly exceeding those of similar type stores. In addition to the statistical irregularity of such high dollar transactions, the limited availability of counter space for checking out and the lack of shopping carts and/or hand-held baskets support the Retailer Operations Division's determination. It is not plausible that the store's customers are carrying large amounts of food around the store without the benefit of a substantial number of shopping carts and/or hand-held baskets. Customers purchasing such large quantities of food items would have to hold them in their arms, or enlist the help of others while shopping. Based on the preponderance of the evidence, the irregular transaction patterns cited in Charge Letter Attachment 4 are more likely than not the result of trafficking in SNAP benefits.

### **Dismissal of Penalty**

The Appellant requests that FNS dismiss the permanent SNAP disqualification imposed on Wholesome Foods. However, the Food and Nutrition Act of 2008, at § 2021, does not allow for discretion in determining sanctions for trafficking and is specific in its requirement that "... a disqualification . . . shall be permanent upon ... the first occasion or any subsequent occasion of a disqualification based on the purchase of coupons or trafficking in coupons or authorization cards by a retail food store or wholesale food concern or a finding of the unauthorized redemption, use, transfer, acquisition, alteration, or possession of EBT cards ...". In keeping with this legislative mandate, 7 CFR § 278.6(e)(1)(i) of the SNAP regulations states that FNS shall disqualify a firm permanently if personnel of the firm have trafficked.

### **CIVIL MONEY PENALTY**

As previously indicated, the April 11, 2018 Determination Letter advised the Appellant of the ineligibility for consideration for a trafficking civil money penalty according to the terms of Section 278.6(i) of the SNAP regulations. The letter of charges dated July 27, 2016 advised the Appellant that documentation of eligibility for that alternative sanction was to be provided within 10 days. The regulations specify that such documentation must, in part, establish that there was an effective compliance policy and training program and that both were in effect and implemented prior to the occurrence of violations. The letter indicates that no information was provided by the Appellant for consideration; therefore, on review the Retailer Operations

Division's determination that the Appellant firm is ineligible for the imposition of civil money penalties in lieu of disqualification is affirmed.

### **CONCLUSION**

The Retailer Operations Division's analysis of the Appellant's EBT transaction record, upon which charges of violations are based, together with observations made during the store visit and an analysis of customer shopping behaviors, provide substantial evidence that questionable transactions during the focus period have characteristics and display patterns that are not consistent with legitimate sales of eligible food to SNAP benefit customers at a store of this type, size and makeup. Rather, the characteristics are indicative of illegal trafficking in program benefits. The Appellant's contentions do not outweigh this evidence.

The record has yielded no indication of error or discrepancy in the reported findings by the Retailer Operations Division that program benefits were accepted in exchange for cash or consideration other than eligible food. Therefore, based on a review of the evidence in this case, it is more likely true than not true that program violations did, in fact, occur as charged. Therefore, the decision to impose a permanent disqualification from participation in the SNAP against E S Wholesome Foods Of Brooklyn Corp. is sustained.

### **RIGHTS AND REMEDIES**

Your attention is called to Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. 2023) and to Section 279.7 of the Regulations (7 CFR § 279.7) with respect to your right to a judicial review of this determination. Please note that if a judicial review is desired, the Complaint, naming the United States as the defendant, must be filed in the U.S. District Court for the district in which you reside or are engaged in business, or in any court of record of the State having competent jurisdiction. If any Complaint is filed, it must be filed within thirty (30) days of receipt of this Decision.

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

LORIE L. CONNEEN  
Administrative Review Officer

July 18, 2018