

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

**Waaberi Halal Market,**

**Appellant,**

**v.**

**Case Number: C0198860**

**Retailer Operations Division,**

**Respondent.**

**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 Waaberi Halal Market (hereinafter “Waaberi Halal Market” or “Appellant”) by the Retailer Operations Division of FNS.

**ISSUE**

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR § 278.6(e)(1)(i) in its administration of the SNAP, when it imposed a permanent disqualification against Waaberi Halal Market.

**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 April 19, 2017, the Retailer Operations Division informed the Appellant that Waaberi Halal Market was in violation of the terms and conditions of the SNAP regulations, 7 CFR § 270 –282, based on EBT SNAP benefit transactions that "establish clear and repetitive patterns of unusual, irregular, and inexplicable SNAP activity for your type of firm." The letter also noted that the Appellant could request a trafficking civil money penalty (CMP) in lieu of a permanent disqualification within 10 days of receipt under the conditions specified in 7 CFR § 278.6(i). Per UPS confirmation of delivery, the charge letter was delivered to the Appellant at the store owner’s home address of record on April 20, 2017.

The record reflects that on April 28, 2017, the Appellant requested an extension in time for providing a response to the letter of charges. The Retailer Operations Division granted the Appellant's time extension request to May 11, 2017. The Appellant was informed that the time to request a civil money penalty in lieu of permanent disqualification and to provide documentation to support such a request could not be extended.

The record also reflects that in a letter received on May 10, 2017, the Appellant's counsel requested information and documents from FNS with regard to the agency's case against Waaberi Halal Market pursuant to the Freedom of Information Act (FOIA). In a letter dated June 1, 2017, FNS provided the Appellant's counsel with a response to the FOIA request. The Appellant's counsel appealed the FOIA request in a letter of August 30, 2017. In a letter dated August 27, 2020, FNS provided the Appellant's counsel with a response to the FOIA appeal. The Retailer Operations Division subsequently sent a 10 day letter to counsel on September 1, 2020 providing the opportunity to respond to the letter of charges.

In responses to the Retailer Operations Division of April 28, 2017, September 11, 2020, and December 10, 2020, the Appellant, through counsel, replied to the letter of charges. The record reflects that the Retailer Operations Division received and considered the information provided prior to making a determination.

After considering the Appellant's responses and the evidence in the case, the Retailer Operations Division issued a determination letter dated December 22, 2021, informing the Appellant that Waaberi Halal Market was being permanently disqualified from participation in the SNAP in accordance with 7 CFR § 278.6(e)(1) for trafficking violations. The letter also stated that the Appellant was not eligible for a trafficking civil money penalty (CMP) as the Appellant did not submit sufficient evidence to demonstrate that the firm had established and implemented an effective compliance policy and program to prevent violations of the SNAP.

In a letter postmarked January 3, 2022, 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 January 7, 2022. In an email correspondence of January 28, 2022, the Appellant, through counsel, submitted additional information in support of the request for administrative review.

## **STANDARD OF REVIEW**

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

## **CONTROLLING LAW**

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

FNS policy memoranda and clarification letters which further explain the conditions necessary in order to permanently disqualify retail stores.

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

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

7 CFR § 278.6(a) states, inter alia:

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

7 CFR § 278.6(e)(1)(i) states:

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

7 CFR § 271.2 states, inter alia:

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

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

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

7 CFR § 278.6(i) states, inter alia:

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

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

(ii) Firms that request consideration of a civil money penalty in lieu of a permanent disqualification for trafficking shall have the opportunity to submit to FNS information and evidence as specified in § 278.6(i), that establishes the firm's eligibility for a civil money penalty in lieu of a permanent disqualification in accordance with the criteria included in §

278.6(i). This information and evidence shall be submitted within 10 days, as specified in § 278.6(b)(1). [Emphasis added].

(iii) If a firm fails to request consideration for a civil money penalty in lieu of a permanent disqualification for trafficking and submit documentation and evidence of its eligibility within the 10 days specified in § 278.6(b)(1), the firm shall not be eligible for such penalty. [Emphasis added].

### **SUMMARY OF CHARGES**

The Appellant was charged and determined to be trafficking based on an analysis of EBT transaction data from January 2017 through March 2017. 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 too rapidly to be credible;
- There were multiple transactions made from individual benefit accounts in unusually short timeframes; and
- There were excessively large purchase transactions made from recipient accounts.

The issue in this review is whether, through a preponderance of evidence, it is more likely true than not true that questionable transactions were the result of trafficking.

### **APPELLANT'S CONTENTIONS**

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

In the replies to the charge letter, in the administrative review request, and in subsequent correspondence to FNS, the Appellant, through counsel, stated the following summarized contentions, in relevant part:

- The Appellant denies that trafficking took place.
- The Appellant operates as a local middle eastern small grocery store that occupies 2,400 square feet and provides a variety and quantity of staple food items to the surrounding community including Halal meats and ethnic spices that are imported from Somalia that adhere to the cultural and religious standards, along with additional food items. These food items sell frequently and require replenishment monthly. Inventory at the beginning of the month is typically superior to inventory at the end of the month.
- The vast majority of local stores are small convenience, with a substantial portion of the population getting at least a portion of their groceries from stores like the Appellant. The vast majority of the store's offerings are qualified items under the SNAP regulations.
- A review of the Case Analysis Document clearly indicates that this store has been mischaracterized as a "combination/other" store. The Appellant specializes in providing the local community with a large variety of specialty items focusing on Halal meats and foods. The store's expansive inventory is supported by the submitted vendor invoices from Pacific Wholesale Trading, Inc., West Coast Pita & Foods, Inc., Benadir Imports, Inc., and the store

photos submitted by the Appellant. Other combination grocery/other stores include Walgreens and CVS—hardly comparable for purposes of transaction analysis. Furthermore, given that the Scan categories are at least in part based upon thresholds using store category data, the Scans are invalid as a result of the store’s miscategorization.

- For example, some of the more popular specialty items sold at the Appellant which cannot be found at the average combination/other store include: Halal goat meat, Halal beef meat, basmati rice, corn meal, and tuna steaks. The Appellant also sells meats per the pound and bundles of other foods (unlike other combination/other stores), including, but not limited to: Halal 25 pound goat meat; Halal beef meat; 10 pound tuna steaks; 10 pound Bazarac basmati rice; 10 pound Aahu Barah basmati sela rice; tandoori masala spice; pure natural ghee; 2 pound Moong beans; 10 pound pasta; 25 pound white corn meal; and 2 pound adzuki beans.
- According to the Case Analysis Document, there are no other combination grocery stores that carry the same food items that the Appellant does. There is however, one combination grocery/other (which are not direct competitors) that does not have anything approximating the inventory contents of the Appellant.
- The Appellant is located in an economically depressed area, surrounded by poverty and many low-income families. A substantial portion of the Appellant’s clients come from the surrounding residential neighborhoods. According to USDA’s *Profile of Households for the 3<sup>rd</sup> Congressional District of Oregon*, approximately 16% of the local households receive SNAP benefits.
- The store is within walking distance of a community college, multiple schools, Creative Science School at Clerk, and parks and sits on a main transportation route which draws, houses, or places a significant number of SNAP participants. A material portion of these participants visit the store.
- The Appellant services a much higher Asian population than the average SNAP retailer to whom their transactions are compared.
- Most visits to a store the size of the Appellant are made while the customer is on his/her way to work or school, or while running errands at night. Typically, SNAP participants who visit on a daily or weekly basis are significantly more likely to do so in the morning, or during the late evening.
- As noted in the April 2016 edition of Single Store Owner magazine, SNAP participants are more likely to shop at convenience stores and small grocery stores and customers of these stores are among the most loyal customers. Also, SNAP participants are more likely to shop regularly at small grocer/convenience stores than nonparticipants.
- Households with particular demographic information are more likely to be disqualified which shows a bias towards smaller grocers. Where certain households are more likely to shop at smaller stores – and in greater frequency or transactions amounts – they are more likely to be disqualified. Regional differences in disqualification rates and shopping habits support this contention as well.
- In support of the Appellant’s discussions regarding SNAP households’ shopping habits, the following studies were cited: *Benefit Redemption Patterns in the SNAP in Fiscal Year 2017 Final Report*, Insight Policy Research, September 2020; *Shopping Pattern and Food Purchase Difference Among SNAP Households and Non-SNAP Households in the United States*, Preventative Medicine Reports, June 20, 2017; and *What Does SNAP Benefit Usage Tell Us About Food Access in Low-Income Neighborhoods?*, Social Science & Medicine, 2014.
- There are a number of generally accepted explanations for Attachment 1 transactions. These explanations, which are drawn from past SNAP compliance cases are as follows: Pricing

structure: Where the store's pricing structure favors the result of the transactions landing at a particular number of cents; Purchases using set amounts authorized by the SNAP participant (for example, a transaction of \$31.99 for which a customer asked to have \$20.00 taken off their EBT card); and rounding of transactions by the clerk as a means to speed up transactions.

- Same cents transactions are not in and of themselves suspicious, even in significant number. There are no regulations prohibiting such transactions nor does this pricing habit occur at a higher rate in stores that are trafficking than stores who are not. These transactions are a statistical anomaly as there are a variety of ways that these transactions come about organically in the store.
- Transactions ending in .00 and .99 occur in both non-SNAP and SNAP transactions as well as the SNAP transactions set out in the charge letter.
- Because nearly every item in the store is priced to have a high likelihood of resulting in a \$.00 or \$.99 price, the statistical possibility of the store's transactions reflecting those values is almost a certainty. This pricing is reflected in the store's pricing model and submitted stock photos.
- These prices are the result of specials that the store runs on certain products, and the result of discounted or ad-hoc pricing for customers who are regulars or when circumstances warrant it (such as customer negotiations/haggling).
- With respect to the store's habit of rounding some transactions because of a customer's loyalty or when business circumstances warrant, the store's clerks are given a reasonable amount of autonomy. Business circumstances which warrant the rounding of transactions occur when the store has a number of customers shopping all at once and the risk of theft or unnecessary delay in line increases. This is not to say that a customer will always be given a round number price, but rather that the clerk may, within his or her discretion, choose to round the sales price to the half or whole dollar to expedite the transaction.
- USDA has no evidence to refute the Appellant's position regarding the pricing of individual items in the store. While USDA may look at averages in determining whether or not a store conducts certain activity, there are no local stores that sell the items as the Appellant nor are there other stores that sell to this customer base in such significant volume. USDA cannot present evidence as to the inventory of the other stores that are similarly situated. Thus, the baseline for comparison in this instance does not exist.
- Past Administrative Review Branch decisions have identified a number of certain explanations for the presence of Attachment 2 transactions to include: SNAP benefit pooling amongst multiple SNAP households to receive larger discounts and thus more food; and the presence of multiple checkout machines and a single EBT processing terminal. The Appellant cited two administrative review cases in support thereof.
- Other logical explanations that would result in fast-in-time transactions for multiple households include pre-tabulation from orders, pre-designated food packages or similar purchases which do not require significant time to calculate.
- Regarding pre-tabulation, if the store is aware of the transactions (because the customer is gathering the items at the register and the clerk is calculating the balance due as the customer collects items), then the entire transaction is not limited to the time between the transactions in the Attachment.
- Multiple households participate in the same transactions at this store. From a logistics standpoint, these customers usually shop in groups and identify what they want to purchase verbally. In these instances, the total balance is rung in by the register and then participants portion out which parts they are going to be responsible for. Using this approach, the time

between transactions does not involve the calculation of groceries, but rather the processing of the second portion of the original transaction.

- This store has large items or food bundles which do not need to be presented to the clerk for individual calculation. For example, a SNAP participant may approach the counter, identify his/her selection verbally, and the clerk need only to enter the price. This entire process takes a matter of moments, and does not involve moving item by item through the participant's selections to make a purchase.
- Even without an optical scanner, an experienced clerk can process and enter one item manually within 3 seconds, enter the transaction into the EBT terminal in 5 seconds, and allow 10 seconds for the participant to swipe their card, enter their PIN and receive transaction confirmation. This means that at least 13 items can be entered manually and a transaction processed in 54 seconds or less. Given the price range at the store, it is possible for these transactions to be the result of organic transactions rather than any of the other circumstances. Logistically it is possible to transact the transaction matrices set out in the charge letter.
- With respect to logistics, the closest in time transactions were 1 and 2, which are separate by 1 minute and 51 seconds and are in the amounts of \$59.99 and \$99.99, respectively. It is possible to physically conduct these transactions in the timeframes set for the in the charge letter cause of the expensive items in the store's inventory. Faster transaction times are aided in part by the experienced store clerks who are already familiar with the prices and have the authority to round out where appropriate.
- The Appellant's inventory greatly exceeds those around it and there is no store that carries the same food items.
- The transactions in Attachment 3 are the result of: (1) the participant forgetting an items in his/her prior transactions; (2) co-shopping; (3) the participant making a purchase, returning home, and then returning to the store to make a second purchase; (4) the store's business practices; and (5) a reflection of the normal shopping habits of SNAP participants.
- As stated in the court in *Onukwughu v. U.S.*, "multiple transactions occurring over the span of hours" are not "inherently suspicious" as it is not uncommon for a customer to make multiple trips to the same store on the same day (finding it unclear as to why FNS found certain close in proximity transactions to be consistent with patterns of trafficking "rather than the innocent explanation of a shopper realizing he forgot something or, for example, one household member wanting to make a small purchase . . . while the other household member stays behind to complete a larger purchase).
- Past Administrative Review Branch decisions have identified a number of certain explanations which adequately explain the presence of Attachment 3 transactions. These cases (the Appellant cited numerous administrative review cases and numbers in support thereof) and explanations include: The significant presence of low-income population of SNAP residing near the retailer; absence of local SNAP retailers to compete with the subject store; significant inventory that encourages multiple shopping trips, like the presence of deli or meat by the pound; customer loyalty and loyalty programs; lack of transportation for local SNAP households; delivery services; bulk discounts on food purchases, especially expensive items and sodas (like Red Bull); and forgotten items.
- The pertinent factors in the above referenced cases which are also present in this case include low-income SNAP population near the retailer, absence of location competition, significant inventory with items contained in the top 100, customer loyalty, and lack of transportation for local SNAP participants.

- As noted by FNS in its *Benefit Redemption Patterns in the Supplemental Nutrition Assistance Program Final Report* (2011), a large portion of households redeem nearly all of their benefits within the first two weeks of the month. Purchases made within the first seven days after receiving benefits is not unusual.
- In Oregon, participant benefits are issued between the 1<sup>st</sup> through the 9<sup>th</sup> day of each month, based upon the last digit of the SNAP recipient's social security number. USDA has previously conducted research into the standard practices of participants for food purchases, and purchases made within the first seven days after receiving benefits is not unusual. In fact, on a regular basis, the participants will make significant grocery purchases from the Appellant store within 48 hours of receiving the deposit in their accounts. Such patterns are supported by the *Benefit Redemption Patterns in the Supplemental Nutrition Assistance Program Final Report* (2011). Here, almost all of the transactions set forth in Attachments and 3 reflect this standard shopping habit and patterns of SNAP participants.
- As was noted in the in the 2016 study conducted by Convenience Store News, small grocery/convenience store customers are among some of the most loyal customers when it comes to their store selection.
- Co-shopping is on the rise where both adult members are responsible for picking up groceries.
- The Appellant is aware that there are a number of SNAP households that come into the store multiple times a day because of convenience, often sending their children on separate shopping trips to pick up items. In other cases, participants make purchases for friends, for large gatherings, or to satisfy needs that are not obvious.
- The store's inventory is such a variety that it is reasonable to assume a household could satisfy all of their needs on a single shopping trip. The store benefits from being able to satisfactorily supply their customers with enough types of food for them to be able to make meals for their families.
- The SNAP customers in this case purchase items in bulk because they limit the number of shopping trips they take per month. Most of these items can be broken up and frozen for different meals (in the case of meats), or are shelf-stable (like rice). The items in the store are ethnically important to these SNAP customers. The items cannot be readily bought at larger grocers. The store is clearly miscategorized and has a special inventory and draw to its SNAP clientele.
- The store does not have an optical scanner, but the clerk has the ability to visually identify and enter items into the register. Item prices are usually consistent if not outright uniform, and are frequently memorized by the clerk through repetition over time. Furthermore, the store will tabulate transactions on a rolling basis, meaning that unlike a grocery store when you line up, set all of your items on the counter and then purchase them, this store permits participants to gather items, bring them to the register, and then return to gather more items. Although the EBT transactions are processed consecutively over a matter of a few minutes, the calculations, bagging and gathering of items can take dozens of minutes if the participant chooses.
- From a physical transportation angle, the groceries are often carried in the store's shopping carts, then bagged, and often customers carry the groceries by hand (using their children or friends to carry some items). On occasion, other items (like stroller) can be used to help transport the items out of the store.
- It is important to consider the store's size, inventory, specialty items, and operations. The store's inventory is sufficient to account for the transactions as it consists of expensive items like: 25 pound goat meat, 60 pound bag of basmati rice, 50 pound bag of corn coarse meal,



10 pound tuna steaks, cut beef, ready-made Chapati, along with other food items. The items are bulk purchases in-and-of themselves, and make it easy for higher priced transactions to be tabulated in shorter amounts of time. This store's inventory greatly exceeds those around and there is no store that carries the same food items.

- It is much easier for the customer to get through the spaces of a store like the Appellant's than it is for them to go into a supermarket/super store and the location is much closer to their homes. Accordingly, these customers are more likely to come back for supplemental and quick shopping trips than they otherwise would at an average convenience store with an inferior inventory and a further distance from their homes.
- Many of the local SNAP household members are unemployed. To satiate their boredom, these participants will regularly shop at stores to find something to do. In some instances, the act of purchasing an item is pleasing, as much of the month they lack the financial ability to do so. So they will either shop regularly on the same day, or they will binge shop and make large purchases because they have the benefits to do so.
- SNAP participants do not have or are limited to one vehicle forcing them to shop at nearby retailers rather than being dependent on family and friend.
- Transportation inconsistency is another reason for the transactions outlined in this Attachment. Participants do not have their own vehicles so trips to larger stores are dependent upon rides from friends or family. A household that cannot depend on those trips is forced to shop nearby.
- Furthermore, given that the closest supermarket is 1.3 miles away, there are not a lot of larger SNAP retailers located immediately around the store.
- Also, the store's customers come from several different residential areas and are not strictly limited to the immediate surrounding area. Some of the customers travel for periods of time due to the Halal meats that are offered.
- Past Administrative Review Branch decisions have identified a number of certain explanations for the presence of Attachment 4 transactions. Examples of acceptable explanations for excessively large purchase transactions include (the Appellant cited numerous administrative review cases and numbers in support thereof): Sufficient inventory to account for the transactions, as supported by invoices; sales tax documentation to support sales of food items in amounts to satisfy the transactions; large families shopping contemporaneously; presence of high dollar eligible foods in the store's inventory; presence of specialty or imported foods, which are expensive and not generally available elsewhere; miscategorization of the store, leading to inadequate comparisons of transaction sizes; sales of large quantities of soda; absence of local large SNAP retailers; presence of a large local SNAP population; and presence of bulk pricing or a reward system for larger purchases.
- The transactions documented in Attachment 4 are the result of the store's inventory, the store's pricing structure, reliance on the store as a primary grocery for some minutiae of local participations, co-shopping and/or the normal reflections of the SNAP participants shopping habits.
- The store offers customers a considerable inventory in Halal meats, 25 pound goat meat, 60 pound bag of basmati rice, 50 pound bag of corn coarse meal, 10 pound tuna steaks, cut beef, ready-made Chapati, along with other food items.
- These transactions are a direct result of the store's inventory. The higher priced specialty items are sold in bulk to immigrant customers who have different shopping habits than the average non-immigrant SNAP participant. This directly results in higher dollar purchases, especially compared to combination/other stores which do not carry these items.

- From a logistics standpoint, many of these transactions are conducted by households who have multiple persons present. The items are scanned and bagged and then carried home or placed in a vehicle for transportation.
- From a causality standpoint, the store's inventory and comparative lack of big box competitors create a higher likelihood that these transactions are going to occur at the Appellant.
- According to USDA's research (*Foods Typically Purchased by SNAP Households*), sweetened beverages and salty snacks are within the top 10 expenditures for SNAP households, as are meats and a number of other items offered by the Appellant. It is therefore reasonable to expect customers to spend large amounts and/or the majority of their benefits at the Appellant on the inventory evidenced in the on-site inspection.
- In all, the SNAP household study found that participants spend almost 62% of their monthly benefits on meats, sweetened beverages (sodas and energy drinks, Gatorade and the like), vegetables, frozen prepared foods, prepared desserts, high fat dairy/cheese and breads—in that order. It is therefore reasonable to expect SNAP customers to spend large amounts and/or the majority of their benefits at the Appellant store.
- According to the FMI *U.S. Grocery Shopping Trends* 2016 annual report, limited assortment stores saw an increase of consumers who use them as a primary grocery by 3% over 2015; convenience stores likewise saw an increase of 3% in consumers who used their store as their primary grocer; ethnic food stores saw a rise of 1% in primary grocery usage.
- Households that conducted the transactions in Attachment 4 have a large amount of SNAP residents residing in the areas surrounding the store, thus requiring a larger quantity of grocery products each month than those households with less participants.
- The number of high priced items in the store does not require the store to have a huge amount of counter space to set all of the items. Given that a number of items are roughly \$10.00 to \$20.00 each, five to ten of such items would not be difficult to carry and could be placed on the given space set out in the store visit observations.
- Furthermore, visual identification on the part of the store clerk is easier than scanning items as they are aware of the prices because of experience so they need only to identify the items and enter the price on the register.
- The physical ability to conduct these transactions was aided by households who shopped in groups, brought their own portable carts (to make transportation of the groceries home easier), or who gathered their items in groups and brought them to the counter to be bagged and tabulated while they continued shopping.
- The on-site inspection of the store had a hard time identifying the ethnic foods that the Appellant has to offer and ended up producing an inaccurate, incomplete and worthless store visit report. The investigator noted that "Also a fair amount of ethnic food that's hard to identify or categorize". Even the store visit photos identify large, bulk items which are expensive, including several kinds of 50 pound bags of different rice, and completely stocked shelves of ethnic food items. A specific list of the higher priced items that were missed by the reviewer's limited list include: 5 U.S.C. § 552 (b)(7)(E).
- The submitted affidavits from eleven of the store's customers attest that they spend between \$200.00 to \$450.00 at the store during a single trip, exhausting between 20% to 60% of their SNAP benefits at the store and the majority attesting to frequenting the store multiple times in a single day.
- The submitted inventory invoices and bank statements for the review period substantiate the firm's inventory and demonstrate that there was adequate eligible food items to account for the transactions during the review period.

- Because the Appellant is located much closer to the SNAP participants (who do not have regular access to transportation – otherwise they would not qualify to be SNAP participants), and its inventory contains such a wide variety of items, these transactions are more likely to occur as a matter of course.
- Furthermore, the only other stores that are nearby do not have the inventory variety that the Appellant has. Accordingly, this store is going to have larger transactions than the average convenience store.
- The Appellant has never had a compliance problem with SNAP.
- The firm’s compliance policy is an important factor and should be taken into consideration as it could have a material impact on the transactions noted during the review period. It would defy logic for the store owner with a long history of compliance to suddenly start trafficking for the de minimus amounts set forth in the charge letter.
- USDA does not know the correlation coefficient between ALERT scans and trafficking. The Appellant has calculated this based on results of undercover investigations and determined that it was a positive correlation, but the relationship between the values is weak.
- The ALERT Scan categories are not inherently indicative of trafficking. The ALERT system cannot identify fraud. It is designed to identify “suspicious behavior” at most, but the basis for the system is unknown. See *TG Mini Mart, Inc.* and *Lima Mini Mart Inc.*
- The district courts have cautioned USDA in relying too heavily on numbers generated by the ALERT system: *Brooklyn Mini Market vs. U.S.*, Federal Western District of New York, 12-CF-6708; and *Skyson USDA, LLC vs. U.S.*, 2010 WL 651032 (D. Hawaii 2010)
- Recent administrative review cases discuss the precedent that should be considered in this case: *Howard’s Quik Mart vs. Retailer Operations Division* and *Gloesis Group vs. Retailer Operations Division*.
- It is likely that the presence of a Confirmation Bias exists, as it does in many cases handled by FNS. The danger of Confirmation Bias is obvious: USDA starts with the theory that trafficking exists because that is allegedly what the ALERT patterns were designed to detect and if the store is flagged often enough, then the automatic hypothesis put forth by USDA that trafficking is occurring.
- The pertinent burden of proof of SNAP disqualification is the “preponderance of evidence” standard, which means that the evidence must be adequate enough which is a reasonable mind, considering the record as a whole, would accept as sufficient a conclusion that the matter is asserted more likely to be true than not true. See *L&M Grocery Market, Inc. vs. Retailer Operations and Compliance*. The Department bears the burden of proof, not the retailer. See *Cardenes Market vs. Retailer Operations and Compliance*.
- The transaction patterns identified have been explained by the Appellant as required in *Skyson USDA, LLC vs. U.S.*
- In the event that FNS determines that trafficking did occur, the Appellant requests imposition of a civil money penalty pursuant to 7 CFR § 278.6(i) which states that to be considered for a CMP, a retailer must demonstrate that the firm had established and implemented an effective compliance policy and program to prevent violations. Here, the effective compliance policy and program at the Appellant is reflected by the store’s significant compliance history since it became an authorized SNAP retailer.

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

- Inventory purchase invoices (5 total);

- Store stock photos (7 total);
- Affidavits of 11 customers;
- Business bank statements for review period;
- EBT purchase register receipts (2 total);
- *Pearson Correlation Coefficient Calculator*, Social Science Statistics;
- *Benefit Redemption Patterns in the SNAP in FY 2017 Final Report*, Insight Policy Research;
- *What Does SNAP Benefit Usage Tell Us About Food Access in Low-income Neighborhoods?* Social Science & Medicine, 2014; *Shopping Pattern and Food Purchase Differences Among SNAP Households and Non-SNAP Households in the United States*, Preventative Medicine Reports, June 20, 2017;
- *Shopping Pattern and Food Purchase Differences Among SNAP Households and Non-SNAP Households in the United States*, Preventative Medicine Reports, June 20, 2017
- *Profile of SNAP Households in 2017, Oregon Congressional District 3*, USDA FNS;
- *Know Your Core, Protect Your Core*, Convenience Store News for the Single Store Owner, April 2016;
- *U.S. Grocery Shopping Trends Annual Report*, FMI, 2016; and
- *Foods Typically Purchased by SNAP Households*, FNS, November 2016.

## **ANALYSIS AND FINDINGS**

### **SNAP Authorization**

During the review period of January 2017 through March 2017, Waaberi Halal Market was classified as a combination grocery/other store. When the Appellant was authorized by FNS for participation in the SNAP on December 11, 2015, the owner signed a SNAP application for the store and acknowledged he was aware of the SNAP regulations and understood those regulations. That application included a certification and confirmation that the owner would “accept responsibility on behalf of the firm for violations of the SNAP regulations, including those committed by any of the firm’s employees, paid or unpaid, new, full-time or part-time.” The violations listed on this certification include accepting SNAP benefits in exchange for cash, otherwise known as trafficking, and other violations such as accepting SNAP benefits as repayment on credit accounts or in exchange for ineligible items.

### **Store Visit Observations**

The case file indicates that in reaching a disqualification determination, the Retailer Operations Division considered information obtained during a March 11, 2017 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 1,400 square feet in size with no additional storage area outside of public view;
- No shopping carts and no hand-held baskets available for customer use;
- One small checkout counter area with limited check-out counter space;
- One cash register and one EBT point-of-sale (POS) device for use in ringing-up SNAP transactions;

- Did not have optical scanners;
- No signs posted or flyers available advertising the availability of bulk foods offered at a discounted rate to include meats in bulk, foods sold by the case, and grocery package deals;
- No meat/seafood specials or bundles or fruit/vegetable boxes that might sell for high prices;
- No evidence of a wholesale business such as posted prices or separate entrances for wholesale customers;
- Store noted to be disorganized;
- Stock included specialty or ethnic/Halal food items and ethnic spices;
- No fresh or frozen meats, poultry, or seafood;
- No fresh produce stock;
- No frozen food stock;
- Did not have a kitchen and hot foods were not sold;
- Did not have a deli or prepared food section;
- Meat items included units of canned fish;
- Dairy included milk, butter/margarine, yogurt, and infant formula;
- Other staple foods available for purchase included such items as juice, pasta, rice, infant cereal, corn meal, flour, dried peas, beans, and lentils, nuts, and canned goods;
- Much of the remaining food stock consisted of accessory foods such as candy, carbonated and non-carbonated drinks, condiments, spices, vegetable oil, tea, and sugar; and
- Store stocked a considerable amount of ineligible nonfood items to include such items as health and beauty aids, household cleaning supplies, household items, housewares, clothing, automotive supplies, and gift items/souvenirs/party goods.

### **Charge Letter Attachments**

On review, the investigative materials provided by the Retailer Operations Division, including computer printouts of transaction data available from Federal records, store visit observations, information regarding area competitor firms, and household shopping patterns, were analyzed. Government analyses of stores caught in trafficking violations during on-site investigations have found that transactions involving trafficking consistently display particular characteristics or patterns. These patterns include, in part, those cited in the letter of charges. 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.

### **Same Cents Transactions (Charge Letter Attachment 1)**

This charge letter Attachment documents transactions ending in same cents values. This Attachment includes 116 transactions (as high as \$320.00) ending in \$x.00 that total \$6,912.00. Also included are 144 transactions (as high as \$420.99) ending in \$x.99 that total \$12,409.56. When such repetitive

patterns are not supported by any kind of special pricing structure at the store, they are a strong indicator of trafficking in SNAP benefits.

**5 U.S.C. § 552 (b)(7)(E).** 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 because nearly every item in the store is priced to have a high likelihood of resulting in a \$.00 or \$.99 price, the statistical possibility of the store's transactions reflecting those values is almost a certainty. This pricing is reflected in the store's pricing model and submitted stock photos. However, the store visit observations indicate that the Appellant does not appear to employ any kind of obvious pricing structure. The Appellant provided a list of 48 "higher priced" food items with prices. Of the 48 food items listed, 9 had prices ending in \$.99 and 11 had prices ending in \$.00. At least one of the items noted by the Appellant having a price at \$.00 (i.e., frozen chicken breast at \$25.00) was not noted during the store visit observations as the firm stocked no fresh or frozen meats, poultry, or seafood. While some of the Attachment 1 transactions may be the result of purchases of these items, the Appellant provided no evidence, **5 U.S.C. § 552 (b)(7)(E)**, to show staple food items priced at \$.00 and \$.99 were a common practice. The store visit observations also indicate that specials on certain products were not advertised or available to customers, contrary to the Appellant's claim.

While it is plausible that from time to time, a household may "haggle" an even dollar transaction, it is highly unlikely that a household would negotiate a price ending in \$.99. It is also reasonable to believe that from time to time a customer may request to pay a specific amount of the transaction in an even dollar amount. However, the food price listing provided by the Appellant makes it less plausible that the firm would have endless organic transactions ending in \$.00 or \$.99. In addition, the customer affidavits provided by the Appellant are void of statements attesting to such activity.

The Appellant contends that clerks are given autonomy in which to round transactions to the half or whole dollar to expedite the purchase process to alleviate increasingly long lines and as a theft prevention mechanism. Such autonomy may be permissible. However, the Appellant has provided no documentation to support such claim. Likewise, this argument breaks down as the same households or different households transacted rounded (.00) and unrounded (.99) totals within a very short time period at peak and non-peak hours.

In addition, there is no indication from the store visit record that indicates that transaction totals are rounded up or down at the checkout counter. Furthermore, the EBT card is like a credit card and there is no need for recipients to worry about a cent value or to round purchases for the purpose of budgeting benefits. Additionally, when rounding prices either the SNAP recipient will pay more for a purchase rounded up or the retailer will lose money if purchases are consistently rounded down to an even amount. Also, for the purpose of keeping track of any remaining balance, every SNAP transaction receipt has the recipient's ending balance printed on the receipt or the recipient can request a "balance inquiry" at any time to determine the balance.

The Appellant contends that no other local stores sell the same items at the same volume as the subject firm. Thus, the baseline for comparison in this instance does not exist. While FNS may not be able to account for the volume of sales of a particular item, the agency is able to identify

competitor firms selling the same or comparable food items as the Appellant within a 2.5 mile radius. 5 U.S.C. § 552 (b)(7)(E).

The Appellant contends that the Department cannot present evidence as to the inventory of other stores that are similarly situated because of the firm's pricing structure. However, the pricing structure of the firm and its inventory are different elements of evaluation. FNS is able to provide photographic evidence of comparable firms' inventory, if this is what is implied by similarly situated.

While some of the transactions in this Attachment may have been for legitimate staple food purchases, particularly those in the lower dollar amounts, there is insufficient evidence that these repeating same cent transactions are legitimate. As the Appellant has offered no rational explanation or supporting documentation for why such patterns might exist, it is reasonable to conclude that these same cent transactions are the result of trafficking.

### **Transactions Made Too Rapidly to be Credible (Charge Letter Attachment 2)**

There are 28 total SNAP transactions (14 transaction sets) totaling \$2,386.14 that met the parameters of this charge letter Attachment. These transactions were conducted by 22 different SNAP households. These types of rapid transactions at a firm with no optical scanner, only one register, one EBT POS device and limited counter space are indicative of trafficking in EBT benefits.

The Appellant contends that these transactions are the result of pre-tabulation from orders, pre-designated food packages or similar purchases which do not require significant time to calculate. If the store is aware of the transactions (because the customer is gathering the items at the register and the clerk is calculating the balance due as the customer collects items), then the entire transaction is not limited to the time between the transactions in the Attachment. However, the Appellant provided no evidence to substantiate these contentions. As the Appellant has only one cash register and one EBT POS device, it is unlikely that the store would tie up the cash register and POS device while a customer is gathering items especially when there are other customers shopping at the firm and requesting to have their purchases rung up. In addition, the store visit observations indicate that the firm offered no special or custom services to customers, such as on-line or telephone orders and/or delivery services, which would entice SNAP customers to utilize the subject store over other area authorized retail stores.

The Appellant contends that multiple households participate in the same transactions at this store. From a logistics standpoint, these customers usually shop in groups and identify what they want to purchase verbally. In these instances, the total balance is rung in by the register and then participants portion out which parts they are going to be responsible for. Using this approach, the time between transactions does not involve the calculation of groceries, but rather the processing of the second portion of the original transaction.

However, no evidence was submitted by the Appellant to support this claim. Additionally, if balance splitting by SNAP customers were true, the time between transactions would likely take just a few seconds. 5 U.S.C. § 552 (b)(7)(E). However, the time between these transactions sets ranges from 32 seconds to 6 minutes and 46 seconds. A SNAP household is defined as everyone that lives together and purchases and prepares meals together. The Appellant's scenario implies that multiple

households are shopping together and then splitting the balance. However, there is no benefit for multiple households to participate in one transaction and then split the balance.

The Appellant's claim that the closest in time transactions were 1 and 2, which are separate by 1 minute and 51 seconds and are in the amounts of \$59.99 and \$99.99, respectively is an incorrect statement. The closest in time transactions were transactions #267 and #268 (transaction set 4 in Attachment 2) and are in the amounts of \$53.99 and \$79.99, respectively.

FNS refutes the Appellant's contention that no other retailer or combination grocery store exceeds the firm's inventory or carries the same food items as the Appellant (alone or grouped together). Traditional retailers and national combination grocery stores may not have the same product selection as the subject firm. However, at the time of charging there were at least seven Halal designated SNAP authorized specialty stores located within a 2.5 mile radius of the subject firm. A review of five of these retail stores revealed comparable products and the assortment of Halal meats and ethnic spices referenced by the Appellant.

The Appellant contends that this store has large items or food bundles which do not need to be presented to the clerk for individual calculation. However, the Appellant provided no evidence to substantiate this claim. Such documentation could have included customer attestations, signage, stock photographs, and/or consumer purchase logs for repeat customers/product purchases. Furthermore, the store visit report clearly indicates that the firm does not offer special food bundles or boxes. Bundles are typically advertised and include a select number of products at a set discounted price. The store visit form and photos document the availability of larger sized shelf stable ethnic products to include such items as pasta, rice, barley, millet, rye, corn meal, cracked wheat, beans, nuts, peas, lentils, oils, ghee, and spices. However, bundles are not available. The submitted inventory invoices also substantiate that only dry goods were purchased for the Appellant. In addition, the customer affidavits provided by the Appellant are void of statements attesting to purchasing of bundles at the subject firm.

The Appellant contends that even without an optical scanner, an experienced clerk can process and enter one item manually within 3 seconds, enter the transaction into the EBT terminal in 5 seconds, and allow 10 seconds for the participant to swipe their card, enter their PIN and receive transaction confirmation. Given the price range at the store, it is possible for these transactions to be the result of organic transactions rather than any of the other circumstances. Logistically it is possible to transact the transaction matrices set out in the charge letter. Faster transaction times are aided in part by the experienced store clerks who are already familiar with the prices and have the authority to round out where appropriate.

5 U.S.C. § 552 (b)(7)(E).

It is not credible that the transactions noted in this Attachment are for legitimate purchases of eligible foods especially taking into consideration the time required to process a legitimate purchase and the steps involved: 5 U.S.C. § 552 (b)(7)(E).

While such transactions may well be done in succession, performing these processes on large transactions generally are not done rapidly. The amount of time required is, largely, proportional to the dollar amount of the transaction; typically, the larger the dollar amount transacted the longer the time period between transactions. The Appellant firm processed orders considerable faster



than supermarkets typically process them, yet the firm has only one small checkout counter, one cash register and one EBT POS device, and none of the logistical tools such as optical scanners, conveyor belts, rotating bagging platforms or order separators that are routinely used in rapid throughput operations. As the Appellant has offered no rational explanation or supporting documentation for why such patterns might exist, it is reasonable to conclude that the SNAP transactions included in this charge letter Attachment are the result of trafficking.

### **Repeat Transactions by the Same Household (Charge Letter Attachment 3)**

This charge letter Attachment documents 20 sets of transactions (40 total transactions) that total \$3,794.08 in SNAP benefits to meet the parameters of this scan. These transactions were conducted by 19 different SNAP households. Multiple transactions conducted by the same household account within a short period of time is a method which violating stores use to avoid single high dollar transactions that cannot be supported by a retailer's inventory and structure.

The Appellant contends that as noted by FNS in its *Benefit Redemption Patterns in the Supplemental Nutrition Assistance Program Final Report* (2011), a large portion of households redeem nearly all of their benefits within the first two weeks of the month. Purchases made within the first seven days after receiving benefits is not unusual. The Appellant is aware that there are a number of SNAP households that come into the store multiple times a day because of convenience, often sending their children on separate shopping trips to pick up items. In other cases, participants make purchases for friends, for large gatherings, or to satisfy needs that are not obvious.

Although it is not uncommon for customers to have more than one transaction per day and there are no limits on the number of times EBT cards may be used or the amount of eligible foods that may be purchased, it is not common that such multiple transactions are for large dollar amounts. The SNAP transactions noted in the charge letter are questionable not because they exceed any limits for use, but rather because they display characteristics of use inconsistent with the nature and extent of the Appellant's stock and facilities and are therefore, indicative of trafficking.

Although many SNAP 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 just one or two days, especially from a combination grocery store like the Appellant firm that has a moderate food stock, no fresh produce, no fresh meats, poultry, or seafood, and no frozen meats, poultry, or seafood. The February 2011 government report cited by the Appellant revealed that households most often redeemed their benefits at supermarkets and super stores with only 4% of all households never shopping in a supermarket or super store. Thus, when a supermarket or super store is available, it is highly unlikely that a SNAP recipient would conduct multiple transactions within a limited period of time or excessively large SNAP transactions at a combination grocery store like Waaberi Halal Market with a moderate selection of staple foods.

The Appellant contends that as was noted in the 2016 study conducted by the Convenience Store News, small grocery/convenience store customers are among some of the most loyal customers when it comes to their store selection.

FNS acknowledges the statement regarding small grocery/convenience store shoppers being some of the most loyal, based on the supplied 2016 study and that customers often pick-up needed items on their way to or from work or school. However, no evidence was submitted by the Appellant to support the statement that SNAP customers are more likely to shop regularly at a small grocery or

convenience store than non-participants. The Appellant's claim that SNAP customers are more likely to shop regularly at a small grocery or convenience store than non-participants is located nowhere in the supplied study. This study appears to refer to all types of customers. The consumer research on convenience store core shoppers cited in the 2016 study did not address SNAP redemptions or SNAP customers.

As to whether or not co-shopping actually affected the Appellant firm during the review period, this argument is little more than conjecture. The Appellant has provided no evidence to show that co-shopping is particularly common among SNAP recipients in Portland, Oregon. If co-shopping truly impacted Waaberi Halal Market as the Appellant suggests, it would stand to reason that co-shopping would affect other nearby firms as well. This would manifest itself in comparable firms having similar transaction patterns – multiple transactions from the same household in a short period of time. But this is simply not the case.

The Appellant contends that these transactions are the result of the participant forgetting an item in his/her prior transaction and the participant making a purchase, returning home, and then returning to the store to make a second purchase. The store's inventory is such a variety that it is reasonable to assume a household could satisfy all of their needs on a single shopping trip. The store's inventory is sufficient to account for the transactions as it consists of expensive items like goat meat, basmati rice, corn coarse meal, tuna steaks, cut beef, Chapati, along with other food items. The SNAP customers in this case purchase items in bulk because they limit the number of shopping trips they take per month. Most of these items can be broken up and frozen for different meals (in the case of meats), or are shelf-stable (like rice).

However, the second/subsequent transactions in each set are too large to consist of forgotten items. The report and photographs from the store visit as well as the stock photos submitted by the Appellant offer no explanation as to why SNAP customers would routinely shop at Waaberi Halal Market multiple times during a short period or purchase. While the store visit observations indicate that larger sized shelf stable ethnic food products to include such items as pasta, rice, barley, millet, rye, corn meal, cracked wheat, beans, nuts, peas, lentils, oils, ghee, and spices were available, the firm did not offer or advertise bundles or significant bulk items or food cases offered at a discounted price or meats by the pound. The firm's stock was void of any fresh or frozen meats, poultry, or seafood and fresh produce stock. The submitted inventory invoices also substantiate that only dry goods were purchased for the firm. The firm also offered no special or custom services to customers, such as on-line or telephone orders and/or delivery services, which would entice SNAP customers to utilize the subject store over other area authorized retail stores. The firm's ineligible item stock was also prominent, including pots and pans, rugs, apparel, handbags, health and beauty aids, automotive supplies, etc., which cannot be legally purchased with SNAP benefits.

FNS does not refute the Appellant's contention that it is easier for a customer to get through the spaces of a store like the subject firm than it is for them to go into a supermarket/super store. Nor does FNS refute the Appellant's claim that customers are more likely to come back for supplemental and quick shopping trips than they would at an average convenience store with an inferior inventory and a further distance from their homes. However, these contributing factors do not explain the multiple and often large transactions made at the Appellant from the same household in a short period of time.

The Appellant contends that the store does not have an optical scanner, but the clerk has the ability to visually identify and enter items into the register. Item prices are usually consistent if not outright

uniform, and are frequently memorized by the clerk through repetition over time. Furthermore, the store will tabulate transactions on a rolling basis, meaning that unlike a grocery store when you line up, set all of your items on the counter and then purchase them, this store permits participants to gather items, bring them to the register, and then return to gather more items. From a physical transportation angle, the groceries are often carried in the store's shopping carts, then bagged, and often customers carry the groceries by hand (using their children or friends to carry some items). On occasion, other items (like stroller) can be used to help transport the items out of the store.

However, the store visit observations indicate that the firm had a small checkout area with limited check-out counter space, no optical scanner, one cash register and one EBT POS device, no shopping carts or hand-held baskets, and no optical scanners or conveyor belts to expedite high dollar or rapid consecutive purchases. The customers have no place to put multiple purchases while shopping. As a customer this would be inconvenient at best and it would make it hard for the cashiers to keep a running total of items purchased as the Appellant suggests. As such, even if cashiers do know the price of goods by memory, these factors call into question that this is a reasonable explanation for the transactions.

The Appellant contends that the items in the store are ethnically important to these SNAP customers. The items cannot be readily bought at larger grocers. FNS refutes in part the Appellant's contention that larger retailers would not have superior inventory to the Appellant because of the ethnically imported inventory of the firm. A traditional larger retailer may not have all of the ethnically imported inventory of the Appellant but this is not to say that some of the larger competitive stores within the firm's geographical location would not cater to the same clientele. At the time of the charge letter, there were at least seven Halal designated SNAP authorized specialty stores within a 2.5 mile radius of the subject firm. A review of five of these retail stores revealed comparable products and the assortment of Halal meats and foods referenced by the Appellant.

With regard to the Appellant's contentions that the firm was misclassified as a combination grocery/other store, based on the firm's December 2015 SNAP authorization application and accompanying store visit, the firm was classified as a "combination grocery/other" store based on the firm being deficient in the dairy products staple food category. The firm's deficiency in dairy products and its staple food stock noted as 86 percent of total gross retail sales resulted in the firm being authorized for SNAP participation under Criterion B and places it in direct alignment with other ethnic specialty firms and some well-known national competitors. FNS acknowledges that store categories are not homogenous and that there are often difference in those stores' operations and inventory. However, there is no evidence that the subject firm was miscategorized as the mere presence of certain Halal food items would not change the store's designation.

No evidence was submitted to support the Appellant's contentions that these transactions are the result of unemployed local SNAP household members satiating their boredom by regularly shopping at stores to find something to do and resulting in them either shopping regularly on the same day, or binge shopping and making large purchases because they have the benefits to do so. If shopping due to boredom were a regular occurrence at the Appellant, this pattern would manifest itself in comparable firms having similar transaction patterns. But this is simply not the case.

With regard to the Appellant's statements regarding vehicle restrictions in SNAP, households are eligible to receive SNAP benefits based on their income, not vehicle ownership. According to the USDA SNAP eligibility requirements, a vehicle may be counted as a resource (<https://www.fns.usda.gov/snap/recipient/eligibility>); resources are deducted from a household's

gross income for the purpose of determining eligibility. However, a household may own one or more vehicles without them being counted as a resource or being subjected to the equity test based on the listed criteria.

The Appellant contends that given that the closest supermarket is 1.3 miles away, there are not a lot of larger SNAP retailers located immediately around the store. Also, the store's customers come from several different residential areas and are not strictly limited to the immediate surrounding area. Some of the customers travel for periods of time due to the Halal meats that are offered.

It is recognized that sometimes a firm may have unusual transaction patterns due to a recipient's lack of access to other SNAP authorized stores. However, during the review period there were 25 SNAP authorized retailers located within a 1.0 mile radius of Waaberi Halal Market, including 1 large grocery store, 2 supermarkets, and 1 super store, that could meet the nutritional needs of SNAP customers. Some of these area authorized stores offer a comparable or greater quantity and variety of food products at comparable or better prices as compared to the subject store. As noted previously, there were at least seven Halal designated SNAP authorized specialty stores within a 2.5 mile radius of the subject firm. A review of five of these retail stores revealed comparable products and the assortment of Halal meats and foods referenced by the Appellant.

The Appellant contends that transportation inconsistency is another reason for the transactions outlined in this Attachment. Participants do not have their own vehicles so trips to larger stores are dependent upon rides from friends or family. A household that cannot depend on those trips is forced to shop nearby.

The record indicates that SNAP customers who shopped at Waaberi Halal Market during the review period also shopped at other area grocery stores and, therefore, transportation to other stores is not an issue for these customers. Therefore, lack of access to other authorized stores or the availability of other food stores does not appear to be an explanation for the Appellant's abnormally high SNAP transaction amounts conducted within a short timeframe of each other.

No documentation was offered to support the Appellant's contention that trafficking was not occurring at the firm. The Appellant has the burden to provide relevant evidence to rebut the trafficking charges. Unfortunately, the Appellant has not provided any evidence to show that the transactions listed in this Attachment were legitimate purchases of eligible foods. The arguments presented by the Appellant hold little weight without some kind of evidence to substantiate its claims.

#### **Excessively Large Purchase Transactions (Charge Letter Attachment 4)**

This charge letter Attachment documents 136 SNAP transactions, as large as \$420.99, that total \$25,599.24. These large transaction amounts are not consistent with the store's observed characteristics and food inventory. The frequency of high dollar purchases in the review period calls into question the legitimacy of these transactions.

The Appellant contends that the store is approximately 2,400 square feet in size and offers customers a considerable inventory in halal meats, goat meat, bags of basmati rice, bags of corn coarse meal, tuna steaks, cut beef, ready-made Chapati, along with other food items. The reviewer's list of higher priced items was not exhaustive (the Appellant provided a list of 48 food items in support thereof).

The store is set up to provide for all of one's nutritional needs. The higher priced specialty items are sold in bulk to immigrant customers who have different shopping habits than the average non-immigrant SNAP participant. This directly results in higher dollar purchases, especially compared to combination/other stores which do not carry these items. Given that a number of items are roughly \$10.00 to \$20.00 each, five to ten of such items would not be difficult to carry and could be placed on the given space set out in the store visit observations.

However, a review of the store visit report and photos as well as the photos provided by the Appellant indicates that Waaberi Halal Market is a combination grocery/other store that is approximately 1,400 square feet in size with no additional storage out of view and that it is located in a strip mall. The firm offers a moderate variety and amount of staple food items. While the store visit observations indicate that larger sized shelf stable ethnic food products to include rice, corn meal, beans, lentils, oils, ghee, and spices were available, the firm did not offer or advertise bundles or significant bulk items or food cases offered at a discounted price or meats by the pound. While the 2015 store visit observations that the store previously sold Halal meats, the firm's stock was void of any fresh or frozen (Halal or otherwise) meats, poultry, or seafood or fresh produce stock. The only meat in stock was canned fish. The submitted inventory invoices also substantiate that only dry goods were purchased by the Appellant. The firm's ineligible item stock was also prominent, including pots and pans, rugs, apparel, handbags, health and beauty aids, automotive supplies, etc., which cannot be legally purchased with SNAP benefits.

As noted previously, the firm had a small checkout area with limited check-out counter space, one cash register and one EBT POS device, and no optical scanners or conveyor belts to expedite high dollar or rapid consecutive purchases. In addition, there were no shopping carts or hand-held baskets in which to transport the large number of items required to make up these large transaction amounts. Without these, it is unlikely that such large dollar value transactions could be for actual food purchases and more likely they are trafficking. The customers have no place to put multiple purchases while shopping. As a customer this would be inconvenient at best and it would make it hard for the cashiers to keep a running total of items purchased as the Appellant suggests. As such, even if cashiers do know the price of goods by memory, these factors call into question that this is a reasonable explanation for the transactions.

While there is no definition in the SNAP regulations for an excessively large purchase or transaction, FNS makes its determination based on the store type, characteristics and stocked inventory. The burden is on the Appellant to prove transactions FNS identified as large for the store type (in this case, a combination grocery/other store) are for legitimate purchases. According to the store visit, the subject store did not have inventory to support the numerous large transactions. The Appellant also did not provide adequate evidence of continuously purchasing inventory throughout the review period to satisfy the large transactions (see "Invoice" section of the Final Agency Decision). The store must have stocked inventory to repetitively generate large sales, which was not evident in the store visit.

The Appellant contends that according to USDA's research (*Foods Typically Purchased by SNAP Households*), sweetened beverages and salty snacks are within the top 10 expenditures for SNAP households, as are meats and a number of other items offered by the Appellant. It is therefore reasonable to expect SNAP customers to spend large amounts and/or the majority of their benefits at the Appellant store.

It is acknowledged that the subject store does offer items that SNAP households would purchase; however, many of these items are accessory items that a SNAP customer would not purchase all the time. However, the key findings of the noted study indicate that there were no major differences in the expenditure patterns of SNAP and non-SNAP households, no matter how the data was categorized. The study noted that similar to most American households: About 40 cents of every dollar of food expenditures by SNAP households was spent on basic items such as meat, fruits, vegetables, milk, eggs, and bread; another 20 cents out of every dollar was spent on sweetened beverages, desserts, salty snacks, candy and sugar; the remaining 40 cents was spent on a variety of items such as cereal, prepared foods, dairy products, rice, and beans; and the top 10 summary categories and the top 7 commodities by expenditure were the same for SNAP and non-SNAP households, although ranked in slightly different orders.

The Appellant provided statistics pertaining to the general demographic and noted that households that conducted these transactions have a larger amount of SNAP residents residing in their homes. However, there is no indication as to how this explains the questionable transaction patterns addressed in the charge letter. Many households are comprised of a diverse family dynamic, yet this is not an indication that questionable transactions would be occurring at any given store. The subject store shows unusual transaction patterns that are not occurring in other similarly or even better stocked stores. If specific family needs are causing these questionable transactions at the subject store, it would be expected that similar patterns would exist at other neighboring stores. However, this is not the case.

#### 5 U.S.C. § 552 (b)(7)(E).

As to whether co-shopping, being located in a neighborhood with households that qualify for SNAP benefits, servicing a high Asian population, being located within walking distance of multiple schools, colleges, Creative School at Clerk, and parks, and sitting on a main transportation route actually affected the Appellant firm, these factors are not an indication that questionable transactions would be occurring at any given store. The subject store shows unusual transaction patterns that are not displayed in other similarly stocked stores. If specific household needs are causing these questionable transactions at the subject store, it would be expected that similar patterns would also present themselves at nearby firms as well. But this is simply not the case.

The Appellant contends that according to the 2016 *U.S. Grocery Shopping Trends Annual Report*, FMI, limited assortment stores saw an increase of consumers who use them as a primary grocery by 3% over 2015; convenience stores likewise saw an increase of 3% in consumers who used their store as their primary grocer; ethnic food stores saw a rise of 1% in primary grocery usage. FNS does not question the data in the report and acknowledges that it could be possible that some people shop at the subject store regularly. However, the Appellant is using this average and or overall data to attempt to explain the questionable transactions in the charge letter. This data, however, is not specific to the subject store. This report does not mention the number of SNAP recipients, if any, included in the survey. In addition, the survey participants were located in Seattle, Washington, while the subject firm is located in Portland, Oregon. As such, the referenced report does not substantiate that trafficking did not occur at the Appellant firm.

In support of the Appellant's contentions regarding SNAP households' shopping habits, the following studies were cited and submitted: *Benefit Redemption Patterns in the SNAP in Fiscal Year 2017 Final Report*, Insight Policy Research, September 2020; *Shopping Pattern and Food Purchase*

*Difference Among SNAP Households and Non-SNAP Households in the United States*, Preventative Medicine Reports, June 20, 2017; and *What Does SNAP Benefit Usage Tell Us About Food Access in Low-Income Neighborhoods?*, Social Science & Medicine, 2014. While FNS does not dispute the findings of these studies, they do not provide any evidence that trafficking was not occurring at Waaberi Halal Market.

The Appellant contends that the affidavits submitted from eleven of the store's customers attest that they spend between \$200.00 to \$450.00 at the store during a single trip, exhausting between 20% to 60% of their SNAP benefits at the store and the majority attesting to frequenting the store multiple times in a single day.

Of the eleven customer affidavits provided, the Retailer Operations Division could identify eight of the customers via the state administrative terminal database. However, one of these customers did not conduct any SNAP transactions at the Appellant during the review period. The seven identifiable households conducted a total of 44 flagged transactions at the Appellant during the review period. While each of these households shopped at the Appellant during the review period, they currently shopped at larger, better stocked stores with likely better prices. Of these seven households, five households overstated the large purchase dollar amounts listed on their statements. 5 U.S.C. § 552 (b)(7)(E).

5 U.S.C. § 552 (b)(7)(E).

The Appellant contends that the only other stores that are nearby do not have the inventory variety that the Appellant has. Accordingly, this store is going to have larger transactions than the average convenience store. As noted previously, it is recognized that sometimes a firm may have unusual transaction patterns due to a recipient's lack of access to other SNAP authorized stores. However, during the review period there were 25 SNAP authorized retailers located within a 1.0 mile radius of Waaberi Halal Market, including 1 large grocery store, 2 supermarkets, and 1 super store, that could meet the nutritional needs of SNAP customers. Some of these area authorized stores offer a comparable or greater quantity and variety of food products at comparable or better prices as compared to the subject store. While the Appellant contends that there are a lack of big box competitors creating a higher likelihood that these transactions are going to occur at the Appellant, there were a total of 8 super stores, 8 supermarkets, and at least seven Halal designated SNAP authorized specialty stores within a 2.5 mile radius of the subject firm. A review of five of these Halal designated retail stores revealed comparable products and the assortment of Halal meats and foods referenced by the Appellant. Also, simply being located near SNAP households and operating during convenient hours would not explain why a SNAP household would spend up to \$420.99 in a single transaction at the subject store, which is not stocked to provide for all of one's nutritional needs.

5 U.S.C. § 552 (b)(7)(E).

Based on the store layout, infrastructure, and available inventory, it is not credible that the Appellant would so frequently conduct large transactions closely resembling those typically found at a supermarket or super store. It is not plausible that the firm's customers would regularly carry very large amounts of merchandise around the store without the benefit of shopping carts, especially since larger, better-stocked stores are readily available and in the vicinity of the Appellant firm. The Appellant is not set up to process high-dollar transactions, as indicated by its lack of equipment to

facilitate large transactions and limited counter space. There are no legitimate bases for SNAP customers' unusual attraction to the firm such as a superior selection of staple foods, price advantages, package specials, bulk or promotional items, an extensive variety of otherwise unavailable ethnic food items at other area stores, or special services rendered. The Appellant failed to provide convincing evidence to establish the legitimacy of these excessively large transactions, such as itemized cash register receipts. Based on all of these factors discussed in this section, the large volume of transactions for high dollar amounts is unlikely to indicate a pattern of legitimate food purchases.

### **Evidence of Trafficking**

Regarding the Appellant's contentions with respect to the reliability of the ALERT system and Confirmation Bias, USDA employs a computerized fraud detection tool to identify EBT transactions that form patterns that have characteristics indicative of trafficking. However, this tool does not, by itself, determine or conclude that trafficking has occurred. The Retailer Operations Division analyzes the transaction data and patterns along with other documentation such as, information from the onsite store visit report including photographs of stock and the store layout, an analysis of recipient shopping behavior, and comparisons with similar store types in local area, to render a determination as to whether or not the questionable transaction patterns were, more likely than not, the result of trafficking. The regulations at 7 CFR § 278.6(a) state that FNS may disqualify any authorized retail food store if the firm fails to comply with the Food and Nutrition Act of 2008, as amended, and that such disqualification shall result from a finding of a violation on the basis of evidence that may include facts established through, inconsistent redemption data, and evidence obtained through a transaction report under an electronic benefit transfer system.

The Appellant argues that USDA does not know the correlation coefficient between ALERT scans and trafficking. The Appellant asserts that it has calculated this based on results of undercover investigations and determined that it was a positive correlation, but the relationship between the values is weak. These contentions are pure conjecture on the part of the Appellant. The Appellant does not have the necessary data to perform a reliable correlation analysis.

### **Bank Statements/EBT Receipts/Invoices**

The Appellant submitted bank records, EBT register receipts, and inventory purchase invoices to substantiate the firm's inventory and demonstrate that there was adequate eligible food items to account for the transactions during the review period.

The bank statements submitted are within the review period and reflect activities such as withdrawals and deposits made by the Appellant. 5 U.S.C. § 552 (b)(7)(E). As such, this information provides little probative value.

The Appellant submitted two receipts which in its January 28, 2022 response miscategorized as EBT purchase receipts. Both receipts were partial receipts for purchases made at Costco. 5 U.S.C. § 552 (b)(7)(E). The results of the receipts analysis indicates that they provide little probative value and do not establish that trafficking was not occurring at the Appellant firm.

The Appellant also submitted five purchase invoices/receipts to substantiate the firm's inventory and demonstrate that there was adequate eligible food items to account for the firm's SNAP transactions.



However, the invoices are insufficient to demonstrate this. 5 U.S.C. § 552 (b)(7)(E). In sum, the invoices do not explain the questionable transactions at the Appellant. It is important to note that even if the two non-itemized invoices noted as being excluded from the analysis and the two Costco receipts previously discussed were included in the invoice analysis, the firm still lacked sufficient purchased food stock to cover its SNAP redemptions during the review period.

### **Compliance History**

The Appellant asserts that this firm has never had a compliance problem with SNAP in the past. The firm's compliance policy is an important factor and should be taken into consideration as it could have a material impact on the transactions noted during the review period. It would defy logic for the store owner with a long history of compliance to suddenly start trafficking for the de minimus amounts set forth in the charge letter.

The Appellant is correct that the firm has not been cited for prior violations. However, a record of participation in the SNAP with no previously documented instance of violations does not constitute valid grounds for dismissal of the current charges of violations or for mitigating the impact of those charges.

Neither the Food and Nutrition Act of 2008, as amended, nor the accompanying regulations cite any minimum dollar amount of cash or SNAP benefits, or number of occurrences, for such exchanges to be defined as trafficking. Nor do they cite any degrees of seriousness pertaining to trafficking of SNAP benefits. Trafficking is always considered to be extremely serious, even when the exchange of SNAP benefits for cash is dollar-for-dollar or is conducted by a nonmanagerial store clerk. This is reflected in the Food and Nutrition Act, which reads, in part, that disqualification "shall be permanent upon . . . the first occasion of a disqualification based on . . . trafficking . . . by a retail food store." In keeping with this legislative mandate, § 278.6(e)(1)(i) of the SNAP regulations states that FNS must disqualify a firm permanently if personnel of the firm have trafficked. There is no agency discretion in the matter of what sanction is to be imposed when trafficking is involved.

### **Case Laws and Past Administrative Reviews**

With regard to the case laws cited by the Appellant, it is beyond the scope and authority of this review to determine the applicability of same. This review is limited to consideration of whether or not the Retailer Operations Division duly adhered to the Food and Nutrition Act of 2008, as amended, and the implementing regulations, and whether or not the action taken is sustainable by a preponderance of the evidence. Therefore, the application of any judicial precedent is better addressed via judicial review. Accordingly, no further findings or conclusions are rendered in this regard.

With regard to the prior Final Agency Decisions cited by the Appellant, this administrative review decision is based on the specific circumstances of this case as documented by the materials provided by the Appellant and the Retailer Operations Division. This administrative review decision does not establish policy or supersede Federal law or regulations. The determination in this case conforms to SNAP regulations and is consistent with sanctions imposed upon other retailers that have committed similar violations.

## CIVIL MONEY PENALTY

In the April 19, 2017 charge letter the Appellant was informed by the Retailer Operations Division that, under certain conditions, FNS may impose a civil money penalty (CMP) of up to \$59,000 in lieu of permanent disqualification of a firm for trafficking. Per Section 278.6(i) of the SNAP regulations, four criteria must be met in order to be considered for a trafficking civil money penalty. If requesting a trafficking CMP, an Appellant must meet each of the four criteria listed and provide the documentation as specified within ten days of the Appellant's receipt of their charge letter. As specified in 7 CFR § 278.6(i), in determining the minimum standards of eligibility of a firm for a civil money penalty in lieu of trafficking, the firm shall, at a minimum, establish by substantial evidence its fulfillment of each of the following four criteria:

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

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

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

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

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

In the reply to the charge letter of September 11, 2020, (i.e., after the required 10 days of receipt of the April 19, 2017 charge letter), the Appellant, through counsel, requested the imposition of a civil money penalty pursuant to 7 CFR § 278.6(i) which states that to be considered for a CMP, a retailer must demonstrate that the firm had established and implemented an effective compliance policy and program to prevent violations. Here, the effective compliance policy and program at the Appellant is reflected by the store's significant compliance history since it became an authorized SNAP retailer.

The record supports that the Appellant did not submit a timely request and timely substantial evidence, as required by the regulations, to meet the criteria for a trafficking CMP in lieu of permanent disqualification. Therefore, the Retailer Operations Division's decision not to impose a civil money penalty in lieu of disqualification is sustained as appropriate pursuant to 7 CFR § 278.6(i).

## 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 Waaberi Halal Market is sustained.

### **RIGHTS AND REMEDIES**

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

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

LORIE L. CONNEEN  
ADMINISTRATIVE REVIEW OFFICER

March 14, 2022