

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

**Habibi Gourment Deli,**

**Appellant,**

**v.**

**Retailer Operations Division,**

**Respondent.**

**Case Number: C0185249**

**FINAL AGENCY DECISION**

It is the decision of the USDA that there is sufficient evidence to support that the Retailer Operations Division properly imposed a permanent disqualification of Habibi Gourment Deli (aka Habibi Gourmet Deli and hereinafter referred to as “Habibi” or “Appellant”) as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP).

**ISSUE**

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with Title 7 Code of Federal Regulations (CFR) Part 278 in its administration of the SNAP, when it imposed a permanent disqualification against Habibi.

**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 October 23, 2015, the Retailer Operations Division charged the Appellant with trafficking, as defined in Section 271.2 of the SNAP regulations, based on a series of irregular SNAP transaction patterns that occurred during the months of March 2015 through August 2015. The letter noted that the penalty for trafficking is permanent disqualification as provided by 7 CFR § 278.6(e)(1). The letter stated the Appellant had the right to respond to the charges within 10 days of receipt to provide explanations for the irregular SNAP transaction patterns. The letter also stated 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). The charge letter was delivered via UPS on October 26, 2015.

In a letter dated November 2, 2015, the Appellant, through former counsel, the late Melvin L. Greenwald, made an initial reply to the charges and requested certain information under the Freedom of Information Act (FOIA). An official FOIA response was completed and the Appellant appealed the FOIA response on December 21, 2015. The Appellant requested the Retailer Operations Division to hold in abeyance all action until a decision was reached on the FOIA appeal. On June 14, 2019, FNS closed the FOIA appeal as the Appellant had not responded to a letter requesting an updated Third Party Representation.

After considering the evidence in the case and the Appellant's prior contentions, the Retailer Operations Division issued a determination letter dated July 10, 2019. The determination letter informed the Appellant it was permanently disqualified from the SNAP in accordance with 7 CFR § 278.6(c) and 7 CFR § 278.6(e)(1). The determination letter also stated that the Retailer Operations Division considered the Appellant's eligibility for a trafficking CMP according to the terms of 7 CFR § 278.6(i) of the SNAP regulations. The Retailer Operations Division determined that the Appellant was not eligible for a trafficking CMP because the Appellant failed to 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 dated and postmarked July 22, 2019, the Appellant, through new counsel, requested an administrative review of the Retailer Operation Division's determination. The request for administrative review was granted. The Appellant again requested information under FOIA on August 29, 2019 and an official FOIA response was issued on October 2, 2019. The Appellant was then given the opportunity to submit additional evidence in support of its administrative review which it did through an e-mail dated November 1, 2019.

### **STANDARD OF REVIEW**

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

### **CONTROLLING LAW AND REGULATIONS**

The controlling law in this matter is covered in the Food & Nutrition Act of 2008, as amended, 7 U.S.C. § 2021, and promulgated through regulation under Title 7 CFR Part 278. In particular, 7 CFR § 278.6(a) and (e)(1)(i) establish the authority upon which a permanent disqualification may be imposed against a retail food store or wholesale food concern.

7 U.S.C. § 2021(b)(3)(B) states, in part:

... 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 § 271.2 states that the definition of “coupon” includes:

... an electronic benefit transfer card or personal identification number issued pursuant to the provisions of the Food and Nutrition Act of 2008, as amended, for the purchase of eligible food.

7 CFR § 278.6(e)(1)(i) states:

FNS shall disqualify a firm permanently if personnel of the firm have trafficked as defined in § 271.2.

7 CFR § 271.2 defines trafficking, in part, as:

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 § 271.2 defines eligible food, in part, as:

Any food or food product intended for human consumption except alcoholic beverages, tobacco, and hot foods and hot food products prepared for immediate consumption ....

7 CFR § 278.6(a) states, in part:

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(i) states, in part:

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

7 CFR § 278.6(b)(2) states, in part:

(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 a penalty. [Emphasis added.]

### SUMMARY OF CHARGES

The Appellant was charged and determined to be trafficking based on an analysis of electronic benefit transfer (EBT) transaction data from March 2015 through August 2015. This involved the following transaction patterns which are trafficking indicators:

- **Charge Letter Attachment 1:** There were an unusual number of transactions ending in a same cents value. This attachment lists 893 transactions  
5 U.S.C. § 552 (b)(6) & (b)(7)(C). 5 U.S.C. § 552 (b)(6) & (b)(7)(C)
- **Charge Letter Attachment 2:** Multiple transactions were made from individual benefit accounts within unusually short time frames. This attachment lists 78 sets of 180 transactions  
5 U.S.C. § 552 (b)(6) & (b)(7)(C). 5 U.S.C. § 552 (b)(6) & (b)(7)(C)
- **Charge Letter Attachment 3:** In a series of transactions, the majority or all of individual recipient benefits were exhausted in unusually short periods of time. This attachment lists 21 sets of 48 transactions  
5 U.S.C. § 552 (b)(6) & (b)(7)(C). 5 U.S.C. § 552 (b)(6) & (b)(7)(C)
- **Charge Letter Attachment 4:** Excessively large purchase transactions were made from recipient accounts. This attachment lists 334 SNAP transactions  
5 U.S.C. § 552 (b)(6) & (b)(7)(C). 5 U.S.C. § 552 (b)(6) & (b)(7)(C)

### APPELLANT'S CONTENTIONS

The Appellant, through counsel, made the following summarized contentions in its request for administrative review, in relevant part:

- The Appellant store operates as a small grocery store, next to a train station stop, and is open 24/7. There are also multiple government developments/housing units in the area. The store stocks a variety of staple food items, including canned and packaged goods, bread, pasta, eggs, dairy items, fresh produce, frozen foods, and deli meats and cheeses.
- The store visit showed that the store is sufficiently stocked in all four (4) staple food categories and is sufficiently provisioned to explain the transaction amounts listed in the Charge Letter.
- The agency's ALERT system is over utilized by the USDA. The ALERT system fails to account for special business practices, differences in demographics, foodstuff and geographic areas.

- The Retailer Operation Division’s decision was influenced by confirmation bias. Ambiguous or contradictory evidence has been disregarded or interpreted in such a way that unreasonably favors the hypothesis that trafficking is occurring at the Appellant store.
- The transactions listed in Charge Letter Attachment 1 are all the result of store pricing, business practices and/or the habits of the SNAP clientele. The store rounds down transactions to better accommodate their customers. For example, when a SNAP customer does not have enough benefits left to make a purchase, the clerks were permitted to round down the transaction “to a certain extent.”
- The transactions listed in Charge Letter Attachment 2 are all the result of the store’s business practices, co-shopping, and/or the habits of the SNAP clientele. In New York, SNAP participant household benefits are issued between the 1st through the 9th day of the month so multiple purchases 5 U.S.C. § 552 (b)(6) & (b)(7)(C) are not unusual. These transactions are reasonably explained by co-shopping where both adult household members of an average household are responsible for shopping. The store takes telephone orders and it is not unusual for an Appellant to make additional purchases when they arrive at the store to pick up their prior order. It is also entirely reasonable to expect multiple transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C) as store employees assist with in processing and bagging purchases.
- The transactions listed in Charge Letter Attachments 3 and 4 are all the result of either co-shopping, store inventory, the store’s pricing structure, customer reliance on the store as a primary grocer, or a general aberration and statistical outlier to the average whole. A substantial portion of the transactions were made between the 1<sup>st</sup> and 9<sup>th</sup> of the month when benefits first become available. Based on the store inventory, the Retailer Operations Division cannot make a compelling argument that the transactions are impossible for want of items to sell. The households who engaged in said transactions have a greater number of household members, thus requiring a larger quantity of groceries each month than those households with less residents. Most other grocers in this specific geographic area are likely to have the same or greater number of similar transactions.
- A proper store comparison was not made as the Retailer Operations Division only compared the Appellant to larger stores such as medium grocery stores, large grocery stores, supermarkets or superstores.

The preceding may represent only a brief summary of the Appellant’s contentions presented in this matter. Please be assured, however, in reaching a decision, full attention was given to all contentions presented, including any not specifically recapitulated or specifically referenced herein.

## **ANALYSIS AND FINDINGS**

### **Authorization History**

The Food & Nutrition Service (FNS) authorized Habibi for the SNAP on February 28, 2014. During the review period of March 2015 through August 2015, the Retailer Operations Division classified the store as a small grocery store. This classification was based on reported sales and observed store inventory.

The store owner signed the SNAP application for the store on November 12, 2013 and acknowledged that the owner 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 Report**

The case record documents that in reaching a disqualification determination, the Retailer Operations Division considered information obtained during a July 24, 2015 store visit conducted by an FNS contractor to observe the nature and scope of the store’s operation, stock and facilities. This information was then used to ascertain if there were justifiable explanations for the store’s irregular SNAP transactions. The store visit report and photographs documented the following store size, description, and characteristics:

- Habibi was approximately 600 square feet in size and was located in a freestanding building in an urban commercial area.
- The store had no shopping carts and no handheld shopping baskets for customer use.
- The store had one (1) cash register and one (1) point-of-sale device.
- The store did not have an optical scanner or conveyor belts at the checkout.
- No food was kept in storage outside of public view.
- Store pictures show that food items generally had prices ending in 9 cent amounts which is typical for retail food stores. Therefore, the store did not appear to have a special price structure such as ending most product prices at even dollar amounts.
- The store did not offer specials or sales of expensive items such as fresh meat bundles, fresh seafood specials, and/or fresh fruit and vegetable boxes. The store did not carry any international or specialty food items.
- The checkout area consisted of a small window opening surrounded by Plexiglas and wooden shelves. The available space for stacking food to be purchased was no more than two (2) feet by two (feet) at best. This extremely limited space for stacking food at the checkout area made it not conducive to conducting large transactions. There was also a very small turnstile type night window for conducting business when access to the store was limited during nighttime hours.

The SNAP eligible food stocked by the store consisted almost exclusively of inexpensive canned and packaged goods typical of a small grocery store along with a limited selection of fresh produce, cheese and deli meat. The store also sold inexpensive accessory food items such as snack foods, ice cream, potato chips, candy, carbonated sodas, coffee, tea, condiments, and spices.

The store had a kitchen that prepared SNAP ineligible hot and cold food not intended for home preparation and consumption. The stocked ineligible items included tobacco products, alcohol, health and beauty aids, pet food, clothing and general household goods.

The Appellant states that the store visit showed that Habibi is sufficiently stocked in all four (4) staple food categories to justify the transactions cited in the charge letter. It is true that the store visit report shows that Habibi has sufficient stock **to be eligible for SNAP authorization**; however, given the available inventory as noted above, there is no indication from the store visit report that the store would be likely to have SNAP transaction patterns significantly different from similar-sized competitors offering similar food items.

## **ALERT System**

The Appellant makes multiple contentions regarding the limitations of the ALERT system and states it is relied upon too heavily by the agency. With regard to these contentions, it should be noted that the ALERT system is a computerized fraud detection tool to identify SNAP transactions that form patterns having characteristics indicative of trafficking. However, this tool does **not** by itself determine or conclude that trafficking has occurred. The Retailer Operations Division must still conduct an extensive analysis of the transaction data and patterns, often with other factors such as, in this case, observations from store visits, an analysis of customer shopping behavior, local conditions, and a comparison of similar stores in the area using transaction data from the same review period, and render a determination whether the questionable transactions were, more likely than not, the result of trafficking. In addition, the Appellant is always given a chance to explain the specific transaction patterns before the determination letter is issued.

The legality of this methodology is supported by 7 CFR § 278.6(a) which states, in part, “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.]

The Appellant further claims that the Retailer Operations Division was influenced by confirmation bias; however, this is mere speculation on the Appellant’s part and there is no evidence in the case record that would support this assumption.

## **Court Cases**

The Appellant further cites some case law which it claims supports its position on the ALERT system and on other contentions made in the administrative review. Although the Appellant may disagree, considerations of legal precedent through case law, or the lack thereof in relation to the present case, is beyond the scope of this review. Instead this administrative review is limited to whether the Retailer Operations Division appropriately followed the Food and Nutrition Act of 2008, as amended, and the regulations promulgated under the Act, and whether the action taken is sustainable by a preponderance of the evidence. Therefore, any application of a supposed judicial precedent would best be addressed in a judicial review in a court of law. Accordingly, no further findings or conclusions are rendered in this regard.

## **Same Cent Transactions**

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

The Appellant states the store was rounding down prices for its own convenience and customer service. However, there is no evidence to support this other than the Appellant's unsubstantiated claim. Typical retail food stores operate on relatively low profit margins and it is unlikely that a store would be routinely rounding down below posted prices at checkout. Likewise it is unlikely that the clerks would have the authority to choose when to round down amounts or to charge based on the price labels. This method of pricing would be seemingly arbitrary to store customers and would likely lead to conflicts and confusion within the store.

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

Based on the store visit report, the Appellant's food inventory contains almost exclusively inexpensive canned and packaged goods, single-serving food items and accessory foods with limited amounts of fresh produce, cheese and deli meat. Due to the store's mostly low cost foods, the larger dollar transactions cited in the charge letter would normally consist of multiple food products being purchased in one transaction. It is implausible that several of these relatively inexpensive items purchased together would disproportionally result in total purchase prices ending in 00 cents or 50 cents. Instead when SNAP customers buy multiple food items, resulting in higher dollar amounts, the total transaction amount is more likely to result in a random statistical spread of ending cent ranges from 00 to 99 cents.

Consequently, when there are a disproportional amount of high dollar transactions that end in a same cents value, it appears that these transaction amounts are contrived and therefore, in the absence of any compelling rationale to the contrary, are a strong indicator that the firm is trafficking in SNAP benefits. A preponderance of the evidence indicates that the irregular transactions cited in Charge Letter Attachment 1 are more likely than not a result of the store trafficking in SNAP benefits.

## **Multiple Transactions by the Same Household within a Set Time Period**

SNAP households have no limit on the number of times they may use their SNAP cards or how much eligible food they may purchase. However, 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 this small grocery store's stock and facilities and are thus indicative of trafficking.

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

The Appellant contends that the transactions listed in Charge Letter Attachment 2 are all the result of co-shopping, telephone orders, store inventory and/or the habits of the SNAP clientele. Regarding the Appellant's "co-shopping" contention, while different household members can use the EBT card, it is unlikely they would conduct multiple irregular large dollar transactions in such a short period of time at a small grocery store that does not offer a great variety and



quantity of staple foods. Even if repeated “co-shopping” trips were made by different household members this does not explain the multiple high dollar transactions conducted in a short period of time as cited in Charge Letter Attachment 2. Even the smallest transactions in each set had an amount which were generally two (2) to three (3) times higher than the average purchase amount for a SNAP small grocery store in New York. Also, if co-shopping is causing these type of patterns one would expect those patterns to be repeated at nearby competitor stores that offer a similar amount and quantity of staple and accessory food. However, none of these stores exhibited the same irregular transaction patterns that occurred at Habibi.

The Appellant states that shoppers may forget to purchase an item and make another transaction or they may make a telephone order and make another purchase when picking up their order. It is true that sometimes a customer will forget an item or two and come back later to make an additional small dollar purchase. However, the transactions cited in the charge largely consisted of second or subsequent transactions which greatly exceeded the average transaction of a New York small grocery store during the review period.

The Appellant notes that New York SNAP benefits are issued on the 1st through the 9th day of the month. It is true that SNAP recipients tend to conduct transactions earlier in the month when benefits first became available, but this is true at all stores and does not explain why Habibi exhibits the irregular transaction patterns described in Charge Letter Attachment 2 as compared to other small grocery stores in the area that sell similar food items.

The Appellant states that the store is located near a train station stop as well as government housing which results in additional foot traffic and different spending habits and patterns. If true, all of these factors could possibly contribute to a larger customer base leading to a greater overall number of total transactions in comparison to other stores. However, this would still not explain the store’s multiple large dollar repeat transactions greater than those of a supermarket or superstore as the average transaction amounts would generally remain the same even with increased foot traffic. Even so, during the review period, there were other small grocery stores located close to the train station stop and local housing, yet these other small grocery stores did not exhibit the same irregular transaction patterns.

In conclusion, the store visit pictures show that is unlikely that SNAP customers would want to shop at this store multiple times during a short time frame, or purchase such a large volume of items. In addition, the store’s small checkout area and extremely limited counter space makes it unsuitable for conducting large transactions. The store also had no shopping carts or baskets for transporting food within the store. Based on the analysis above, and in the absence of any other reasonable explanation, the irregular transaction patterns are more likely than not to be a result of trafficking in SNAP benefits.

### **Exhaustion of Benefits**

**5 U.S.C. § 552 (b)(6) & (b)(7)(C) and 5 U.S.C. § 552 (b)(7)(E)**

The Appellant states that these transactions are due to either co-shopping, store inventory, the store’s pricing structure, customer reliance on the store as a primary grocer, or a general

aberration and statistical outlier to the average whole. However, as noted in the other irregular transaction patterns above, these are not credible explanations. Again, other nearby small grocery stores with similar food inventory did not exhibit the same irregular transaction pattern.

The Appellant states that because New York staggers its allotments between the 1<sup>st</sup> and the 9<sup>th</sup> of the month, customers often makes large purchases towards the beginning of the month when funds are available. It is true that many SNAP households do shop early in the month as opposed to later in the month; however, most households do not spend all or a majority of their monthly benefits in a single day at one store. A government report on SNAP shopping patterns indicates that after the first day of benefit issuance, on average, 80 percent of a household's allotment remains unspent. Even after seven days, 40 percent of benefits still remain unspent. It takes two weeks to deplete 80 percent of one's benefits, and three weeks to deplete 90 percent. Depleting one's entire allotment in a single day, or in a single large transaction, leaving no benefits for the remainder of the month, is inconsistent with the normal shopping behavior of SNAP households. Based on a preponderance of the evidence this irregular transaction pattern is more likely than not the result of trafficking in SNAP benefits.

### **Excessively Large Transactions**

SNAP households have no limit on the amount of eligible food they may purchase (subject to the remaining balance on the card). However, 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 this small grocery store's stock and facilities and are thus indicative of trafficking.

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

The substantial number of high dollar purchases atypical of a SNAP authorized small grocery store calls into question the legitimacy of these transactions. As noted previously, there is no indication from the store visit report that the store would be likely to have SNAP redemption patterns significantly different from similar-sized competitors offering similar food items.

The Appellant contends that the transactions listed in Charge Letter Attachment 4 are all the result of either co-shopping, store inventory, the store's pricing structure, customer reliance on the store as a primary grocer, or a general aberration and statistical outlier to the average whole. Again, the Appellant does not explain how co-shopping leads to excessively large transactions atypical of a small grocery store in New York. If co-shopping or these other conditions explained this pattern, then this pattern would also be replicated at other small grocery stores located in the same area as Habibi.

The Appellant references a USDA study that states that SNAP participants tend to buy sweetened beverages, frozen prepared foods and prepared desserts at a much higher rate than traditional consumers. These items are carried by Habibi; however, it should be noted that these inventory items are relatively inexpensive purchases as compared to other foods such as fresh meat, poultry, fish, or international or specialty foods none of which Habibi carried. These more expensive food items are carried at supermarkets and superstores. Yet, Habibi had average

transactions cited in the charge letter which are greater than those of a New York supermarket or superstore. SNAP purchases of snack food, soda, flavored drinks and candy may be typical of a small grocery store; yet, the irregular transaction patterns cited in Charge Letter Attachment 4 are not typical of a small grocery store in New York.

The Appellant states that with the varieties and quantities carried by the store, the Department cannot make a straight-faced argument that the transactions are impossible for want of items to sell. Regarding this contention, the Retailer Operations Division is not required to prove that a **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** transaction, for example, is impossible. The Appellant also overstates the variety and quantity of food sold by the store. Lastly, if the Appellant's argument were to be accepted it would lead to an assumption that any transaction amount lower than the store's total food inventory is a legitimate transaction.

The Appellant states that the store is located near a train station stop as well as multiple housing complexes which results in additional foot traffic and different spending habits and patterns. If true, all of these factors could contribute to a larger customer base leading to a greater overall number of total transactions in comparison to other nearby competitors. However, this would still not explain the store having large dollar transactions greater than that of a supermarket or superstore. If the Appellant's arguments were valid, these irregular patterns would also be present at nearby competitor stores offering similar food items and they are not. The Appellant claims that the Retailer Operations Division did not compare Habibi to any other small grocery stores in the vicinity. However, a case analysis document in the case record documents that the Retailer Operations Division compared Habibi's irregular transaction to five (5) other small grocery stores that operated generally within walking distance of the Appellant store. None of these stores exhibited the same irregular transaction patterns as Habibi. These nearby stores would likely be subject to many of the same factors as the Appellant store including being near to the train station stop and the housing authority complexes.

Sometimes a store may have higher than normal SNAP transactions due to the lack of access to other SNAP authorized stores in the area. However, agency mapping systems shows that, during the review period, there were 43 larger SNAP authorized stores located within a mile radius of Habibi. These included a superstore that was 0.23 miles away and a supermarket that was 0.38 miles away. Therefore, a lack of access to SNAP authorized stores does not appear to explain the Appellant store's excessively large transaction patterns. The Appellant complains that the Retailer Operations Division did not include small grocery stores within the one-mile radius, but the whole purpose of this particular comparison was to demonstrate that there was ample food available in the community through SNAP authorized stores offering a likely greater depth and breadth of staple foods at likely better prices.

A government report<sup>1</sup> on SNAP benefit redemption patterns revealed that households most often redeemed their benefits at supermarkets and superstores with only four (4) percent of all households never shopping in a supermarket or superstore. Thus, when a supermarket or superstore is available, it is highly unlikely that a SNAP recipient would conduct excessively large SNAP transactions at a small grocery store with a limited selection of staple foods like

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<sup>1</sup> "Benefit Redemption Patterns in the Supplemental Nutrition Assistance Program," report prepared by Mathematica Policy Research for the Food and Nutrition Service, February 2011.

Habibi. The Appellant states that based on a Food Marketing Institute study, in 2016, consumer's shopping habits trended towards an increase in the use of convenience stores, small grocers, and ethnic food stores. That may be true, however, FNS' year-end study for 2016 documented that more than 80 percent of SNAP dollars were spent at supermarkets and superstores with only 1.42 percent of all SNAP dollars spent at small grocery stores. This again indicates that when a supermarket or superstore is available it is highly unlikely that a small grocery store would have transactions much greater than a supermarket or superstore.

The case record also documents that the Retailer Operations Division conducted a detailed analysis of five (5) households identified in the charge letter to analyze their shopping patterns at Habibi compared to their shopping patterns at other SNAP authorized stores. All of these households had access to, and shopped at supermarkets and/or superstores. However, despite this access to better stocked stores, these sampled households conducted excessively large transactions at Habibi **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** of shopping at these larger supermarkets and superstores. Under these circumstances, it is highly unlikely that a small grocery store with a more limited selection of staple foods would have legitimate SNAP transactions comparable or larger than these SNAP authorized supermarkets and superstores.

In summary, the store's layout, infrastructure, and food inventory do not support a high percentage of transactions markedly exceeding the average SNAP transaction amount of similar type stores. In addition to the statistical irregularity of such high dollar transactions, the limited availability of counter space for checking out and the lack of shopping carts and baskets support the Retailer Operations Division determination. Customers purchasing such large quantities of food items would have to hold them in their arms, or enlist the help of others while shopping. Based on a preponderance of the evidence, the irregular transaction patterns cited in Charge Letter Attachment 4 are more likely than not the result of trafficking in SNAP benefits.

### CIVIL MONEY PENALTY

The Appellant did not request consideration for a trafficking CMP in lieu of a permanent disqualification under 7 CFR § 278.6(i) even though it was informed of the right to do so in the charge letter. The SNAP regulation at 7 CFR § 278.6(b)(2)(ii) mandates that a request for a trafficking CMP along with supporting documentation shall be submitted within ten (10) days of receipt of the charge letter.

The SNAP regulation at 7 CFR § 278.6(b)(2)(iii) also states, in part, 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 ... the firm **shall not be eligible** for such a penalty." [Emphasis added.]

Even if a timely request had been submitted, the Appellant would likely not have been eligible for a trafficking CMP in lieu of disqualification because there is insufficient evidence to demonstrate that the firm had established and implemented an effective SNAP compliance policy and program prior to the violations. Therefore, the Retailer Operations Division's decision not to impose a trafficking CMP 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 in comparison with actual store circumstances was the primary basis for its determination to permanently disqualify the retailer. This data provided substantial evidence that the questionable transactions during the review period had characteristics that are consistent with trafficking in SNAP benefits. Stores caught in trafficking violations consistently display particular, characteristic patterns of transactions, including those cited in the letter of charges.

In the absence of any reasonable explanations for such transaction patterns, a conclusion can be drawn through a preponderance of evidence that the "unusual, irregular, and inexplicable" transactions and patterns cited in the letter of charges evidence trafficking as the most likely explanation. Therefore, based on a review of all of the evidence in this case, it is more likely true than not true that program violations did in fact occur as determined by the Retailer Operations Division. Based on the discussion above, the decision to impose a permanent disqualification against Habibi Gourment Deli, Appellant, is **sustained**.

## RIGHTS AND REMEDIES

Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and Title 7, Code of Federal Regulations, Part 279.7 (7 CFR § 279.7) addresses 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.

RONALD C. GWINN  
Administrative Review Officer

November 12, 2019