

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

JJ Gas,

Appellant,

v.

Case Number: C0206922

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 JJ Gas (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 JJ Gas on July 2, 2018.

AUTHORITY

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

CASE CHRONOLOGY

In a letter dated April 19, 2018, the Retailer Operations Division informed the Appellant that JJ Gas was in violation of the terms and conditions of the SNAP regulations, 7 CFR § 270 –282, based on EBT SNAP benefit transactions that "establish clear and repetitive patterns of unusual, irregular, and inexplicable SNAP activity for your type of firm."

In responses to the Retailer Operations Division of April 27, 2018, April 30, 2018, and May 23, 2018, the Appellant denied the trafficking allegations and provided various explanations for the questionable SNAP transactions that were outlined in the April 19, 2018 Charge Letter.

After considering the Appellant's replies and the evidence in the case, the Retailer Operations Division issued a Determination Letter dated July 2, 2018, informing the Appellant that JJ Gas was being permanently disqualified from participation in the SNAP in accordance with 7 CFR § 278.6(e)(1) for trafficking violations.

In a letter postmarked July 11, 2018, the Appellant, through counsel, requested an administrative review of the Retailer Operations Division's decision to permanently disqualify the firm from participation in the SNAP. FNS granted the Appellant's request for administrative review by letter dated July 24, 2018.

STANDARD OF REVIEW

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

CONTROLLING LAW

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

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

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

7 CFR § 278.6(a) states, inter alia:

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

7 CFR § 278.6(e)(1)(i) states:

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

7 CFR § 271.2 states, inter alia:

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

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

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

7 CFR § 278.6(i) states, inter alia:

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

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

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

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

SUMMARY OF CHARGES

The Appellant was charged and determined to be trafficking based on an analysis of EBT transaction data from August 2017 through January 2018. This involved the following SNAP transactions patterns which are indicative of trafficking:

- There were multiple transactions made from individual benefit accounts within a set period of time; 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 and in the administrative review request, the Appellant, through counsel, stated the following summarized contentions, in relevant part:

- The Appellant denies that trafficking of SNAP benefits took place at the subject firm.
- The Appellant has been doing business for the past 14 years and has never broken any rules and has always been in compliance with the SNAP rules.
- The owner had a stroke prior to the investigation period where a substitute/volunteer store clerk helped out sporadically.
- The questionable SNAP transactions included in the Charge Letter Attachments are the result of the Appellant giving food to a few customers and then charging them at a later time when they have the money.
- Regarding the transactions included in Attachment 1 of the Charge Letter, the Appellant is located within a residential area. The Appellant has many repeat customers who use their EBT cards multiple times to buy various food products. The SNAP regulations do not prohibit SNAP customers from making multiple transactions in a set period of time. The Appellant does not know what customers do with the food that they purchase from it. The Appellant does not know if customers are giving their EBT cards and PIN number to others as there is no way for the Appellant to determine this as there are no names on the cards. Each SNAP household card can be used numerous times throughout the day as there are numerous individuals in each large family and there are a significant number of unemployed customers that frequent the store. Customers make an initial purchase and then ask the Appellant how much is left on their EBT card and based upon the reply, make purchases of additional groceries.
- Regarding the transactions included in Charge Letter Attachment 2, some customers make special requests of the Appellant to purchase big bags of sugar, flour, butter, and some other food items. The Appellant purchases these items for the requesting customers. Some customers purchase jars of sausages that they cannot find anywhere else. The store is fully stocked with EBT qualified items. Most of the store's customers purchase groceries for their entire household as they would at a fully-fledged grocery store. The Appellant is located in a low income neighborhood of Avondale, Arizona in a notorious subdivision for poverty. This yields a higher than normal amount of SNAP customers. The average family consists of 3-8 children with a single parent which results in a higher amount of food being purchased with SNAP benefits. Many customers buy large quantities of raw meat by the pound to meet the family's needs for an entire month to eliminate frequent visits to the store. Many customers do not have transportation or

have restrictions such as wheelchairs and other accessibility issues that make it very difficult to make frequent trips to the grocery store. For this reason, buying in bulk is a practical option. The USDA manual does not allow store owners to restrict the time or purchase amount of its customers.

- The Appellant requests that FNS impose a civil money penalty in lieu of a permanent SNAP disqualification. The Appellant's compliance policy clearly states the following: (1) There will be no exchange for cash for EBT benefits; (2) Customers cannot share EBT cards; (3) Any questions regarding EBT cards must be addressed to the owner; (4) Any employee engaging in EBT misuse will be terminated, and (5) Employees can only sell qualified EBT items. The compliance policy is current. The owner and his employees review the SNAP user's manual on a regular basis.

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

- Affidavit of store owner;
- Customer affidavits;
- Hand-written list of foods with purchase cost and resale prices;
- Cash register and EBT receipts; and
- Purchase invoices.

ANALYSIS AND FINDINGS

Store Characteristics

FNS authorized JJ Gas as a convenience store on February 9, 2009. The case file indicates that in reaching a disqualification determination, the Retailer Operations Division considered information obtained during a November 24, 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 1,200 square feet in size with no additional food storage outside of public view;
- No shopping carts or hand-held baskets available for customer use;
- One cash register and one EBT point-of-sale (POS) device for use in ringing-up SNAP transactions;
- Limited check-out counter space;
- No 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;

- No indication from the store visit report that the firm has a special pricing structure, such as prices ending in \$.x9 and/or \$.00;
- The four most expensive foods items in stock were Nescafe at \$8.99 per 7 ounces; Jack Links at \$6.29 per 3.25 ounces; sodas at \$5.56 per 12 pack; and Red Bull at \$5.33 per two cans;
- There were no fresh or frozen meats, poultry, or seafood;
- No deli counter and deli meats and cheeses were not sold by the pound;
- Hot foods were not sold;
- Meat items included units of canned/potted meat, eggs, sausage, and meat jerky;
- Dairy included milk and ice cream;
- Fresh produce was limited to a few bananas and lemons;
- Other staple foods available for purchase include such items as juice, pasta, bread, cereal, cakes/pastries, snack foods, and canned goods;
- Much of the remaining food stock consists of accessory foods such as candy, carbonated and non-carbonated drinks, and condiments; and
- Ineligible nonfood items included tobacco products, health and beauty items, household cleaning supplies, lottery tickets, alcohol, automotive products, pet food, gasoline, sunglasses, electronic cigarettes, and cell phone accessories.

The available inventory of SNAP eligible food at the time of the store visit showed food stock that would be typical of a convenience store, where households normally purchase a limited number of items. There was little indication that SNAP households would be inclined to regularly visit the store to purchase large quantities of groceries. Given the available inventory and the store's characteristics, this review could find no reason why JJ Gas's SNAP redemption patterns differed so significantly from those of similar sized competitors.

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.

Credit Transactions

The Appellant contends that the questionable SNAP transactions included in the Charge Letter Attachments are the result of the owner giving food to a few customers and then charging them at a later time when they have the money.

When a retailer claims it maintains credit accounts to explain irregular SNAP transactions and data patterns, FNS requires a level of detail regarding the legitimacy of the claim. This is because retailers have often made false admissions of credit in an attempt to obtain a lesser penalty after committing more egregious violations such as trafficking. Credit transactions must be accounted for with substantive evidence such as the dates credit was extended, to whom, for what amount, and for what items.

The Appellant provided no evidence or documentation in support of its argument that the violative SNAP transactions were the result of the store extending credit to a few SNAP customers. FNS reviewed the information provided from the Appellant and properly determined that the information was insufficient to support the Appellant's credit extension contention for the following reasons:

5 U.S.C. § 552 (b)(7)(E).

In conclusion, although JJ Gas may have, on a rare occasion, accepted SNAP benefits as repayment on credit accounts, the evidence submitted by the Appellant does not support its contention that the irregular SNAP transactions listed in the Charge Letter are due to repayment on credit accounts.

Repeat Transactions by the Same Household (Charge Letter Attachment 1)

This Charge Letter Attachment documents 20 sets of transactions (52 total transactions) **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** in SNAP benefits to meet the parameters of this scan. 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.

Although it is not uncommon for customers to have more than one transaction per day, 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. The photographs from the store visit offer no explanation as to why SNAP customers would routinely shop at JJ Gas multiple times during a short period or purchase such a large volume of items, there being no great variety of products, price advantage, profusion of large packages, or significant bulk items or food cases for sale. The second, third, fourth, and fifth transactions in each set are too large to consist of forgotten items.

The Appellant contends that it is located within a residential area. The Appellant has many repeat customers who use their EBT cards multiple times to buy various food products. The SNAP regulations do not prohibit SNAP customers from making multiple transactions in a set period of time. The Appellant does not know what customers do with the food that they purchase from it. The Appellant does not know if customers are giving their EBT cards and PIN number to others as there is no way for the Appellant to determine this as there are no names on the cards. Each SNAP household card can be used numerous times throughout the day as there are numerous individuals in each large family and there are a significant number of unemployed customers that frequent the store. Customers make an initial purchase and then ask the Appellant how much is left on their EBT card and based upon the reply, make purchases of additional groceries.

With regard to these contentions, while there are no limits on the number of times EBT cards may be used or the amount of eligible foods that may be purchased, the SNAP transactions noted in this Charge Letter Attachment are questionable because they display characteristics of use inconsistent with the nature and extent of the store's stock and facilities and are indicative of trafficking. Although it is not uncommon for customers to conduct more than one transaction per day, it is not common that such multiple transactions are for large dollar amounts. JJ Gas is not set up to provide for all of one's food needs with no fresh or frozen meats, poultry, or seafood, no frozen fruits or vegetables, a very minimal variety and amount of fresh produce, and lacks an abundant depth and breadth of staple foods. Also, the store visit observations indicate that there is no evidence of a price advantage or custom or special services rendered at the subject store that are not offered at other authorized SNAP stores in the area. There were 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 evidence of meat/seafood specials or bundles or fruit/vegetable boxes that might sell for high prices, and no evidence of a wholesale business such as posted prices or separate entrances for wholesale customers. The store visit report and photos also indicate that there is no storage area/space outside of public view. It is irregular for convenience stores to have purchases such as those cited, especially when JJ Gas stocks only a few high priced food items so the majority of the food items stocked at the store are low priced items.

A review of client shopping data for the review period shows that clients shopping at JJ Gas are also shopping at other area grocery stores, as well as full-line supermarkets and super stores that most likely offer customers a much larger quantity and variety of eligible food items for better prices. Based on these shopping patterns, transportation to other stores is not an issue for these SNAP customers. Yet, these customers continue to shop and spend suspicious high dollar amounts in short timeframes at JJ Gas, where the eligible food stock is minimal, **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** of their purchases at better stocked stores. This is a strong indicator of trafficking.

Sometimes a firm may have unusual transaction patterns due to a recipient's lack of access to other SNAP authorized stores. However, there are seven (7) SNAP authorized retailers (including a medium grocery store and a super store) located within a 1.0 mile radius of JJ Gas that can meet the nutritional needs of SNAP customers. Several of these authorized SNAP stores are larger than JJ Gas and offer a greater quantity and variety of food products at comparable or

better prices as compared to the subject store. As mentioned previously, SNAP customers who shopped at JJ Gas 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 does not appear to be an explanation for JJ Gas's abnormally high SNAP transaction amounts conducted within a short timeframe of each other.

As to whether or not SNAP recipients sharing their EBT cards and PIN numbers with others 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 sharing of EBT cards is particularly common among SNAP recipients in Avondale, Arizona. FNS acknowledges that the SNAP regulations and statute do not govern or mandate how or when a SNAP household should spend its benefit allotment. Regulations also do not govern how frequently a customer may visit a store or whether household members should purchase items independently. SNAP benefits are issued to individual households and as such are meant to provide most of the nutritional needs of that household. Although sharing of SNAP benefits can occur, they are not intended to be used by households purchasing eligible food items for other household members or other households. Again, the SNAP regulations do not govern what happens to the food once it is purchased. However, the repetitive nature of the transactions identified in Attachment 1 are vastly different in JJ Gas than in any other nearby comparable firm giving credibility to the notion that trafficking is mostly likely taking place.

The Appellant argues that customers make an initial purchase and then ask how much is left on their EBT card and based upon the reply, make purchases of additional groceries. However, the EBT point-of-sale machine is programmed to permit immediate inquiries without having to first process a purchase. There is also a toll-free 800 telephone number that can be called to find out account balances. Therefore, it is not necessary for customers to make a purchase just to find out what they have on balance in their SNAP benefit accounts. In addition, it appears that a few of the questionable SNAP transactions cited in this Charge Letter Attachment were conducted at the beginning of the month when the recipients' benefits were replenished and plentiful. It would be unusual for recipients to be concerned about their account balances with so many benefit dollars at hand.

Unfortunately, the Appellant has not provided any evidence to show that the transactions listed in Attachment 1 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 2)

This Charge Letter Attachment lists 134 transactions (5 U.S.C. § 552 (b)(6) & (b)(7)(C)) 5 U.S.C. § 552 (b)(6) & (b)(7)(C). These large transactions are not consistent with a convenience store in Maricopa County, Arizona. During the review period, the average transaction amount for a convenience store in Maricopa County, Arizona was \$6.01. The average transaction in Attachment 2 is more than nine (9) times larger than the average purchase amount for this store type. There is no evidence that the firm would be likely to have SNAP redemption patterns that differ considerably from similar-sized competitors. These large transaction amounts are also not consistent with the store's inventory. There were no fresh or frozen meats, poultry, or seafood and the only fresh produce in stock was a few bananas and

lemons. Most of the food products in JJ Gas consisted of accessory food items such as snack foods, candy, and soda and inexpensive staple foods such as canned and packaged goods. The frequency of high dollar purchases in the review period calls into question the legitimacy of these transactions.

The Appellant contends that some customers make special requests of the Appellant to purchase big bags of sugar, flour, butter, and some other food items. The Appellant purchases these items for the requesting customers. Some customers purchase jars of sausages that they cannot find anywhere else. The store is fully stocked with EBT qualified items. Most of the store's customers purchase groceries for their entire household as they would at a fully-fledged grocery store. The Appellant is located in a low income neighborhood of Avondale, Arizona in a notorious subdivision for poverty. This yields a higher than normal amount of SNAP customers. The average family consists of 3-8 children with a single parent which results in a higher amount of food being purchased with SNAP benefits. Many customers buy large quantities of raw meat by the pound to meet the family's needs for an entire month to eliminate frequent visits to the store. Many customers do not have transportation or have restrictions such as wheelchairs and other accessibility issues that make it very difficult to make frequent trips to the grocery store. For this reason, buying in bulk is a practical option. The USDA manual does not allow store owners to restrict the time or purchase amount of its customers.

Regarding the Appellant's contention that it sells big bags of sugar, flour, butter, raw meat by the pound, sausage in jars, and other food items, the FNS store visit of November 24, 2017 indicates that there were 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; there were no meat/seafood specials or bundles or fruit/vegetable boxes that might sell for high prices; and there was no evidence of a wholesale business such as posted prices or separate entrances for wholesale customers. The food items mentioned by the Appellant including sugar, flour, butter, and raw meat by the pound were not in stock at the time of the store visit. In addition, there was only one jar of sausages in stock that appeared to be sold by the individual sausage, not by the jar.

There is no evidence to support the Appellant's contention that the excessively large purchase transactions are the result of it selling large quantities (i.e., bulk/case food purchases) to SNAP customers or the result of JJ Gas taking special orders for food items from SNAP customers. The Appellant did not submit any documentation to prove that it sells large quantities of food items or that it takes special orders for foods from customers. Neither the purchase invoices nor the EBT and cash register receipts provided for review indicate that the Appellant purchased large quantities of staple food products during the review period. The receipts also do not identify the products purchased. In addition, the hand-written list of foods with purchase cost and resale prices do not validate that the firm sells foods in bulk/large quantities. It is also important to note that the majority of the food items included on the hand-written food list are accessory food items such as snack foods, candy, and soda. It is unlikely that customers are using their SNAP benefits to make large purchases of these food items at the subject firm. As noted previously, the store visit observations indicate that most of the food products in JJ Gas consisted of accessory food items such as snack foods, candy, and soda and inexpensive staple foods such as canned and packaged goods. The frequency of high dollar purchases in the review period calls into question the legitimacy of these transactions.

The food stock and facilities of the Appellant as reported in the store visit documentation do not appear sufficient to provide for all of one's food needs. People generally do not spend large sums at such stores. They usually stop at convenience stores to pick up a few staple food items, such as bread, milk, or a can or two of food that they may consider are not worth a trip to the supermarket to purchase. The Appellant contends that the large transactions are not excessive nor do the SNAP regulations or training materials disallow such purchases. However, it is rare for a convenience store such as JJ Gas to have purchases like those included in Attachment 2 to the Charge Letter. 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

The FNS store visit report and photos of November 24, 2017 show that JJ Gas offers a minimal stock of SNAP eligible foods with no fresh or frozen meats, poultry, or seafood, a limited amount and variety of canned fruits and vegetables, only two varieties of fresh produce in limited amounts, and no frozen fruits or vegetables. The inventory report and photos also show only a few expensive eligible foods in stock that would account for these large amounts as well as showing the store has limited checkout counter space and 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 record shows that there are seven (7) SNAP authorized retailers located within a 1.0 mile radius of JJ Gas that can meet the nutritional needs of SNAP customers. Many of these area SNAP stores are of a comparable size or larger than JJ Gas and offer a comparable or greater quantity and variety of food products at comparable or better prices as compared to the subject store. An analysis of the shopping patterns for all of the SNAP households listed in this Attachment shows that the majority of the households shopping at JJ Gas have access to transportation and that all are regularly shopping at a variety of larger stores, including super stores and/or supermarkets, located nearby and at several miles distance from the Appellant's location. While JJ Gas does offer some staple food items, SNAP recipients are already shopping at other larger SNAP retailers located in proximity to the Appellant's business offering a greater quantity and variety of products, including fresh meats/seafood and produce, at lower prices. Therefore, the store has nothing to attract SNAP customers as there are no special or custom services offered.

The record shows that the Retailer Operations Division compared the Appellant firm, a convenience store, to two comparable SNAP authorized convenience stores located 0.08 and 0.45 miles of the subject firm. During the review period, JJ Gas's ALERT rank was considerably higher as compared to the two comparison stores. In addition, JJ Gas's average transaction dollar amount and dollar volume were considerably higher as compared to the store type average in Maricopa County, Arizona. These are indicators that trafficking is more likely than not occurring at the subject firm.

Lastly, the case record documents that the Retailer Operations Division conducted a detailed analysis of five SNAP households identified in the Charge Letter to analyze their shopping patterns at JJ Gas compared to their shopping patterns at other SNAP authorized stores. Each of these households had access to, and shopped at larger stores including super stores and/or

supermarkets. It is obvious that these SNAP households had transportation available to them to reach these other authorized stores. However, despite this access to better stocked stores, these sampled households conducted excessively large transactions at JJ Gas often **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** of shopping at the larger stores where they conducted much smaller SNAP purchases. It is highly unlikely that a convenience store with minimal staple foods would have legitimate SNAP transactions greater than these larger and better stocked stores.

In summary, the store's layout, infrastructure, and food inventory do not support a high percentage of transactions markedly exceeding those of similar type stores. In addition to the statistical irregularity of such high dollar transactions, the limited availability of counter space for checking out and the lack of shopping carts and hand-held baskets support the Retailer Operations Division's determination. It is not plausible that the store's customers are carrying large amounts of food around the store without the benefit of shopping carts and/or hand-held baskets. Customers purchasing such large quantities of food items would have to hold them in their arms, or enlist the help of others while shopping. Based on the preponderance of the evidence, the irregular transaction patterns cited in Charge Letter Attachment 2 are more likely than not the result of trafficking in SNAP benefits.

Invoices

The Appellant provided purchase invoices in support of its contentions that the questionable SNAP transactions listed in the Charge Letter Attachments were the result of legitimate food purchases and not the result of trafficking of SNAP benefits.

FNS reviewed the invoices provided by the Appellant. Some of the invoices were outside the review period; therefore, they were not counted in the analysis. As the firm's EBT redemptions were **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** for the review period, the invoices provided by the Appellant do not explain the questionable transactions conducted at JJ Gas during the review period.

Affidavits

The Appellant provided FNS with two affidavits signed by households as well as an affidavit signed by the owner in support of JJ Gas. The affidavits indicate that the permanent SNAP disqualification of JJ Gas would impose a hardship on SNAP households. The affidavits provided by the Appellant do not, however, attest that the Appellant did not traffic SNAP benefits during the review period.

With regard to the affidavit claim that a permanent SNAP disqualification will impose a hardship on SNAP customers, 7 CFR § 278.6(f) of the SNAP regulations provides for civil money penalty assessments in cases where disqualification would cause "hardship" to SNAP households because of the unavailability of a comparable participating food store in the area to meet their needs. However, this regulation also sets forth the following specific exception to such assessments there under: "A civil money penalty for hardship to SNAP households may not be imposed in lieu of a permanent disqualification". Therefore, since this case involves a

permanent disqualification action, the civil money penalty provision is not applicable to the present case.

While the Appellant asserts that the statements/affidavits provided to FNS purpose to establish that questionable transactions were legitimate and that no trafficking occurred, the truth of such declarations cannot be verified. Customers and store owners engaging in trafficking transactions would be unlikely to admit to this behavior. On the contrary, customer and owner statements would be expected to attest to the legitimacy of questionable transactions regardless of whether they were, in fact, legitimate.

Denial of Charges

Regarding the Appellant's contention that it denies the trafficking allegations, this review encompasses and documents the examination of the primary and relevant information in this case, the purpose of which is, as noted above, to determine whether the Appellant demonstrates by a preponderance of the evidence that the permanent disqualification should be reversed. In this case, therefore, if the Appellant demonstrates by a preponderance of the evidence that trafficking did not occur in the Appellant's firm, then trafficking will be considered not to have occurred and the disqualification reversed. If this is not demonstrated the case is to be sustained. Assertions that the firm has not violated program rules, by themselves and without supporting evidence and rationale, do not constitute valid grounds for dismissal of the current charges of violations or for mitigating their impact.

No Prior Violations

The Appellant contends that it has been doing business for the past 14 years and has never broken any rules and has always been in compliance with the SNAP rules. However, a record of participation in the SNAP with no documented previously violations does not constitute valid grounds for mitigating the impact of the present serious determination of trafficking.

Owner Unaware of Violations

The owner contends that he had a stroke prior to the investigation period where a substitute/volunteer store clerk helped out sporadically. This contention cannot be accepted as a valid basis for dismissing any of the charges, or for mitigating the impact of those charges. As owner of the store, the Appellant is liable for all violative transactions that occur at JJ Gas. Regardless of whom the ownership of a store may utilize to handle store business (i.e., regardless of whether a store owner, store manager, store clerk, family member, etc. was involved in the violative transactions), ownership is accountable for the proper handling of SNAP benefit transactions.

Prior to becoming authorized to participate in the SNAP on February 9, 2009, the Appellant completed and submitted a SNAP Application for Retail Stores. The SNAP Application contained a section indicating that the person(s) signing the Application understood and agreed to ensure that store employees follow the SNAP rules and regulations and that the person(s) accepts responsibility for any SNAP violations that may occur at the store that were committed

by any of the store's employees---paid, unpaid, new, temporary, full-time, part-time, etc. The SNAP Application also included a section that contained a statement which acknowledged that the person(s) signing the Application was aware that violations of Program rules could result in fines, legal sanctions, withdrawal, or disqualification of the store. In addition, the Appellant was provided with program training and reference materials which reinforced the statements included in the SNAP Application.

The regulations establish that an authorized food store may be disqualified from participating in the program when the store fails to comply with the Act or regulations because of the wrongful conduct of an owner, manager, or someone acting on their behalf. Trafficking is defined in 7 CFR § 271.2 of the SNAP regulations which states that 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... The Food and Nutrition Act of 2008, at § 2021, does not allow for discretion in determining sanctions for trafficking and is specific in its requirement that "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, 7 CFR § 278.6(e)(1)(i) of the SNAP regulations states that FNS shall disqualify a firm permanently if personnel of the firm have trafficked.

The Appellant's implied contention that if SNAP violations occurred, they were committed by a substitute/volunteer store clerk without its knowledge, consent, or approval cannot be accepted as a valid basis for diminishing the penalty. To allow store ownership to disclaim accountability for the acts of persons whom the ownership chooses to utilize to handle store business would render virtually meaningless the enforcement provisions of the Food and Nutrition Act and the enforcement efforts of USDA.

CIVIL MONEY PENALTY

The Appellant requests that FNS impose a civil money penalty in lieu of a permanent SNAP disqualification. The Appellant's compliance policy clearly states the following: (1) There will be no exchange for cash for EBT benefits; (2) Customers cannot share EBT cards; (3) Any questions regarding EBT cards must be addressed to the owner; (4) Any employee engaging in EBT misuse will be terminated, and (5) Employees can only sell qualified EBT items. The compliance policy is current. The owner and his employees review the SNAP user's manual on a regular basis.

In the April 19, 2018 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 Appellant's request for administrative review postmarked July 11, 2018 (i.e., dated **after the ten day required timeframe** for requesting consideration of an imposition of a trafficking CMP in lieu of permanent disqualification and providing documentation in support of its request for a CMP), the Appellant requested consideration of a civil money penalty in lieu of permanent disqualification. However, the only supporting documentation provided by the Appellant was a typed statement/affidavit (which he did not sign) declaring that the owner is trained on the SNAP rules and is keeping himself posted by watching online training videos provided by USDA.

The Retailer Operations Division determined that Appellant was not eligible for a trafficking civil money penalty in lieu of a disqualification under 7 CFR § 278.6(i) 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 SNAP violations. **5 U.S.C. § 552 (b)(7)(E).**

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 JJ Gas 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 27, 2019