

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

**New Rainbow Foods,**

**Appellant,**

**v.**

**Case Number: C0205792**

**Retailer Operations Division,**

**Respondent.**

**FINAL AGENCY DECISION**

The U.S. Department of Agriculture, Food and Nutrition Service (FNS), finds that there is sufficient evidence to support the determination by the Retailer Operations Division to impose a permanent disqualification against New Rainbow Foods (hereinafter Appellant) from participating as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP).

**ISSUE**

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with Title 7 of the Code of Federal Regulations (CFR) § 278.6(a), (c) and (e)(1)(i), when it imposed a permanent disqualification against Appellant on April 30, 2018.

**AUTHORITY**

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

**CASE CHRONOLOGY**

By letter dated April 5, 2018, the Retailer Operations Division charged Appellant with trafficking based on a series of irregular SNAP transaction patterns that occurred in November 2017 through February 2018. The letter noted that the penalty for trafficking is permanent disqualification as provided by 7 CFR § 278.6(e)(1). The letter also noted that the Appellant could request a trafficking civil money penalty (CMP) in lieu of a permanent disqualification within ten days of receipt under the conditions specified in 7 CFR § 278.6(i).

Appellant did not respond to the charge letter and no evidence was submitted to be considered in support of the CMP. The Retailer Operations Division notified Appellant by letter dated April 30, 2018, that the firm was permanently disqualified from participation as a SNAP retailer in accordance with 7 CFR § 278.6(c) and 278.6(e)(1) for trafficking violations. This letter also stated that Appellant was not eligible for the CMP because insufficient evidence was submitted to demonstrate that it had established and implemented an effective compliance policy and program to prevent SNAP violations.

By letter dated May 10, 2018, Appellant, through counsel, appealed the Retailer Operations Division's assessment and requested administrative review. The appeal was granted. No subsequent correspondence was received from Appellant.

### **STANDARD OF REVIEW**

In an appeal of an adverse action, Appellant bears the burden of proving by a preponderance of evidence that the administrative action should be reversed. That means Appellant has the burden of providing relevant evidence that a reasonable mind, considering the record as a whole, would accept as sufficient to support a conclusion that the argument asserted is more likely to be true than untrue.

### **CONTROLLING LAW**

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

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

7 CFR § 278.6(e)(1)(i) states: "FNS shall disqualify a firm permanently if personnel of the firm have trafficked as defined in § 271.2." Trafficking is defined in part as, "The buying, selling, stealing, or otherwise effecting an exchange of SNAP benefits for cash or consideration other than eligible food". Trafficking includes "Intentionally purchasing products originally purchased with SNAP benefits in exchange for cash or consideration other than eligible food".

7 CFR §278.6(i) states: "FNS may impose a civil money penalty in lieu of a permanent disqualification for trafficking . . . if the firm timely submits to FNS substantial evidence which

demonstrates that the firm had established and implemented an effective compliance policy and program to prevent violations of the Program.”

7 CFR §278.6(b)(2)(ii) states: “Firms that request consideration of a civil money penalty in lieu of a permanent disqualification for trafficking shall have the opportunity to submit to FNS information and evidence that establishes the firm’s eligibility for a civil money penalty in lieu of a permanent disqualification in accordance with the criteria included in §278.6(i). This information and evidence shall be submitted within 10 days, as specified in §278.6(b)(1).” Part 278.6(b)(2)(ii) further states that if a firm fails to request a civil money penalty in lieu of a permanent disqualification for trafficking and submit documentation and evidence of its eligibility within the specified 10 days, the firm shall not be eligible for such a penalty.

### **SUMMARY OF THE CHARGES**

The issue in this review is whether, through a preponderance of evidence, it is more likely true than not true that the questionable transactions were the result of trafficking. The charges on review were based on an analysis of SNAP EBT transaction data during the four month period of November 2017 through February 2018. This involved three patterns of EBT transaction characteristics indicative of trafficking:

1. There were an unusual number of transactions ending in a same cents value.
2. Multiple transactions were made from individual benefit accounts in unusually short time frames.
3. Excessively large purchase transactions were made from recipient accounts.

### **APPELLANT’S CONTENTIONS**

The following may represent a summary of Appellant’s contentions in this matter; however, in reaching a decision, full attention and consideration has been given to all contentions presented, including any not specifically recapitulated or specifically referenced herein:

- The store has many employees who have a limited ability to communicate in English so many items are priced in .00 cents or two for \$1.00. This makes the transaction simple to calculate and determine the change for cash transactions and allows for much faster transactions. This is evidenced by the price list in Exhibit 1 that shows 117 of 211 items are priced in .00 cents. The transactions listed in Attachment 3 show that only 23 out of 112 end in an even dollar amount which is contrary to the allegations in Attachment 1;
- Regarding the transactions in the second Attachment, Appellant is not aware of any rule limiting the number of transactions a recipient may make. Many times the customer lives in the neighborhood and shops more than once per day, maybe because they forgot an item or realized there was something they needed to prepare a meal. A card being used twice is not evidence that cash was given or of trafficking. The items in the first transaction set are because the firm sells bulk

items and meat by the case and by the pound. These items have to be ordered ahead of time for the wholesaler to deliver them. This household purchased 5 U.S.C. § 552 (b)(6) & (b)(7)(C) of food items and conducted a second transaction for their bulk items. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). This is not evidence of trafficking as previously explained;

- The third Attachment is because the store serves a lot of people who do not have cars to drive to large supermarkets and the store carries meat, fresh produce, cereal, bread, milk, canned good goods, and other SNAP eligible foods. It is not difficult to spend \$100.00 in a grocery store and not get that much. 5 U.S.C. § 552 (b)(6) & (b)(7)(C);
- The transactions do make any specific allegations, but involve assumptions based upon the type of transactions. There is no direct evidence of trafficking or SNAP fraud being committed using the definitions in 7 CFR 271.2. All of these have an innocent explanation. Without actual proof of a vendor being caught red handed, it is not proper to conclude that trafficking was taking place. There are always high and low sales figures and it is not impossible that the sales were due to coincidence or that they were in the higher part of the realm. The store does about 5 U.S.C. § 552 (b)(6) & (b)(7)(C) of sales a month and SNAP sales are a very small part of the business so it is not necessary for the licensee to defraud or traffick SNAP cards or vouchers and asserts there is no direct evidence to support the allegations. Daily sales figures are provided in Exhibit 3 and Exhibit 4 contains the FNS Attachments;
- The penalties section of 7 CFR 278.6 (3) or (4) allows for a disqualification for six months to three years. The owners have never even received a warning letter and assert that through training and diligence, they can operate lawfully. This is the first sanction and it would seem that the numbers in the Attachments may indicate that since non-food items may have been sold to arrive at some of the dollar amounts involved and the owners have not previously been notified of these errors; and,
- This is the first time the owners have received a written charge letter and it is being taken very seriously. The owner trains all employees to sell only food items using SNAP. Exhibit 2 is the cover of the SNAP Training Guide. If the firm is given the opportunity to accept SNAP again, the owner will setup a training for all employees and require them to read the guide as well as go through the products in the store to review items that are not eligible and then to conduct mock transactions with random food baskets.

Appellant submitted a price list, the cover of the SNAP Training Guide, daily sales reports, and the FNS charge letter Attachments in support of these contentions.

## **ANALYSIS AND FINDINGS**

Each Attachment furnished with the letter of charges represents the questionable and unusual patterns of SNAP transactions indicative of trafficking which were conducted at the Appellant

firm during the review period. As patterns of unusual transactions appear across multiple Attachments, the case of trafficking becomes more convincing.

### **Store Background and FNS Store Visit**

FNS authorized the firm as a convenience store on February 12, 2013. The case file indicates that in reaching a disqualification determination, the Retailer Operations Division considered information obtained during a November 10, 2017, store visit conducted by a FNS contractor to observe the nature and scope of the firm's operation, stock, and facilities. This information was then used to ascertain if there were justifiable explanations for the firm's suspicious SNAP transactions. The store visit documented the following store size, description, and characteristics:

- The firm was a moderately sized store offering a minimal quantity and variety of staple foods and carrying no unique items or offering any distinctive services.
- The store visit report and photos showed one shopping cart that appeared to be for store use and three small hand baskets for use by customers making it difficult for them to carry large amounts of food to the checkout.
- No food packages, bundles, case sales, bulk items, or other sales were evident that would explain the unusual transactions and no cased items were available for purchase except for cases of soda and ineligible items such as beer.
- There was no signage indicating that any bulk items or other products could be special ordered.
- The store visit report specifically noted that the firm was not a specialty store and that there were no meat bundles or fruit and vegetable boxes for sale.
- The checkout area was a night window set into a security wall with a table in front that had many food displays leaving a very small area approximately 1.5 feet deep and 1.5 feet wide for customers to place their purchases. The very small checkout area combined with the night window would make it problematic to process large orders. The checkout area had one cash register, no optical scanner, and a POS terminal as confirmed by a store employee/owner.
- The firm had a minimal stock of staple foods that also included many single serving and pre-packaged items with a significant portion of inventory in accessory foods (primarily soda, candy, snacks, and other drinks) and many ineligible items.
- Interior signage advertised the Good Bites Café offering an extensive menu of hot entrees, hot sandwiches, hot breakfast items, and hot sides. The Café had a large commercial kitchen/food prep area with a wide range of equipment that included a cooktop grill, four burner gas range, deep fat fryers, gas ovens, commercial exhaust hood, prep tables, microwave oven, a large walk-in cooler, etc.
- The store had a very limited stock of fresh unprocessed meat, no fresh unprocessed seafood, a very limited stock of frozen unprocessed meat, no frozen unprocessed seafood, a limited quantity and variety of processed meats, no processed seafood except for canned fish, no deli meats, no packaged lunch meats, no bacon, a very limited stock of frozen entrees, no frozen dinners, a moderate supply of eggs, an extremely limited selection of fresh fruit consisting of bananas at the checkout, no fresh vegetables, no frozen fruits, an extremely

limited stock of frozen vegetables consisting of green peas, a limited stock of canned soups, a minimal quantity and variety of canned and packaged staple food items, no deli cheeses, a minimal stock of packaged cheeses, no yogurt, no sour cream, only one package of margarine, a limited stock of baby cereals/foods/juices, a minimal stock of infant formula, no tamales, no tortillas, no pitas, and very few expensive staple food items.

- Ineligible items included: tobacco, tobacco accessories, alcohol, hot foods, hot drinks, household products, paper products, pet products, auto products, health and beauty items, hats, party supplies, diapers, rock salt deicer, jewelry, and gaming machines while accessory foods included: candy, spices, condiments, snacks, baked goods, coffee, cooking oil, sugar, single serving ice cream, un/carbonated drinks, cake mixes, pie shells, and cold ready-to-eat prepared foods.
- Signage was in English and there were no SNAP posters (anti-fraud, eligible items, reporting trafficking, etc.) visible in the store.
- The firm's hours of operation were 8 AM-9 PM daily as confirmed by a store employee/owner. The employee/owner also stated that the business did take telephone orders, but no online grocery orders; did not deliver groceries; and did not round prices.
- Many food items were priced with all visible food prices ending in .x9 cents except for a very few items priced differently such as some drinks priced at \$0.50, \$1.00, \$1.50, \$2.50, two for \$1.00, and two for \$2.00. Comments on the FNS store visit report by the contract reviewer specifically stated that most of the food prices ended in .x9 cents. A price ending in .x9 cents is the most common pricing structure for stores of this type.
- The FNS store visit report listed the four most expensive items costing more than \$5.00 for sale in the store as being 12.7 ounce Gerber Formula priced at \$21.99, 29 ounce Banquet Fried Chicken priced at \$9.99, three pound chubs of ground beef priced at \$9.99, and 11.3 ounce Folgers Coffee priced at \$6.99. This listing of the most expensive items was provided by a store employee/owner during the store visit.
- While the firm did stock a limited selection of baby foods, most SNAP households with infants or small children are WIC participants and therefore would be purchasing these products using WIC vouchers, not SNAP EBT.
- The store visit photos and report showed several empty or marginally stocked shelves, coolers, and display racks.
- The quantity and variety of the store's staple food inventory was less than that seen during the previous FNS store visit on February 9, 2013.

### **Unusual numbers of transactions ending in a same cents value**

This attachment lists 267 transactions with 187 transactions ending in the same cents value of .00 cents and 80 transactions ending in the same cents value of .50 cents.

**5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. These include an unusually high number of transactions for the exact same dollar amount that are not supported by store inventory or pricing. When such repetitive patterns are unsupported by special pricing structures they are a strong indicator of

trafficking in SNAP benefits. The FNS store report and photos revealed no signs posted to indicate special food packages, bundles, case sales, or other sales that would explain the unusual number of transactions ending in these same cents values and no bulk items were available for purchase.

Based on the contractor visit, the store's inventory contained almost exclusively inexpensive single-serving, prepared food items and accessory foods. As such, it is implausible that several of these relatively inexpensive items purchased together would routinely total to a purchase amount ending in .00 or .50 cents. The high percentage of same cent transactions combined with the large number of high dollar transactions is irregular and suspicious for this type store.

Appellant contends the store has many employees who have a limited ability to communicate in English so many items are priced in .00 cents or two for \$1.00. This makes the transaction simple to calculate and determine the change for cash transactions and allows for much faster transactions. This is evidenced by the price list in Exhibit 1 that shows 117 of 211 items are priced in .00 cents. The transactions listed in Attachment 3 show that only 23 out of 112 end in an even dollar amount which is contrary to the allegations in Attachment 1.

Limited English proficiency of store employees should not impact the keying of SNAP eligible food prices into the firm's cash register or the firm's pricing structure. It is reasonable for the store owner to train employees on how to operate store equipment and communicate prices to customers; however, the use of a cash register to calculate the total of a purchase eliminates the requirement for an employee to tally the total purchase amount for the customer manually; for example with paper and pen. Additionally, Appellant's statement that having food prices end in .00 cent amounts expedites the checkout process is questionable.

The inventory report and photos from the 2017 FNS store visit show the Appellant firm offered a minimal stock of staple foods that included almost no fresh or frozen unprocessed meats or seafood and no fresh or frozen fruit or vegetables except for bananas and frozen peas. Additionally, the firm was noted as carrying few expensive eligible food items making it questionable that such a large number of high dollar SNAP transactions could be for legitimate food purchases. Contrary to Appellant's claim, the store visit report and photos show that the firm had no bulk items or cased goods for sale with the exception of cases of soda and no meats or cheeses were available for sale by the pound. A review of Appellant's price list shows that it primarily consists of soda, other canned or bottled beverages, candy, and snacks, but it does not include any specialty foods or bulk items. The price list shows that low cost snack foods, candy, and beverages favor a price structure ending in .00 or .50 cents with the most expensive food item ending in .00 cents identified as "Cereal-various flavors" priced at \$5.00. The majority of items ending in .00 amounts are either beverages, snack foods, or candy while the majority of staple food items have prices ending in .x9 cents. The store visit report also specifically notes that Appellant's pricing structure has the majority of food prices ending in .x9 cents. The purchase of several items with prices ending in .x9 cents would most likely not result in a total ending in a same cents value of .00 or .50 cents as multiples of nine seldom have a value ending in these amounts making it statistically impossible that this many store transactions would end in these amounts with legitimate food purchases. This is further supported by the number of high dollar value transactions in the third Attachment that do not end in .00 cents.

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. When many transactions end in a same cents amount, it appears that these transaction amounts are contrived and therefore, in the absence of compelling evidence to the contrary, are suggestive of trafficking. As such, the transactions in this Attachment have not been adequately documented as legitimate.

### **Multiple transactions in unusually short time frames**

This Attachment documents six individual transactions in three sets of two transactions conducted by three different households in a short period of time.

**5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. It is not a usual shopping pattern to see so many purchases, in a short period of time, by the same recipients as documented in this Attachment.

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. These sets of transactions appear to be in amounts which are indicative of trafficking.

Appellant is not aware of any rule limiting the number of transactions a recipient may make. Many times the customer lives in the neighborhood and shops more than once per day, maybe because they forgot an item or realized there was something they needed to prepare a meal. A card being used twice is not evidence that cash was given or of trafficking. The items in the first transaction set are because the firm sells bulk items and meat by the case and by the pound. These items have to be ordered ahead of time for the wholesaler to deliver them. This household purchased **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** of food items and conducted a second transaction for their bulk items. **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. This is not evidence of trafficking as previously explained.

SNAP households have no limit on the number of times they may use their benefits or the dollar value of eligible food they may purchase. The SNAP transactions listed in this Attachment 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 store's stock and facilities and are thus indicative of trafficking. **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**.

The Retailer Operation Division's analysis of the shopping patterns for the three households listed in this Attachment shows that they all have ready access to transportation as evidenced by their shopping at a variety of larger food stores located nearby and at a distance from Appellant's location, including a variety of super stores and supermarkets. Appellant's contentions fail to offer any explanation or rationale as to why households who are regularly shopping and spending large dollar amounts at many larger and better stocked stores would conduct multiple purchases totaling to high dollar values at a minimally stocked store. Common sense dictates that it is improbable that households would choose to spend large dollar amounts at the Appellant firm if their purchases consisted solely of eligible food items that could be purchased at any of the super stores and/or supermarkets they were already regularly shopping at and therefore more likely than not that these households were trafficking SNAP benefits at the Appellant firm.



As previously stated, the FNS store visit report and photos show no evidence that the Appellant firm stocks or offers special orders on any bulk food items, including cases of meats. No invoices or other evidence was provided to support Appellant's claim of offering bulk food items and special orders. Assertions without supporting evidence and rationale do not constitute valid grounds for dismissal of the current charges. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). FNS records show this large grocery store is a warehouse type store that has a much larger selection of staple foods, including fresh meats and produce, than the Appellant firm and also that this store specializes in bulk food sales. There is no compelling reason why this household would conduct two transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C) at the Appellant firm, that allegedly included payment in advance for a special order of bulk foods, 5 U.S.C. § 552 (b)(6) & (b)(7)(C) before conducting a higher dollar value transaction at a larger store with a greater food selection that included similar and identical food items and brands at comparable or lower prices than can be found at the Appellant firm. The fact that the household could immediately purchase bulk foods at the large grocery store without having to wait for the wholesaler's delivery or pay in advance also makes these transactions highly indicative of trafficking. It is further noted that this household conducted only one other transaction during the review period at the Appellant firm showing that it did not consider the firm to be its primary or even secondary grocery choice. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). FNS records show this supermarket also offers a full range of staple foods that include many bulk items as well as fresh meats and produce. There is no logical reason why this household would return to the Appellant firm the very next day and transact 5 U.S.C. § 552 (b)(6) & (b)(7)(C) unless the purchases were not for eligible foods. This household conducted only three other transactions at the Appellant firm during the review period showing that it also did not consider the firm to be one of its regular sources for groceries.

It is certainly not unusual for a small number of SNAP households to conduct multiple transactions in a short period of time. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). These multiple transactions indicate that the amounts were contrived in an attempt to avoid suspiciously high transactions that would be indicative of trafficking by breaking them into multiple, smaller amounts. FNS transaction data shows that this same pattern of multiple transactions in unusually short time frames is not evident at other nearby like type grocery stores further supporting that trafficking was occurring at the Appellant firm during the period under review.

There may be legitimate reasons why a SNAP household might return to a store during a short period of time, but the examples in this Attachment indicate a series of SNAP purchases that total to large dollar amounts. Multiple transactions over a short period of time, especially those of high dollar values, are indicative of attempts to obscure trafficking by dividing a large dollar value transaction into a series of smaller dollar value transactions and are a method which violating stores use to avoid high dollar transactions that cannot be supported.

### **High Dollar Value Transactions**

This Attachment lists 110 individual EBT transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The substantial number of high dollar transactions is uncharacteristic for a store of this size offering a

minimal stock of staple foods and calls into question the legitimacy of these transactions. The SNAP transactions listed are also substantially higher than the average SNAP transaction amount of \$6.33 for this store type in Milwaukee County. This is unusual and indicative of trafficking.

The evidence under review shows that SNAP households shopping at the Appellant firm are also shopping at many full-line supermarkets and super stores, located nearby as well as at a distance from Appellant's location, that offer a greater quantity and variety of eligible foods items for better prices than customers can find at the Appellant firm. The SNAP retailer database shows 42 other retailers located within one mile that includes a supermarket and a super store located 0.57 and 0.85 miles away, respectively. There are also two convenience stores, one combination grocery store, and a small grocery store located within 0.25 miles/440 yards with the small grocery store located less than one block away. These large dollar transactions remain questionable when considering the proximity of the other stores that would be better shopping options for consumers. Based on their shopping patterns, transportation does not appear to be an issue for these households. Yet, these recipients continue to shop and spend suspicious high dollar amounts at the Appellant firm, where the eligible food stock is limited, 5 U.S.C. § 552 (b)(6) & (b)(7)(C) of their purchases at larger food stores. Specifically, one-half (39) of the 79 households listed in this Attachment conducted at least one transaction at a super store or supermarket on the same day they made a high dollar value transaction at the Appellant firm while 59 of the 79 households shopped at a super store or supermarket within two days of making a high dollar value transaction at the Appellant firm. While many of the households shopping at the Appellant firm may not have cars as Appellant alleges, the evidence shows that they do have available transportation based on the numbers of households regularly shopping at these larger stores. It is also noted that the Appellant firm is located on a street with scheduled fixed route bus service that would facilitate shopping at other stores.

The difference in the average SNAP transaction dollar amount and the total SNAP transaction dollar volume for Milwaukee County convenience stores during the review months and at the Appellant firm is significant. Appellant's total SNAP transaction dollar volume is 22.07 percent larger than the amount for Milwaukee County convenience stores while its average SNAP transaction dollar amount is 48.97 percent larger than the County average. A comparison by the Retailer Operations Division of Appellant's SNAP redemptions to that of nearby convenience stores that had redemptions for the review period shows similar differences. Additionally, none of these nearby stores exhibit the same suspicious transaction patterns listed in the charge letter for the Appellant firm even though all are located in proximity to Appellant's location and would therefore be expected to share the same SNAP customer base and shopping patterns. This is a further indication that the SNAP transactions in this Attachment and the others do not represent legitimate food purchases. The Retailer Operations Division considered all of these to be indicators of unusual and suspicious activity.

The firm also had irregular SNAP transaction data as compared to like type stores in Milwaukee County. A comparison of Appellant's redemption data to Milwaukee County convenience stores using ten dollar increments shows that Appellant's transaction count and dollar volume are significantly below the average of like type stores in the lowest ranges of \$0.00-\$19.99 where typically the majority of convenience store transactions occur. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The Retailer Operations Division determined there was no credible reason for the firm to have

transactions at these dollar levels given the minimal stock of staple foods and the lack of any specialty, bulk, or ethnic foods that might sell for large dollar amounts and therefore also considered this to be a strong indication of trafficking. None of Appellant's contentions explain these unusual and suspicious differences.

Appellant contends the large transactions are because the store serves a lot of people who do not have cars to drive to large supermarkets and the store carries meat, fresh produce, cereal, bread, milk, canned good goods, and other SNAP eligible foods. It is not difficult to spend \$100.00 in a grocery store and not get that much. Many items are \$3.00-\$4.00 each so it would only take 40 items to spend \$100.00. Milk is \$3.00 per gallon, cereal more than \$3.00, and some breads over \$4.00. The time period also covers the holidays when people are entertaining and if they buy a 10 pound box of meat costing \$30.00-\$40.00 and a couple of other items it is easy to spend \$50.00-\$150.00. The store does 5 U.S.C. § 552 (b)(6) & (b)(7)(C) sales/month as shown in the daily sales reports provided. SNAP sales are a very small part of the business so it is not necessary for the licensee to defraud or traffick SNAP cards or vouchers.

The SNAP transactions noted in this Attachment are not presumed to be trafficking because they exceed a set dollar amount; they are questionable because they are inconsistent for this type of store and the store's stock. An analysis of shopping patterns by the Retailer Operations Division shows that households in this Attachment are regularly shopping at much larger stores, and conducting transactions of large dollar amounts, yet are conducting comparable or higher dollar value transactions at the Appellant business. It makes no sense for a household that regularly shops at larger stores and apparently has no transportation limitations to spend large dollar amounts at the Appellant firm since its cost of goods is higher than that of larger stores such as supermarkets or super stores.

Information obtained during the FNS store visit on November 10, 2017, shows that the Appellant firm offers a minimal quantity and variety of SNAP eligible staple food items, many accessory foods, and many ineligible items. Much of the inventory for sale consists of inexpensive snacks, candy, condiments, drinks, and single serving foods as well as many ineligible items. Since the firm offers a very limited stock of fresh unprocessed meat, no fresh unprocessed seafood, a very limited stock of frozen unprocessed meat, no frozen unprocessed seafood, a limited quantity and variety of processed meats, no processed seafood except for canned fish, no deli meats, no packaged lunch meats, no bacon, a very limited stock of frozen entrees, no frozen dinners, a moderate supply of eggs, an extremely limited selection of fresh fruit consisting of bananas at the checkout, no fresh vegetables, no frozen fruits, an extremely limited stock of frozen vegetables consisting of green peas, a limited stock of canned soups, a minimal quantity and variety of canned and packaged staple food items, no deli cheeses, a minimal stock of packaged cheeses, no yogurt, no sour cream, only one package of margarine, a limited stock of baby cereals/foods/ juices, a minimal stock of infant formula, no tamales, no tortillas, no pitas, and very few expensive staple food items, these patterns are deemed to be suspicious. The fact that tobacco, tobacco accessories, alcohol, hot foods, hot drinks, household products, paper products, pet products, auto products, health and beauty items, hats, party supplies, diapers, rock salt deicer, jewelry, and gaming machines are not eligible for use or purchase with SNAP benefits also provides no justification for the high transaction amounts. The store visit report and photos also

show that contrary to Appellant's contentions, the firm does not offer case sales or bulk items and has a very limited stock of meats and almost no fresh produce.

Higher food prices make it even more unlikely that SNAP recipients, with very limited food benefits, would want to spend a considerable part of their benefits in a store that does not address all of their food shopping needs when they are already shopping at larger, fully-stocked stores that would offer a greater variety of foods at lower prices. Many of these stores would also offer store brand products at lower prices, offer weekly specials, and have shopping carts and checkouts with built-in scanners and conveyor belts to facilitate processing purchases quickly. Additionally, Appellant furnished no itemized cash register and corresponding EBT receipts for the period under review to document the legitimacy of these excessively large transactions and no evidence was provided of SNAP eligible store stock via receipts of products taken into inventory for the relevant review months. The firm has a small checkout area and no shopping carts thereby making it difficult to facilitate the great quantities of eligible food items required to make up these large dollar transactions. Therefore, it is improbable that the food items purchased in these high dollar amounts could be carried to the register without the use of multiple carts and more likely that the amounts were contrived. It is also noted that the store visit photos and report show several empty or marginally stocked shelves, coolers, and display racks and also that the quantity and variety of the store's staple food inventory was less than that seen during the previous FNS store visit on February 9, 2013.

A review of the daily sales reports provided by Appellant shows that they include a mix of business expenses, including rent, as well as possible payments to individuals and the state of Wisconsin along with what are likely ineligible items such as beer. The price list does not provide substantial evidence such as itemized invoices of available food stock during the review period and it also does not support the sale of bulk food packages. Vendors listed include Galst Food Supermarkets and Aldi Supermarkets that are open to the public. The shopping pattern analysis shows that households shopping at the Appellant firm also shop at these stores so there is no compelling reason why a household would choose to pay more for the same exact item at the Appellant firm that it could purchase at a larger store where it regularly shops.

**5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. A pronounced decrease in SNAP redemptions following the store visit and receipt of the charge letter is a clear indication of trafficking since, if trafficking were not occurring, there would be no abnormal fluctuations in redemption amounts.

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

### **Other Contentions**

Regarding Appellant's denial of trafficking, it is important to state that this review encompasses and documents the examination of the primary and relevant information in this case, the purpose of which is to determine whether Appellant demonstrates by a preponderance of the evidence, that the disqualification should be reversed. In this case, if Appellant demonstrates by a preponderance of the evidence that it did not engage in trafficking SNAP benefits, then such transactions will be considered legitimate and the disqualification reversed. If 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. Regardless of whom the ownership of a store may utilize to handle store business or their degree of involvement in store operations, ownership is accountable for the proper training of staff and the monitoring and handling of SNAP benefit transactions. The ownership remains liable for all violative transactions handled by store personnel, whether paid or unpaid, new, full-time or part-time. Additionally, a record of participation in 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.

The owner and the firm were charged with trafficking based on a computer analysis of the store's transactions for the months of November 2017 through February 2018. The charges do not derive from the use of a confidential informant or independent investigator who visited the store and made illegal purchases to support findings of trafficking, but by a computer program used by SNAP Administrators. While traditional undercover operations are still in use by USDA, for many years federal regulations have also authorized the use of evidence consisting of EBT transaction data in investigations of SNAP retail stores to determine if trafficking is occurring and U.S. District Courts have long upheld the validity of EBT transaction data.

The issue under review involves a charge of trafficking SNAP benefits based on EBT transaction data. EBT transaction data is covered in SNAP regulations at 7 CFR § 278.6(a) and is addressed below. Trafficking is always considered to be the most serious violation even if it is a first offense therefore a temporary suspension or lesser penalty would not be applicable. SNAP regulations at 278.6(e)(1) clearly state that, "FNS shall disqualify a firm permanently if personnel of the firm have trafficked as defined in § 271.2." SNAP regulations at 7 CFR § 271.2, define trafficking as, "The buying, selling, stealing, or otherwise effecting an exchange of SNAP benefits for cash or consideration other than eligible food". SNAP regulations at 7 CFR § 278.6(a) clearly state that "FNS may disqualify any authorized retail food store if the firm fails to comply with the Food and Nutrition Act of 2008, as amended, or this part. Such disqualification shall result from a finding of a violation on the basis of evidence that may include facts established through on-site investigations, inconsistent redemption data, evidence obtained through a transaction report under an electronic benefit transfer system". In the present case, the data presented in the Attachments is solely based on the SNAP EBT transactions conducted at the Appellant firm during the review period. This firm was selected as a result of a series of complex algorithms that make numerous data comparisons with other like type firms during the review period. All of the transactions were then reviewed and analyzed by the Retailer Operations Division staff before the decision was made to issue a charge letter. This investigative process included a detailed examination of information obtained from various sources, including, but not limited to the inventory report and photos from the FNS store visit, a transaction comparison and analysis of like type and larger stores, and analysis of shopping patterns for recipient households conducting transactions at the Appellant firm during the review period. This analysis included a review of the firm to ensure its store classification was correct and the data comparisons with like type firms valid. Additionally, there are nearby like type stores whose transaction data does not form these suspicious patterns and are therefore not at risk

of disqualification for trafficking. There is also no regulatory requirement that trafficking disqualifications be based solely on on-site undercover operations.

Based on this empirical data, and in the absence of sufficient evidence for the legitimacy of such transaction patterns, a conclusion can be drawn, through a preponderance of evidence that the “unusual, irregular, and inexplicable” transactions and patterns cited in the charge letter evidence trafficking as the most likely explanation for the questionable transactions listed in the charge letter Attachments. It is herein determined that Appellant did not provide a preponderance of evidence demonstrating that the transactions contained in the charge letter were more likely due to eligible food sales than not. Under review, the evidence more substantially supports a conclusion that the transaction activity in the charge letter Attachments is due primarily to trafficking in SNAP benefits.

Neither the Food and Nutrition Act of 2008, as amended, nor the regulations issued pursuant thereto cite any minimum dollar amount of cash or SNAP benefits, or number of occurrences, for such exchanges to be defined as trafficking. Nor do they cite any degrees of seriousness pertaining to trafficking of SNAP benefits. Trafficking is always considered to be the most serious violation, even when the exchange of SNAP benefits for cash is dollar-for-dollar or is conducted by a non-managerial store clerk. This is reflected in the Food and Nutrition Act, which reads, in part, that disqualification “shall be permanent upon the first occasion of a disqualification based on trafficking by a retail food store.” In keeping with this legislative mandate, Section 278.6(e)(1)(i) of the SNAP regulations states that FNS shall disqualify a firm permanently if personnel of the firm have trafficked. There is no agency discretion in the matter of what sanction is to be imposed when trafficking is involved and second chances are not an authorized option under existing regulations.

### **CIVIL MONEY PENALTY**

A CMP for hardship to SNAP households may not be imposed in lieu of a permanent disqualification as specified in SNAP regulations at 7 CFR § 278.6(f). Trafficking is a permanent disqualification so Appellant is not eligible for a hardship CMP.

The Retailer Operations Division determined that the Appellant was not eligible for a trafficking CMP in lieu of a disqualification under 7 CFR 278.6(i) because Appellant failed to submit sufficient evidence to demonstrate that the firm had established and implemented an effective compliance policy and program to prevent SNAP violations within the specified timeframe. As such, the Retailer Operations Division determined that Appellant was not eligible for a trafficking CMP in lieu of permanent disqualification.

SNAP regulations are explicit in what constitutes substantial evidence. Specifically, 7 CFR § 278.6(i)(2) states in relevant part, “As specified in Criterion 3 above, in determining whether a firm has established an effective policy to prevent violations, FNS shall consider written and dated statements of firm policy which reflect a commitment to ensure that the firm is operated in a manner consistent with part 278 of current FNS regulations and current FSP policy on the proper acceptance and handling of food coupons.” This section goes on to state, “As required by

Criterion 2, such policy statements shall be considered only if documentation is supplied which establishes that the policy statements were provided to the violating employee(s) prior to the commission of the violation.” This section further states, “A firm which seeks a civil money penalty in lieu of permanent disqualification shall document its training activity by submitting to FNS its dated training curricula and records of dates training sessions were conducted...”

Appellant did not submit a copy of the firm’s SNAP compliance policy and training program or any documentation of training. The only documentation submitted was a copy of the front cover of the FNS SNAP Training Guide for Retailers.

Based on the above discussion and the evidence under review, Appellant failed to meet the regulatory standard for a trafficking CMP as it did not provide substantial evidence that it met all four criteria required by 7 CFR §278.6(i). Based on the above, the Retailer Operations Division’s decision not to impose a CMP in lieu of disqualification is sustained as appropriate pursuant to 7 CFR §278.6(i).

## **CONCLUSION**

The Retailer Operations Division presented a case that Appellant has likely trafficked in SNAP benefits. Their analysis of Appellant’s EBT transaction record was the primary basis for its determination to permanently disqualify Appellant. This data provided substantial evidence that the questionable transactions during the review period had characteristics consistent with trafficking violations in SNAP benefits. This is evidenced by: the suspicious patterns in three Attachments of EBT transaction data, the inadequacy of the store’s staple food stock as observed during the store visit to support large transactions in short time frames, the lack of adequate evidence for customer spending habits given that there are other SNAP authorized stores located within proximity to Appellant that likely offer a greater selection of eligible food items at competitive prices, and the irregular SNAP transaction data of Appellant as compared to other like type and larger stores in the county and state.

The retailer has not provided sufficient evidence to rebut the case that Appellant most likely trafficked in SNAP benefits. Therefore, based on a review of all of the evidence in this case, it is more likely true than not true that program violations did, in fact, occur as charged. Based on the discussion above, the determination to impose a permanent disqualification against Appellant is sustained. Furthermore, the Retailer Operations Division properly determined that Appellant was not eligible for a trafficking CMP according to Section 278.6(i) of the SNAP regulations.

## **RIGHTS AND REMEDIES**

Applicable rights to a judicial review of this decision are set forth in 7 U.S.C. § 2023 and 7 CFR § 279.7. If a judicial review is desired, the complaint must be filed in the U.S. District Court for the district in which Appellant’s owner resides, is engaged in business, or in any court of record of the State having competent jurisdiction. This complaint, naming the United States as the defendant, must be filed within thirty (30) days of receipt of this decision.

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

ROBERT T. DEEGAN  
Administrative Review Officer

September 6, 2018