

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

**Shop N Go #3,**

**Appellant,**

**v.**

**Retailer Operations Division,**

**Respondent.**

**Case Number: C0212925**

**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 Shop N Go #3 (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 January 29, 2019.

**AUTHORITY**

According to 7 U.S.C. § 2023 and the 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 December 19, 2018, the Retailer Operations Division charged Appellant with trafficking based on a series of irregular SNAP transaction patterns that occurred in May through October 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).

Ownership 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 January 29, 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 February 7, 2019, Appellant, through counsel, appealed the Retailer Operations Division's assessment and requested administrative review. The appeal was granted. No subsequent correspondence was received.

### **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 six month period of May through October 2018. This involved two patterns of EBT transaction characteristics indicative of trafficking:

1. Multiple transactions were made from individual benefit accounts in unusually short time frames.
2. 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 firm has been in business since October 2009 and it became a SNAP retailer in October 2010. The owners and five employees were the only employees during the term of the investigation and the firm has never violated SNAP laws;
- The firm is a fully functioning grocery store and most customers buy groceries for the entire household as would a customer at a grocery store. The average customer is elderly and buys enough groceries to last two to four weeks at a time. The corrections facility attracts a lot of EBT card holders that frequent the firm while visiting inmates;
- Each card can be used numerous times throughout the day as there are numerous individuals in each large family and a significant number of unemployed customers that frequent the store. Store ownership describes customer behavior as once a customer makes their first purchase, they ask how much money is left on their card and, based on the reply, purchase more groceries. For this reason, they normally make a test purchase of a qualified grocery item and then plan for future purchases. Their future purchase is

normally made within minutes of finding out how much money is remaining on their card;

- Store customers are not monetarily savvy individuals and many do not understand basic personal financial habits. Instead, they are normally economically challenged and are prone to staying in that particular financial demographic. One cannot hold these individuals to a standard that would compel them to shop at cheaper discount stores. They voluntarily chose to shop at the business. Customers are sometimes bound by transportation issues or health issues, for which reason some of them might only shop at this store as well;
- Not being a large volume retailer, the business can only survive with higher product mark-ups since the owners do not focus on volume sales. Per unit sales must be highly profitable for them to stay in business;
- Under Section 278.6(d), the firm has not violated SNAP law and the transactions are based on the sale of qualified merchandise; and,
- Under 278.6(i), store ownership has ensured full compliance with USDA FNS obligations and meets Criterion 1 for a trafficking CMP by having implemented an effective compliance policy and providing a photocopied booklet to each employee and issues concern EBT processing are addressed as questions and issues come arise. The compliance policy clearly states no exchange of cash for SNAP, do not allow others to share an EBT card, and only sell qualified items. Criterion 2 – since the charge letter was received, store ownership discourages customers from checking their balances prior to them using their card. They have since stopped this practice after consulting with its legal counsel. Secondly, ownership has also stopped customers from making purchases of large volumes of energy drinks. All of the other rules that were implemented in 2010 have since stayed the same. Criterion 3 is met as ownership reviews the FNS Handbook with each employee and tells them to call USDA if they have any questions. Criterion 4 is met as store ownership has not realized any benefit and is committed to serving customers in a highly dangerous and impoverished area.

Appellant submitted an affidavit from the owner describing the training program, statements from four employees regarding their training, statements from two customers on their purchases, invoices for stock purchases, a one page handwritten listing of mark-ups for SNAP items, and six photos of the firm in support of these contentions. A copy of the FNS charge and determination letters was also included and there also was an unsigned letter from the store owners to FNS dated February 4, 2019, that admitted to the store allowing credit.

## **ANALYSIS AND FINDINGS**

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. Nevertheless, transactions having such characteristics are sometimes valid and sufficient evidence that support that they were the result of legitimate purchases of eligible food items is provided. This is why opportunities are afforded to charged retailers to explain the questionable transactions cited and to provide evidence that they are legitimate.

The Retailer Operations Division presented a case that Appellant trafficked SNAP benefits. Each Attachment furnished with the letter of charges represents the questionable and unusual patterns of SNAP transactions indicative of trafficking which were conducted at Appellant's store 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 initially authorized the firm on July 1, 2010. The case file indicates that in reaching a disqualification determination, the Retailer Operations Division considered information obtained during a September 17, 2018, 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 typically sized gas station convenience store offering an extremely limited quantity and variety of staple foods and carrying no unique items or offering any distinctive services.
- The store stocked only traditional American brands and had no ethnic foods.
- Exterior signage showed the firm doing business as “5 U.S.C. § 552 (b)(6) & (b)(7)(C)”.
- The store visit report and photos showed no shopping carts or hand baskets for customer use thus severely limiting the amounts of food that could be moved 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 other than drinks.
- The store visit report specifically notes that the firm was not a specialty store and that there were no meat bundles, seafood specials, or fruit/vegetable boxes for sale.
- There was only one checkout area that was approximately 1.5 feet wide and 2.0 feet deep with displays on both sides and 12 pack cans of soda stacked in front leaving a very limited area for customers to place their purchases. The very small checkout area would make it problematic to process large orders. The checkout area had one cash register, one POS terminal, and an optical scanner as confirmed by the store manager who is the spouse of one of the owners.
- The firm had an extremely limited stock of staple foods that also included many single serving and pre-packaged items with a significant portion of inventory in soda, candy, snacks, other drinks, and single serving Ramen noodle soups as well as many ineligible items.
- The firm had no fresh unprocessed meat or seafood, no frozen unprocessed meat or seafood, no meat or seafood except for canned items and jerky, no hot dogs, no deli meats, no packaged lunch meats, no sausages, no bacon, no frozen entrees, no frozen dinners, no eggs, no fresh fruit or vegetables, no frozen fruit or vegetables, no dried fruit or vegetables, several small containers of lemon and lime juice, a minimal

selection of packaged single serving nuts, an extremely limited selection of canned soups, almost no canned or packaged staple food items, no deli cheese, no packaged cheese, three cheese dips, no yogurt, no sour cream, no butter, no margarine, a few canned milk, several single serving bottles of milk drinks, several containers of fresh milk, no bread, no rolls, no pitas, no tortillas, no tostadas, no corn meal, no flour, several boxes of sugar, no rice, no hot cereal, no boxes of cold cereal, many packages of single serving cold cereal, many single serving Ramen noodle soups, no canned pasta, no dry pasta, no dry noodles, no pancake mixes, no baking mixes, no mac&cheese, no frozen foods, cooking oil, a very limited selection of coffee, no tea, no cocoa, no jars of baby food, no infant formula, and very few expensive staple food items.

- Ineligible items included: gasoline, tobacco, alcohol, lottery, hot drinks, household and paper products, pet products, auto products, health and beauty items, ATM, hats, phone accessories, sunglasses, charcoal, and propane tanks while accessory foods included: candy, condiments, snacks, baked goods, cooking oil, sugar, single serving ice cream, coffee, and un/carbonated drinks.
- The firm's hours of operation, as confirmed by the manager, were 6:30 AM-11 PM Sunday-Thursday and 6:30 AM-12:00 AM on Friday-Saturday. The manager also stated that the firm did not take phone or online grocery orders; did not deliver groceries; and did not round transaction totals up/down.
- Signage was in English and there were no SNAP posters (anti-fraud, eligible items, reporting trafficking, etc.) visible in the store.
- Most food items were not individually priced and comments on the FNS store visit report, completed in conjunction with the store manager, specifically stated that most food prices end 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 most expensive food items costing more than \$5.00 for sale in the store as being a nine ounce package of jerky priced at \$12.99, a four can pack of Red Bull priced at \$7.99, a 12 can pack of soda priced at \$6.99, and a 24 bottle case of water priced at \$5.99. This listing of the most expensive items was provided by the manager during the store visit.
- The firm was not a WIC vendor.
- It is also noted that the firm failed to meet the minimum stocking requirements in the dairy products staple food category.

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

This Attachment documents 36 individual transactions in 14 sets of two or more transactions conducted by 11 different households in a short period of time.

**5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. There are seven individual transactions ending in the same amount of .36 cents accounting for one out of every five transactions.

**5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. The dollar amounts of subsequent transactions in each set are substantial and nearly equal or exceed the dollar amount of the initial transaction in 11 of the 14 sets. **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. One set is comprised of five individual transactions, one set of four, and three sets of three while the remaining nine sets are comprised of two individual

transactions. 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 within a short period of time is a method which violating stores use to avoid single high dollar transactions that cannot be supported by store inventory and structure. These sets of transactions appear to be in amounts which are indicative of trafficking.

Appellant contends the firm is a fully functioning grocery store and most customers buy groceries for the entire household as would a customer at a grocery store. The average customer is elderly and buys enough groceries to last two to four weeks at a time. The corrections facility attracts a lot of EBT card holders that frequent the firm while visiting inmates. Each card can be used numerous times throughout the day as there are numerous individuals in each large family and a significant number of unemployed customers that frequent the store. Store ownership describes customer behavior as once a customer makes their first purchase, they ask how much money is left on their card and, based on the reply, purchase more groceries. For this reason, they normally make a test purchase of a qualified grocery item and then plan for future purchases. Their future purchase is normally made within minutes of finding out how much money is remaining on their card.

Contrary to Appellant's depiction of the firm as being a well-stocked store providing a full range of groceries to meet the shopping needs of customers, the FNS store visit report and photos show the firm offers an extremely limited quantity and variety of staple foods. The firm does not offer any fresh or frozen unprocessed meat or seafood; has no processed meat or seafood, except for canned items and jerky; and has no fresh, frozen, or dried fruits or vegetables. The report also shows that the firm failed to meet the minimum stocking requirements in the dairy products staple food category on the day of the store visit. The nearest prison, jail, or other corrections facility is located 4.9 driving miles from the subject firm so it would be highly unlikely for any prison visitors to be shopping at the firm when there are other stores located in far greater proximity to the prison. No evidence was offered in support of Appellant's claim that the average customer is elderly. There also is a super store located approximately three short blocks away from Appellant's location making it unlikely that any SNAP recipient would consider the Appellant firm as their primary source for groceries.

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 a convenience store's stock and facilities and are thus indicative of trafficking. These transaction sets do not contain the characteristics associated with a household purchasing a forgotten item right after checking-out, of household members/friends shopping together and making separate purchases, or of households making a separate purchase to check their balance followed almost immediately by another transaction as 11 of the 14 transaction sets **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. The transaction sets also do not contain the characteristics of a household returning later in the day or sending their child to purchase a forgotten item or two as all of the sets have subsequent transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**, far more than the cost of a forgotten item or two. Appellant's contentions also provide no explanation as to why households would conduct up to five sizeable transactions at the Appellant firm within a short period of time.

It is certainly not unusual for a small number of SNAP households to conduct multiple transactions in a short period of time. However, it is unusual that subsequent transaction dollar amounts are substantial in these transaction sets and that all of the sets in this Attachment **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** when the comparable average convenience store SNAP transaction amount in San Joaquin County during the review period was \$6.97. 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. Additionally, the fact that one out of five of the individual transactions end in .36 cents supports trafficking as this figure would not appear with this frequency based on Appellant's pricing structure and inventory.

The Retailer Operation Division's analysis of shopping patterns for households listed in this Attachment shows they 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 shopping and spending large dollar amounts at many larger and better stocked stores would conduct multiple purchases totaling to high dollar values at a very poorly 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.

For example, one of the households analyzed conducted three transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. This is a single person household based on its monthly SNAP allotment and is also categorized as homeless on the California SNAP database. It is highly questionable that a homeless single person household would spend almost all of its monthly SNAP allotment in a very short period of time at a very poorly stocked convenience store located miles away from its regular shopping area if it were actually purchasing eligible food items. During the review period, this household conducted only these three transactions at the Appellant firm while conducting 33 transactions at 20 other stores with all, but two stores located more than two miles away. The 20 stores include four super stores and eight supermarkets. There is no legitimate reason why this household would spend so much of its SNAP allotment at a very poorly stocked convenience store when it clearly had access to and frequently shopped at supermarkets and super stores located nearby and at a distance. The more plausible explanation is that this household was trafficking at the firm. Other households analyzed exhibited similar shopping patterns indicative of trafficking.

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 115 individual EBT transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. The substantial number of high dollar transactions is uncharacteristic for a grocery store offering a very limited stock of staple foods and calls into question the legitimacy of these transactions. The transactions are also substantially higher than the average SNAP transaction amount of \$6.97 for this store type in San Joaquin 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 SNAP eligible foods items for better prices than customers can find at the Appellant firm. The high dollar value transactions remain questionable when considering the proximity of these 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 very limited, **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** of their purchases at larger food stores.

While households residing in areas with extremely limited grocery store options may conduct high dollar transactions at convenience stores out of necessity, this is not the case when they have better alternatives. FNS records show there are 10 comparably sized or larger SNAP retailers located within a one mile radius of the Appellant firm that includes one super store, two supermarkets, two medium grocery stores, and one small grocery store. The super store is located approximately three blocks away from Appellant's location. These stores would offer greater quantities and varieties of staple food items at lower prices than would be found at a very minimally stocked convenience store offering no fresh or frozen unprocessed meats or seafood and no fresh or frozen produce.

Five of the transactions in this Attachment occurred well after the firm's reported business hours **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. The firm's reported business hours have the firm closing at either 11:00 PM or at 12:00 AM. Large dollar transactions occurring well outside of store business hours are indicative of trafficking.

The difference in the average SNAP transaction amount, the total SNAP transaction dollar volume, and the total SNAP transaction count for San Joaquin County convenience stores during the review months and at the Appellant firm is significant. Appellant's SNAP transaction dollar amount is 1.29 percent smaller than that of San Joaquin County convenience stores **5 U.S.C. § 552 (b)(7)(E)**. The unusually high number of SNAP transactions combined with the low average SNAP transaction dollar amount is an indication the firm may be dividing larger transactions into multiple smaller transactions in an effort to circumvent detection as previously discussed. A comparison of Appellant's SNAP redemptions to that of nearby like type stores having redemptions for the review period shows that none 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 further indication that the transactions in this Attachment and the previous do not represent legitimate food purchases. The Retailer Operations Division considered all of these to be indicators of unusual and suspicious activity.

Appellant contends the high dollar transactions are because store customers are not monetarily savvy individuals and many do not understand basic personal financial habits. Instead, they are normally economically challenged and are prone to staying in that particular financial demographic. One cannot hold these individuals to a standard that would compel them to shop at cheaper discount stores. They voluntarily chose to shop at the business. Customers are sometimes bound by transportation issues or health issues, for which reason some of them might only shop at this store as well. Not being a large volume retailer, the business can only survive with higher product mark-ups since the owners do not focus on volume sales. Per unit sales must be highly profitable for them to stay in business. Appellant submitted statements from two customers on their purchases, invoices for stock purchases, a one page handwritten listing of mark-ups for SNAP items, and six photos of the firm in support of these contentions.

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 store stock. A shopping pattern analysis by the Retailer Operations Division shows that households in this Attachment are regularly shopping at much larger stores, and conducting high dollar transactions, yet are conducting comparable or higher dollar transactions at the Appellant firm thus refuting Appellant's contention that the firm's customers are not fiscally savvy and voluntarily choose to shop at the firm. 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 September 17, 2018, shows that the Appellant firm offers an extremely limited 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, drinks, and various single serving foods as well as many ineligible items. The fact that gasoline, tobacco, alcohol, lottery, hot drinks, household and paper products, pet products, auto products, health and beauty items, ATM, hats, phone accessories, sunglasses, charcoal, and propane tanks are not eligible for purchase with SNAP benefits also provides no justification for the high transaction amounts.

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 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 also offer store brand products at lower prices, 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 EBT receipts for the period under review to document the legitimacy of these excessively large transactions. The firm has an extremely 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 carts and more likely that the amounts were contrived.

A detailed analysis of invoices submitted for inventory purchases was going to be conducted by the Retailer Operations Division and the dollar amount of eligible food purchases compared to the firm's SNAP redemptions for the review period; however, a review of the invoices submitted shows that all are for the period November 2018 through January 2019 and do not include any of the months in the review period. Accordingly, the invoices offer no explanation for the transactions listed in this Attachment.

Appellant's six undated photos are similar to those taken during the FNS store visit and confirm an extremely limited stock of staple foods that includes many single serving and pre-packaged items with a significant portion of inventory in soda, candy, snacks, and other drinks as well as many ineligible items. One of Appellant's photos does show many cases of energy drinks that were not present during the FNS store visit as evidenced by the listing of the firm's most expensive items. This listing, provided by the firm's manager, listed nine ounce packages of jerky priced at \$12.399 as the firm's most expensive eligible food item. Appellant's mark-up price list also has no item priced higher than \$4.65. These facts support that Appellant's photos were staged in an effort to avoid the permanent disqualification and therefore are of no evidentiary value.

The EBT card numbers listed in the two customer statements provided by Appellant were researched using the California State SNAP database. Only the card number on the typed and unsigned statement was a valid SNAP EBT card number and the household assigned to this card had numerous transactions in both Attachments. The statement alleges that the SNAP recipient has three children and shops multiple times per day buying snacks for his children. The card number listed in the handwritten statement does not exist in the SNAP database despite the recipient claiming to shop at least twice a day at the Appellant firm to buy beef jerky. Neither of these statements provides any evidence to support Appellant's contentions or to explain the irregular SNAP transaction patterns. That a household shops at the firm buying snacks for three children may explain the many low dollar value transactions, but not the multiple high dollar value transactions.

It is further noted that SNAP redemptions at the firm fluctuated unusually following the store visit on September 17, 2018, and again following receipt of the charge letter on December 20, 2018. The volume of SNAP redemptions at the Appellant firm decreased 12.21 percent from August 2018 to September 2018 while the number of SNAP transactions decreased 14.59 percent over the same period following the store visit. The volume of SNAP redemptions at the Appellant firm increased 57.96 percent from December 2018 to January 2019 while the number of SNAP transactions increased 63.84 percent over the same period following receipt of the charge letter. A pronounced fluctuation in SNAP redemptions following the store visit and/or 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, the purpose of this review is to either validate or to invalidate the earlier decision of the Retailer Operations Division and is limited to what circumstances were at the basis of the action at the time such action was made. In an appeal of an adverse action, the Appellant bears the burden of proving by a preponderance of evidence that the administrative action should be reversed. That means the 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. 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. When the store owners signed the certification page of the SNAP retailer authorization application to become a SNAP retailer and again when they signed the SNAP reauthorization application, they confirmed they understood and agreed to abide by program rules and regulatory provisions. They also agreed to accept responsibility on behalf of the firm for violations of the SNAP including those committed by any of the firm's employees, paid or unpaid, new, full-time or part-time. The certification is clear that store ownership understood by signing the document that violations of program rules can result in administrative actions such as fines, sanctions, withdrawal, or disqualification from the SNAP. 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.

Appellant's statement that the firm has never violated SNAP laws is not true. The record shows that FNS issued a warning letter on November 16, 2016, to the firm and its owners for exchanging SNAP benefits for ineligible items on two separate occasions. A copy of the FNS charge and determination letters were included in Appellant's February 7, 2019, request for administrative review as was an unsigned letter from the store owners to FNS dated February 4, 2019, that admitted to the store allowing credit. Since this letter was unsigned and credit was not mentioned in any of Appellant's contentions, it seems most likely that the unsigned letter was mistakenly included and therefore the issue of credit is not being addressed in this decision.

Appellant contends that under Section 278.6(d), the firm has not violated SNAP law and the transactions are based on the sale of qualified merchandise. Contrary to Appellant's contention, the three criteria from SNAP regulations at section 278.6(d) listed below are not bases to be met in order for a firm to be disqualified, but are those areas that FNS considers in determining the appropriate level of sanction for firms that have violated SNAP regulations. The level of sanction could include temporary or permanent disqualification.

- 1) The nature and scope of the violations committed by personnel of the firm,
- 2) Any prior action taken by FNS to warn the firm about the possibility that violations are occurring, and

- 3) Any other evidence that shows the firm's intent to violate the regulations.

While a firm that has previously received warnings of possible violations or that has been sanctioned before could receive a more severe penalty, SNAP regulations do not provide any grounds for dismissing or reducing penalties for those firms that have not received warnings or previously been sanctioned. In this case the firm has received a previous warning, but since the penalty for trafficking is permanent disqualification, the warning letter has no impact on the penalty.

The owners and the firm were charged with trafficking based on a computer analysis of the store's transactions for the review period. 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 also 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. 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.

The Food and Nutrition Act of 2008, as amended, and the regulations issued pursuant thereto do not 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 program or any dated training curricula and records of training sessions. The owner’s affidavit and the employee statements were submitted well after the specified timeframe and the employee statements are dated January 1, 2001; September 19, 2006; November 11, 2008; and March 11, 2015. The record shows the firm opened for business on May 27, 2010 and was not SNAP authorized until July 1, 2010, so only one employee statement is dated during the time the current owners have owned the firm.

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 by the specified deadline 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 two 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

June 18, 2019