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**Stewart D. Fried**  
Principal  
sfried@ofwlaw.com

**Via E-mail and First Class Mail, Postage Prepaid**

September 14, 2021

William R. Strong  
Branch Chief  
Civil Rights Division  
USDA Food and Nutrition Service  
1320 Braddock Place  
Alexandria, VA 33214

**RE: Discriminatory Impacts on SNAP Retailers**

Mr. Strong,

Thank you for the opportunity to meet with Andrew Tapp, Gregory Krog, and me on August 5, 2021, to discuss the issues raised in my April 27, 2021, e-mail to USDA's Equity Commission. That e-mail requested that the USDA's Equity Commission conduct an independent assessment and identification of barriers to retailers who participate in USDA's Food and Nutrition Service's ("FNS") Supplemental Nutrition Assistance Program ("SNAP").

During our August 5, 2021, conference call, Mr. Tapp, Mr. Krog, and I discussed our general concerns with FNS's SNAP retailer enforcement system and our specific concerns with the disparate impacts the agency's enforcement efforts have had and continue to have on minority and immigrant retailers. At the outset, it is important to note that as citizens, taxpayers, and officers of the Court, we are strongly opposed to retailers and beneficiaries who engaged in SNAP trafficking and other violations of the Food and Nutrition Act of 2008 and FNS's SNAP regulations.

However, FNS's system of combatting SNAP trafficking and other statutory and regulatory violations is, without exception, the most inequitable administrative system I have encountered in

my 26 years of practicing law. FNS’s administrative system is wholly unlike the equitable procedures utilized by USDA’s National Appeals Division (“NAD”) and USDA’s Office of Administrative Law Judges (“OALJ”). For example, proceedings brought before NAD and OALJ provide for, *inter alia*, evidentiary hearings. To the contrary, FNS retailer proceedings are not contested cases adjudicated before independent fact-finders. To the contrary, they are decided by FNS employees who are neither attorneys nor administrative law judges. Moreover, retailers who face the loss of their SNAP authorization are not entitled to hearings or the ability to present witnesses and other evidence. They are also not permitted to question or cross-examine undercover investigators or FNS officials about the charges that they are facing. More egregiously, FNS Section Chiefs (who make initial determinations) and FNS Administrative Review Officers (who issue Final Agency Decisions if administrative review is sought following adverse decisions by Section Chiefs) make decisions based on records and other information *never provided to retailers or their counsel*.

Although the playing field was already heavily tilted in favor of the agency, since October 2020, FNS has effectively eliminated the ability of SNAP retailers to use FOIA as a vehicle to seek records in the agency’s possession related to the charge that may result in the *permanent disqualification* of their store from SNAP.<sup>1</sup>

In light of the hurdles that SNAP retailers encounter when FNS charges them with trafficking and other program violations, it is hardly surprising that the agency permanently disqualifies most retailers it charges with trafficking in SNAP benefits. While FNS does not publish data that illustrates the percentage of retailers it charges with program violations that are dismissed or which the agency takes no further action, it does publish statistics regarding administrative review

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<sup>1</sup> On August 26, 2020, FNS published its Final Rule, entitled *Taking Administrative Actions Pending Freedom of Information Act Processing*, 85 Fed. Reg. 52471. <https://www.fns.usda.gov/snap/fr-082620> Pursuant to the Final Rule, FNS no longer holds SNAP retailer administrative proceedings in abeyance pending the agency’s processing of FOIA Requests. While the agency’s stated reason for issuing the Final Rule was to prevent SNAP retailers from using FOIA to “delay FNS’s administrative actions,” there is no doubt that the true reason for any such delays is the agency has an egregious record in processing FOIA Requests and FOIA Appeals. Review of USDA’s Annual FOIA Report for Fiscal Year 2019, the last full year before FNS issued its Final Rule, is instructive. <https://www.dm.usda.gov/foia/docs/USDAFY19Final.docx> For example, FNS had 907 pending FOIA Appeals at the end of FY19, nearly 90% of all FOIA Appeals pending before all USDA agencies. *Id.* at 12. It took FNS nearly 700 days, on average, to process FOIA Appeals. *Id.* at 19. The agency’s record of processing “complex” FOIA Requests, which is how nearly all FOIA requests from SNAP retailers were categorized, was hardly better. On average, FNS took nearly one year -- 357 days, to process those types of FOIA Requests; even its fastest response took 32 days, which is longer than the 20 working days that the agency is required by statute to process FOIA Requests.

proceedings. During Fiscal Year 2020, FNS issued 1,572 Final Agency Decisions in SNAP retailer administrative review cases. It reversed only 14 initial decisions, *a reversal rate of less than 0.9%*. Without question, SNAP retailers do not receive equitable treatment during SNAP administrative proceedings, which have been described as Kafka-esque and akin to a Star Chamber.

FNS charges retailers with SNAP trafficking following two different types of investigations. One is triggered by an undercover investigator's store visit if trafficking is believed to have taken place. The other is founded upon FNS's Anti-Fraud Locator using Electronic Benefits Transfer Retailer Transactions ("ALERT") System.<sup>2</sup> Recent undercover investigations authorized by FNS during 2020 and 2021 are the primary reason for our request that USDA conduct a comprehensive investigation of FNS's SNAP retailer enforcement system.

### **FNS's SNAP Retailer Enforcement System Has Disparate Impacts on Minority Retailers**

During our August 5, 2021, conference call, Mr. Tapp, Mr. Krog, and I discussed our belief that FNS's SNAP retailer enforcement system has had clear disparate impacts on smaller retailers, especially owners of convenience stores and small groceries, for decades. This is undisputed when reviewing FNS's Retailer Management Year End Summaries. <https://www.fns.usda.gov/snap/retailer/data> Those summaries make clear that more than 90% of retailers who were permanently disqualified for trafficking were convenience stores and small groceries. See e.g. <https://fns-prod.azureedge.net/sites/default/files/resource-files/2020-SNAP-Retailer-Management-Year-End-Summary.pdf> at 8.

More recently, we have learned that FNS's undercover investigators<sup>3</sup> appear to have targeted immigrant store owners from the Middle East who are Muslim. For example, FNS charged more than 75 SNAP retailers who operate convenience stores or small groceries in Memphis, Tennessee during late April and early May 2021 with trafficking in SNAP benefits based on undercover investigations. These charge letters were nearly all based on a relatively new type of factual scenario that FNS contends is trafficking. In these cases, an undercover investigator convinces store clerks through lies and persistent efforts, that he needs cash and can sell them Red Bull and other beverages at a discount. Frequently, the undercover investigator tells the clerk that he could obtain it from his place of employment. On occasion, the clerk purchases the items with his or her own money and brings it home for their personal consumption. Without exception, there is no

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<sup>2</sup> The ALERT System purports to identify "suspicious patterns most commonly associated with SNAP retailer fraudulent behavior such as benefit trafficking." <https://www.usda.gov/sites/default/files/27002-0011-13.pdf> The foundation underlying FNS's ALERT System, the reliability thereof, and FNS's development and utilization of patterns of allegedly suspiciously SNAP retailer transactions should also be investigated because the agency's use thereof also has discriminatory impacts against minority retailers.

<sup>3</sup> Upon information and belief, FNS no longer uses federal employees to conduct SNAP retailer undercover investigations. Instead, the agency has outsourced such work to a third-party, for-profit entity.

proof that it was ever sold at the store. Based on these facts, FNS has disqualified hundreds of SNAP retailers, including dozens of stores in Memphis.

To our knowledge, all disqualified retailers in Memphis were Muslim immigrants from the Middle East. Between us, we represented more than 25 of those stores during administrative proceedings. Not surprisingly, FNS permanently disqualified nearly all of those retailers from SNAP. What is surprising is that FNS's Administrative Review Branch ("ARB") reversed a surprising and historically disproportionately high percentage of those cases. *See e.g.* Go Mart (ARB Final Agency Decision in Case No. C0228874); Hyde Park Grocery (ARB Final Agency Decision in Case No. C0240850); and Royal King Grocery (ARB Final Agency Decision in Case No. C0235093). Copies of these Final Agency Decisions are attached hereto.

More recently, FNS curiously rescinded several letters charging retailers located in Memphis (and elsewhere) with trafficking. Most of these rescissions took place after FNS issued its initial determination permanently disqualifying the Store from SNAP and during administrative review proceedings. One, which involved a Raleigh, North Carolina retailer<sup>4</sup>, took place long after FNS issued a Final Agency Decision affirming the store's permanent disqualification from SNAP. Copies of FNS's Final Agency Decision and its rescission letter are also attached hereto.

While FNS refused to disclose the reason for its rescission determinations, despite numerous requests for the reasons, it appears that the same undercover investigator(s) were involved in each on the investigations that led to the issuance of trafficking charge letters that ultimately led to the permanent disqualification of each store from SNAP.

What is clear from the foregoing is that FNS's SNAP retailer administrative process has discriminatory impacts on convenience stores and small groceries owned by Muslim immigrants from the Middle East.<sup>5</sup> We are unable to provide additional information beyond the attached Final Agency Decisions, because FNS does not voluntarily provide anything else. FNS also does not publish data on its website or otherwise release information about the race, national origin, religion, or other protected class data about SNAP retailers. It also does not publish or produce data regarding the race, national origin, or religion of SNAP retailers charged with program violations or who are sanctioned. While we do not have access to such information, USDA Equity Commission and FNS's Civil Rights Division should conduct a comprehensive investigation of the discriminatory impacts that the agency's SNAP enforcement system has on minority retailers.

We believe that conducting investigations will uncover clear evidence that supports our understanding. We also respectfully submit that comprehensive reform of FNS's SNAP retailer system is required. FNS should, as soon as possible:

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<sup>4</sup> The owner of this store is from Nigeria, not the Middle East.

<sup>5</sup> We have anecdotal evidence that FNS's SNAP administrative review process also has adverse impacts on immigrants from East Asia, West Africa, and the Indian Subcontinent.

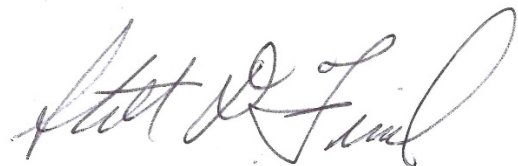
- Cease using employees or third party contractors to conduct undercover investigations;
- Provide to SNAP retailers, either with the Charge Letter or upon request, all records that may be reviewed or relied upon by FNS officials when making initial determinations;
- Commence conducting evidentiary administrative review hearings and transfer decision-making authority from ARB to NAD or OALJ;
- Require FNS to compile and publish detailed statistics regarding the race, gender, national origin, religion, and other protected class information relating to SNAP retailers, including those charged with program violations, those who receive term and permanent disqualifications, and retailers who obtain Final Agency Decisions.

Finally, we are troubled by your comment during our August 5<sup>th</sup> conference call that the results of your investigation would not be disclosed with publicly, including with us. We urge USDA and FNS to be fully transparent regarding the processes utilized and the results of investigations of FNS's SNAP Retailer administrative procedures conducted by USDA's Equity Commission, USDA's Office of Assistant Secretary for Civil Rights, and/or FNS's Civil Rights Division. Supreme Court Justice Louis Brandeis correctly stated that "sunlight is the best disinfectant."

Cloaking any USDA or FNS investigations under a veil of secrecy will result in a lack of confidence that the "bold action" promised by Secretary Vilsack during his Senate confirmation hearing last March to "address discrimination in all its forms across USDA agencies, offices, and programs" will actually take place. While we trust he was not aware of the specific discrimination that exists in FNS's SNAP retailer program, Secretary Vilsack was on the mark when he recognized that systemic discrimination still exists at USDA and is evidently reflected in the way that the department "designed or implemented our programs, laws, and regulations."

The time to reform FNS's SNAP retailer program is now. Failure to promptly do so will perpetuate endemic discrimination at a department that has been described as "The Last Plantation." It will also continue to harm the SNAP beneficiaries that the agency is supposed to be helping. There is no doubt that the adverse discriminatory impacts that FNS's policies and procedures have caused and are continuing to cause are harming impoverished communities. FNS's discriminatory decisions are also increasing the size of food deserts in those communities. Accordingly, we urge USDA and FNS to conduct prompt investigations and to take aggressive action to correct the discriminatory treatment that these minority SNAP retailers have suffered.

Please do not hesitate to contact me with questions or comments.



Stewart D. Fried

Enclosures (5)

Letter to William R. Strong  
September 14, 2021  
Page 6



**Olsson Frank Weeda**  
Terman Matz PC

cc:     USDA Secretary Thomas Vilsack  
          USDA Under Secretary Cindy Long  
          USDA Deputy Under Secretary Stacy Dean  
          USDA Deputy Assistant Secretary Monica A. Rainge  
          USDA Inspector General Phyllis Fong  
          House Agriculture Committee  
          Senate Agriculture Committee  
          Andrew Tapp, Esq.  
          Greg Krog, Esq.

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July 14, 2021

Stewart Fried, Principal  
Olsson Frank Weeda  
Terman Matz PC  
2000 Pennsylvania Avenue NW  
Suite 3000  
Washington, DC 20006

RE: Yaaqob Al Shugga, Owner  
Go Mart  
583 S. Parkway E.  
Memphis, TN 38106-5459

Case C0228874

Dear Counselor:

Enclosed is the Final Agency Decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service, in response to your request for administrative review. The USDA finds that there is insufficient evidence to support the permanent disqualification of Go Mart from participation as an authorized retail food store in the Supplemental Nutrition Assistance Program. The determination is reversed.

Please contact Brandon Howard at (312) 519-1350 with operations questions.

Sincerely,

A handwritten signature in cursive script, appearing to read "M. Viens".

M. Viens  
Administrative Review Officer

Enclosure - Final Agency Decision

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

**Go Mart,**

**Appellant,**

**v.**

**Retailer Operations Division,**

**Respondent.**

**Case Number: C0228874**

**FINAL AGENCY DECISION**

It is the decision of the U.S. Department of Agriculture (USDA), that there is insufficient evidence to support that the Retailer Operations Division (Retailer Operations) properly imposed a permanent disqualification for trafficking against Go Mart (Appellant). The permanent disqualification determination, from the participation of Appellant as an authorized retail food store in the Supplemental Nutrition Assistance Program (SNAP), is reversed.

**ISSUE**

The issue accepted for review is whether Retailer Operations took appropriate action, consistent with 7 U.S.C. § 2021, 7 CFR § 278.6(a), 7 CFR § 278.6(e)(1)(i), and 7 CFR § 278.6(i) in its administration of the SNAP, when it imposed a permanent disqualification against Appellant.

**AUTHORITY**

7 U.S.C. § 2023, and the implementing regulations at 7 CFR § 279.1, provide that a food retailer aggrieved by administrative action under § 278.1, § 278.6, or § 278.7, may file a written request for review of the administrative action with the Food and Nutrition Service (FNS).

**CASE CHRONOLOGY**

By Charge letter dated April 20, 2021, Retailer Operations informed Appellant it was charged with violating the terms and conditions of the SNAP regulations as determined by a USDA investigation. Trafficking violations were cited in Exhibits B and C. The sanction for trafficking is permanent disqualification. The investigation was conducted from March 29, 2021, through March 30, 2021; it is recounted in an investigative report dated April 15, 2021. Counsel replied to the Charge letter by information dated June 2, 2021.

By Determination letter dated June 7, 2021, Retailer Operations informed Appellant that it was



permanently disqualified from participation as a retail food store in the SNAP in accordance with Section 278.6(c) and 278.6(e)(1) of the SNAP regulations. The letter states that the store was not eligible for a trafficking civil money penalty according to the terms of Section 278.6(i). The firm failed to submit sufficient evidence to demonstrate that it had established and implemented an effective compliance policy and program to prevent violations of the SNAP.

By email dated June 12, 2021, counsel appealed Retailer Operations' determination and requested administrative review. The appeal was granted by letter dated June 16, 2021. Counsel provided a brief to this office dated July 7, 2021.

### **STANDARD OF REVIEW**

In an appeal of an adverse action, the Appellant bears the burden of proving by a preponderance of the evidence, that the administrative action should be reversed. That means the Appellant has the burden of providing credible, 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 not true.

### **CONTROLLING LAW AND REGULATIONS**

The controlling statute in this matter is contained in the Food and Nutrition Act of 2008, as amended (the Act), 7 U.S.C. § 2021, and § 278 of Title 7 of the Code of Federal Regulations (CFR).

7 CFR § 278.6(e)(1)(i) states FNS shall disqualify a firm permanently if personnel of the firm have trafficked as defined in § 271.2. 7 CFR § 271.2 trafficking means: “(1) The buying, selling, stealing, or otherwise effecting an exchange of SNAP benefits issued and accessed via Electronic Benefit Transfer (EBT) cards, card numbers and personal identification numbers (PINs), or by manual voucher and signature, for cash or consideration other than eligible food, either directly, indirectly, in complicity or collusion with others, or acting alone;”... (4) Purchasing a product with SNAP benefits with the intent of obtaining cash or consideration other than eligible food by reselling the product, and subsequently intentionally reselling the product purchased with SNAP benefits in exchange for cash or consideration other than eligible food; (5) Intentionally purchasing products originally purchased with SNAP benefits in exchange for cash or consideration other than eligible food; (6) Attempting to buy, sell, steal, or otherwise affect an exchange of SNAP benefits issued and accessed via Electronic Benefit Transfer (EBT) cards, card numbers and personal identification numbers (PINs), or by manual voucher and signatures, for cash or consideration other than eligible food, either directly, indirectly, in complicity or collusion with others, or acting alone.”

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).”

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.”

### **SUMMARY OF THE CHARGES**

The USDA conducted a compliance investigation of Appellant. Appellant was charged with conducting trafficking transactions as described in Exhibits B and C, wherein store personnel purchased products originally purchased with SNAP benefits in exchange for cash.

### **APPELLANT’S CONTENTIONS**

In reaching a decision, full attention and consideration have been given to all contentions and submissions as presented, including any not specifically recapitulated.

- Go Mart denies that the Store engaged in trafficking in SNAP benefits at any time. Go Mart further denies that any Store clerk engaged in trafficking in SNAP benefits and specifically denies that a preponderance of the evidence exists to establish that any Store employee knowingly purchased eligible food items that were purchased with SNAP benefits.
- The undercover investigator made repeated and inappropriate efforts to convince a store clerk to purchase Red Bull from him. At no time did the clerk ever hear the undercover investigator advise that he was going to use SNAP benefits to purchase Red Bull at Sam’s Club for re-sale to him.
- Neither Mr. Al Shugga nor any Store clerk agreed to purchase or was aware that the undercover investigator purchased SNAP-eligible items with SNAP benefits at another store for re-sale to him. It is also important to note that the Store derived no benefit whatsoever from the purchase of Red Bull by a Store clerk. The purchasing of items by a Store clerk is not permitted at Go Mart and any such activity constitutes actions outside of the scope of the duties of a Go Mart clerk.
- It appears from the Transaction Reports that the undercover investigator entered the Store multiple times on March 29 and 30, 2021. On March 29, 2021, the undercover investigator claims to have traveled to a Sam’s Club in another state, Mississippi, and purchased three cases of 8.4-ounce cans of Red Bull and three cases of 12-ounce cans of Red Bull for \$242.88 in SNAP benefits. Exhibit B asserts that one Store clerk directed him to do this and that another Store clerk allegedly paid him \$70.00 in cash from his pocket. Exhibit B also makes clear that the undercover investigator never spoke with the second Store clerk and that that clerk never saw the Sam’s Club receipt.
- On March 30, 2021, the day after the transactions referenced in Exhibit B, the undercover investigator claims to have traveled to the same Sam’s Club at the direction of the first Store clerk and purchased two cases of Red Bull for \$67.96 in SNAP benefits. The Transaction Report indicates that the second clerk paid him \$80.00 in cash, allegedly from the register, in exchange for the two cases of Red Bull. No receipt was attached to either Transaction Report and there is no documentary evidence that was provided to Go Mart or its counsel establishing that cases of Red Bull were purchased at Sam’s Club on successive days or that SNAP benefits were used to purchase those.

- The Charge Letter and Exhibits B and C omit critical factual information regarding the events that transpired at Go Mart on March 29 and 30, 2021. These omissions and misrepresentations preclude FNS from concluding that the Store or its clerk knowingly purchased items bought elsewhere with SNAP benefit or that trafficking took place. Moreover, Go Mart disagrees with the undercover investigator's factual contentions in Exhibits B and C related to the trafficking allegations, denies that the Store or the clerk knowingly purchased eligible food items purchased with SNAP benefits at another retailer, and denies that the Store or the clerk knowingly engaged in trafficking in violation of FNS's SNAP regulations.
- No Go Mart clerk resembles the description of the Store clerk in the Clerk Information section of the Investigative Transaction Reports attached to the Charge Letter.
- On March 29, 2021, a man, who Mr. Omer now knows was an undercover investigator, after purchasing several eligible food items with SNAP benefits, attempted to purchase several ineligible items. Mr. Omer recalled advising the investigator that SNAP benefits could not be used for those items. Thereafter, the investigator paid for those items with cash. Mr. Omer also recalls the investigator purchasing two items not listed on Exhibit A: milk and cereal. After the completion of these transactions, the investigator immediately left the Store. Less than five minutes later, the investigator returned with two cases of Red Bull, placed them on the counter, and without prompting by Mr. Omer, began aggressively urging him to buy them. Mr. Omer agreed to purchase it for his own personal use. After paying the undercover investigator \$80.00 in cash obtained from his pocket, Mr. Omer placed the Red Bull in his car and took it home after his shift ended. At no time did Mr. Omer hear the investigator state that the Red Bull was purchased at another Store. At no time did the undercover investigator give Mr. Omer a receipt showing that the Red Bull was purchased at another SNAP retailer. While it is unclear what "acknowledge" means in connection with a receipt, Mr. Omer denies ever having possession of any such receipts. No clerk ever employed at Go Mart resembles the "second clerk" referenced in Exhibit B.
- A preponderance of the evidence does not establish that the Store or its owner or any Go Mart clerk had actual knowledge that the items allegedly purchased by the undercover investigator at a Sam's Club in Mississippi were purchased with SNAP benefits. It is not unreasonable to conclude that Mr. Omer never heard the undercover investigator state where he intended to purchase the Red Bull with SNAP benefits. From an evidentiary perspective, even if the undercover investigator's representation that he stated where he intended to purchase the Red Bull is true, it does not follow that Mr. Omer heard it. Neither Exhibit B nor C contains any statement that indicates that Mr. Omer acknowledged the undercover investigator's alleged statement. Absent a preponderance of evidence establishing that the Store had actual knowledge regarding where the undercover investigator intended to purchase and did purchase the Red Bull purchased by Mr. Omer on March 29 and 30, 2021 for his personal consumption, the first element cannot be satisfied.

## **ANALYSIS AND FINDINGS**

This review is to either validate or to invalidate the determination made by Retailer Operations. The regulations establish that an authorized retail food store may be disqualified from participating in the SNAP when the store fails to comply with the Act or regulations because of the wrongful conduct of an owner, manager, or someone acting on their behalf. The Exhibits

recount two exchanges by store personnel of cash for items purchased with SNAP benefits accessed via an EBT card(s). Upon review, it is decided that there is insufficient evidence to support a permanent disqualification for trafficking as defined by 7 CFR § 271.2 (5). The permanent disqualification determination of Appellant is herein reversed.

This decision is not precedent setting; it is based on the specific circumstances of this case as documented by the materials in the record. In addition, this final agency decision does not supersede Federal law and regulations.

### **CONCLUSION**

The record does not support, by a preponderance of the evidence, that the store personnel intentionally purchased products, originally purchased with SNAP benefits, in exchange for cash to meet the applicable definition of trafficking. The permanent disqualification determination of Appellant is therefore reversed.

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.

M. Viens  
ADMINISTRATIVE REVIEW OFFICER

July 14, 2021

United  
States  
Department  
of  
Agriculture



Food  
and  
Nutrition  
Service

August 5, 2021

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Stewart Fried, Principal  
Olsson Frank Weeda  
Terman Matz PC  
2000 Pennsylvania Avenue NW  
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Washington, DC 20006

RE: Kahlid Al Omari, Owner  
Hyde Park Grocery  
2075 Nedra Ave.  
Memphis, TN 38108-1348

Case C0240850

Dear Counselor:

Enclosed is the Final Agency Decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service, in response to your request for administrative review. The USDA finds that there is insufficient evidence to support the permanent disqualification of Hyde Park Grocery, as imposed by the Retailer Operations Division, from participation as an authorized retail food store in the Supplemental Nutrition Assistance Program. The permanent disqualification determination is reversed.

Please contact Zachary Martinez at (312) 764-2851 with operations questions.

Sincerely,

A handwritten signature in cursive script that reads "M. Viens".

M. Viens  
Administrative Review Officer

Enclosure - Final Agency Decision

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

**Hyde Park Grocery,**

**Appellant,**

**v.**

**Case Number: C0240850**

**Retailer Operations Division,**

**Respondent.**

**FINAL AGENCY DECISION**

It is the decision of the U.S. Department of Agriculture (USDA), that there is insufficient evidence to support that the Retailer Operations Division (Retailer Operations) properly imposed a permanent disqualification against Hyde Park Grocery (Appellant), from participation as an authorized retail food store in the Supplemental Nutrition Assistance Program (SNAP). The permanent disqualification determination is reversed.

**ISSUE**

The issue accepted for review is whether Retailer Operations took appropriate action, consistent with 7 U.S.C. § 2021, 7 CFR § 278.6(a), 7 CFR § 271.2, and 7 CFR § 278.6(e)(1)(i), in its administration of the SNAP when it imposed a permanent disqualification against Appellant.

**AUTHORITY**

7 U.S.C. § 2023, and the implementing regulations at 7 CFR § 279.1, provide that a food retailer aggrieved by administrative action under § 278.1, § 278.6, or § 278.7, may file a written request for review of the administrative action with the Food and Nutrition Service.

**CASE CHRONOLOGY**

By Charge letter dated April 27, 2021, Retailer Operations informed Appellant that it was charged with violating the terms and conditions of the SNAP regulations based on a trafficking. The investigation was conducted during the period of March 29, 2021, through April 6, 2021, and described in an investigative report dated April 20, 2021. The Charge letter was delivered May 6, 2021. The record shows a phone message reply to Retailer Operations on May 6, 2021.

By Determination letter dated May 19, 2021, Retailer Operations informed Appellant that it was permanently disqualified from participation as a retail food store in the SNAP in accordance with Section 278.6(c) and 278.6(e)(1) of the regulations. The letter states that the store was not eligible for a trafficking CMP according to the terms of Section 278.6(i) because the firm failed

to submit sufficient evidence to demonstrate that it had established and implemented an effective compliance policy and program to prevent violations of the SNAP.

Counsel appealed Retailer Operations' determination, and requested administrative review. The appeal was granted by letter dated June 4, 2021. Counsel requested an extension, and provided additional information July 8, 2021.

### **STANDARD OF REVIEW**

In an appeal of an adverse action, the Appellant bears the burden of proving by a preponderance of the evidence, that the administrative action should be reversed. That means the Appellant has the burden of providing credible, 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 not true.

### **CONTROLLING LAW AND REGULATIONS**

The controlling statute in this matter is contained in the Food and Nutrition Act of 2008, as amended (the Act), 7 U.S.C. § 2021, and § 278 of Title 7 of the Code of Federal Regulations (CFR).

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

7 CFR § 278.6(e)(1)(i) states: FNS shall disqualify a firm permanently if personnel of the firm have trafficked as defined in § 271.2. 7 CFR § 271.2 states that trafficking means: "(1) The buying, selling, stealing, or otherwise effecting an exchange of SNAP benefits issued and accessed via Electronic Benefit Transfer (EBT) cards, card numbers and personal identification numbers (PINs), or by manual voucher and signature, for cash or consideration other than eligible food, either directly, indirectly, in complicity or collusion with others, or acting alone;"... (4) Purchasing a product with SNAP benefits with the intent of obtaining cash or consideration other than eligible food by reselling the product, and subsequently intentionally reselling the product purchased with SNAP benefits in exchange for cash or consideration other than eligible food; (5) Intentionally purchasing products originally purchased with SNAP benefits in exchange for cash or consideration other than eligible food. (6) Attempting to buy, sell, steal, or otherwise affect an exchange of SNAP benefits issued and accessed via Electronic Benefit Transfer (EBT) cards, card numbers and personal identification numbers (PINs), or by manual voucher and signatures, for cash or consideration other than eligible food, either directly, indirectly, in complicity or collusion with others, or acting alone."

### **SUMMARY OF THE CHARGES**

Appellant was charged with trafficking during an onsite investigation. The violations were noted in Exhibits C and D of a provided investigative report. The sanction for the trafficking violations is permanent disqualification.

## **ANALYSIS AND FINDINGS**

This review is to either validate or to invalidate the determination made by Retailer Operations. The regulations establish that an authorized retail food store may be disqualified from participating in the SNAP when the store fails to comply with the Act or regulations because of the wrongful conduct of an owner, manager, or someone acting on their behalf. The Exhibits recount two exchanges by a store clerk of cash with a USDA investigator for items purchased with SNAP benefits.

Upon review, it is decided that there is insufficient evidence to support a permanent disqualification for trafficking defined under 7 CFR § 271.2 (5). The permanent disqualification determination is herein reversed. This administrative review decision is based on the specific circumstances of this case as documented by materials provided by Appellant and the Office of Retailer Operations and Compliance. This administrative review decision does not establish policy or supersede federal law or regulations.

## **CONCLUSION**

The record does not support, by a preponderance of the evidence, that the store clerk's exchange of cash for products purchased with SNAP benefits, meets the definition of trafficking. The permanent disqualification determination is therefore reversed.

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.

M. Viens  
ADMINISTRATIVE REVIEW OFFICER

August 5, 2021



**United States  
Department of  
Agriculture**



Food and  
Nutrition  
Service

August 16, 2021

Retailer and  
Issuance Policy  
and Innovation  
Division

Stewart Fried, Attorney  
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2000 Pennsylvania Ave. N.W., Suite 3000  
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Administrative  
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RE: Belal A. Al Shugaa  
Royal Kings Grocery  
850 W. Raines Rd.  
Memphis, TN 38109-4230

Phone:  
(510) 542-4142

rich.proulx  
@usda.gov

Dear Counselor:

Enclosed is the Final Agency Decision of the U.S. Department of Agriculture, Food and Nutrition Service in response to your May 13, 2021 request for administrative review.

The U.S. Department of Agriculture, Food and Nutrition Service finds that there is insufficient evidence to support the determination by the Office of Retailer Operations and Compliance to impose a permanent disqualification against Royal Kings Grocery from participating as an authorized retailer in the Supplemental Nutrition Assistance Program.

Sincerely,

A handwritten signature in black ink that reads "Rich Proulx". The signature is written in a cursive, slightly slanted style.

**RICH PROULX**  
Administrative Review Officer

Enclosure: Final Agency Decision

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

**Royal Kings Grocery,**

**Appellant,**

**v.**

**Office of Retailer Operations and  
Compliance,**

**Respondent.**

**Case Number: C0235093**

**FINAL AGENCY DECISION**

The U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS) finds that there is insufficient evidence to support the determination by the Office of Retailer Operations and Compliance to impose a permanent disqualification against Royal Kings Grocery (“Appellant”) from participating as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP).

**ISSUE**

The purpose of this review is to determine whether the Office of Retailer Operations and Compliance took appropriate action, consistent with Title 7 of Code of Federal Regulations (CFR) § 278.6(e)(1)(i) in its administration of SNAP when it imposed a permanent disqualification against Appellant on June 24, 2021.

**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**

The USDA conducted an investigation Appellant’s compliance with federal SNAP law and regulations during the period of March 30, 2021 through March 20, 2021. The investigation reported that personnel at Appellant accepted a total of \$175.86 in SNAP benefits in exchange for items purchased with SNAP benefits (indirect trafficking) in the amount of \$29 on one occasion and \$50 on another occasion. The investigation revealed that one clerk was involved in the impermissible transactions.

As a result of evidence compiled from this investigation, the Office of Retailer Operations and Compliance informed Appellant, in a letter dated April 21, 2021, that its firm was charged with violating the terms and conditions of the SNAP regulations, 7 CFR § 278.6(e)(1). This letter stated, in part, “As provided by Section 278.6(e)(1) of the SNAP regulations, the sanction for trafficking . . . is permanent disqualification.” The letter also states that “under certain conditions, FNS may impose a civil money penalty (CMP) . . . in lieu of a permanent disqualification of a firm for trafficking.”

Appellant replied to the charges in a subsequent letter to the Office of Retailer Operations and Compliance. The record reflects that the Office of Retailer Operations and Compliance received and considered this information prior to making a determination.

The Office of Retailer Operations and Compliance notified Appellant in a letter dated June 24, 2021 that the firm was being permanently disqualified from participation as an authorized retailer in SNAP in accordance with Section 278.6 (c) and 278.6(e)(1) for trafficking violations. This determination letter also stated that Appellant’s eligibility for a trafficking civil money penalty (CMP) according to the terms of Section 278.6(i) of the SNAP regulations was considered. However, the letter stated to Appellant that “. . . you are not eligible for the CMP because you failed to submit sufficient evidence to demonstrate that your firm had established and implemented an effective compliance policy and program to prevent violations of the Supplemental Nutrition Assistance Program.”

On May 13, 2021, Appellant appealed the Office of Retailer Operations and Compliance’s assessment and requested an administrative review of this action. The appeal was granted.

### **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 § 278.6(e)(1)(i) establishes 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 of SNAP benefits.

7 CFR § 278.6(e)(1)(i) reads, in part:

FNS shall . . . [d]isqualify a firm permanently if . . . personnel of the firm have trafficked as defined in § 271.2.

Trafficking is defined, in part, in 7 CFR § 271.2, as “the buying or selling of [SNAP benefits] or other benefit instruments for cash or consideration other than eligible food.”

### **ANALYSIS AND FINDINGS**

A review of the evidence in the Office of Retailer Operations and Compliance’s case file does not support the determination to impose a fiscal claim and permanently disqualify Appellant from participating as an authorized retailer in the SNAP. Accordingly, it is unnecessary to address Appellant’s contentions in this matter.

This administrative review decision is based on the specific circumstances of this case as documented by materials provided by Appellant and the Office of Retailer Operations and Compliance. In addition, this administrative review decision does not establish policy or supersede federal law or regulations.

### **CONCLUSION**

Based on the discussion above, the determination by the Office of Retailer Operations and Compliance to impose a permanent disqualification against Royal Kings Grocery from participating as an authorized retailer in SNAP is reversed.

### **RIGHTS AND REMEDIES**

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.

RICH PROULX  
ADMINISTRATIVE REVIEW OFFICER

August 16, 2021

United States  
Department of  
Agriculture



Food and  
Nutrition  
Service

Retailer and  
Issuance Policy  
and Innovation  
Division

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April 23, 2021

Stewart D. Fried, Esq.  
Olsson Frank Weeda Terman Matz PC  
2000 Pennsylvania Avenue NW, Suite 3000  
Washington, DC 20006

**Re: Agori International African Market  
4701 Atlantic Avenue, Suite 111  
Raleigh, North Carolina 37604-8107  
Case Number: C0236097**

Dear Counselor:

Enclosed is the Final Agency Decision of the U.S. Department of Agriculture (USDA) Food and Nutrition Service (FNS), in response to the request for administrative review dated January 25, 2021. Also included therein is a statement regarding applicable rights to a judicial review.

The USDA has decided that there is sufficient evidence to support the determination by the Office of Retailer Operations and Compliance to impose a permanent disqualification against Agori International African Market from participating as an authorized retailer in the Supplemental Nutrition Assistance Program. However, the determination has been modified to remove the fiscal claim of \$230.00.

If store ownership has already paid the \$230.00 fiscal claim, they may call the Retailer Repayment Team, USDA-FNS Financial Management Accounting Division at 1-703-605-0483 to request a refund.

Sincerely,

A handwritten signature in black ink, appearing to read "R. Deegan", written over a horizontal line.

ROBERT T. DEEGAN  
Administrative Review Officer

Enclosure: Final Agency Decision

cc: John Agori, Owner

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

**Agori International African Market,**

**Appellant,**

**v.**

**Office of Retailer Operations and  
Compliance,**

**Respondent.**

**Case Number: C0236097**

**FINAL AGENCY DECISION**

The U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS), finds that there is sufficient evidence to support the determination by the Office of Retailer Operations and Compliance to impose a permanent disqualification against Agori International African Market (hereinafter Appellant) from participating as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP). However, the determination is modified to remove the fiscal claim of \$230.00.

**ISSUE**

The issue accepted for review is whether the Office of Retailer Operations and Compliance took appropriate action, consistent with Title 7 of the Code of Federal Regulations (CFR) § 278.6(a), (c) and (e)(1)(i), in its administration of the SNAP when it imposed a permanent disqualification against Appellant in addition to the assessment of a fiscal claim in the amount of \$230.00.

**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**

USDA conducted an investigation of the compliance of the Appellant firm with federal SNAP law and regulations during the period October 17, 2020, through November 6, 2020. The investigation determined that personnel at the firm accepted SNAP benefits in exchange for cash on three separate occasions as noted in the letter of charges (Exhibits C, D, and E). Exchanging

SNAP benefits for cash is defined as trafficking under 7 CFR § 271.2. These three transactions were deemed clearly violative and warrant a permanent disqualification. Additionally, personnel at the Appellant firm also accepted SNAP benefits in exchange for ineligible merchandise during these same three occasions. The ineligible items sold are best described in regulatory terms as four major ineligible items as well as one common nonfood item. The investigative report shows that the same clerk handled all five transactions at the Appellant firm that included the three transactions involving the ineligible items and the three trafficking transactions. This clerk identified herself as being the owner's spouse and the owner did authorize the purchase of \$400 in SNAP benefits from the investigator's EBT card as stated in Exhibit C. It is noted that the clerk did refuse to allow the purchase of ineligible items using SNAP benefits in Exhibits B and C, but did subsequently allow their purchase in Exhibits C, D, and E.

As a result of evidence compiled from this investigation, the Office of Retailer Operations and Compliance informed Appellant, in a letter dated December 17, 2020, that the firm and its ownership were charged with violating the terms and conditions of the SNAP regulations, 7 CFR § 278.6(e)(1). The letter of charges states, in relevant part, "As provided by Section 278.6(e)(1) of the SNAP regulations, the sanction for trafficking . . . is permanent disqualification." The letter also states that "under certain conditions, FNS may impose a civil money penalty (CMP) . . . in lieu of permanent disqualification of a firm for trafficking."

Appellant did not respond to the charge letter and no evidence was submitted to be considered in support of the CMP. The Office of Retailer Operations and Compliance notified Appellant by letter dated January 15, 2021, 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 January 25, 2021, Appellant appealed the Office of Retailer Operations and Compliance decision and requested an administrative review of this action. The appeal was granted. Subsequent correspondence was received from counsel for 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 Section 278. In particular, Sections 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 of SNAP benefits.

7 CFR § 271.2 states that: Eligible foods means any food or food product intended for human consumption except alcoholic beverages, tobacco, and hot food and hot food products prepared for immediate consumption.

7 CFR § 278.2(a) states that: Coupons [SNAP benefits] may be accepted by an authorized retail food store only from eligible households, and only in exchange for eligible food. Further, the citation specifies that coupons may not be accepted in exchange for cash, in payment of interest on loans, or for any other nonfood use.

7 CFR § 278.6(a) states 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.

7 CFR § 278.6(e)(1)(i) reads, in part, “FNS shall . . . [d]isqualify a firm permanently if . . . personnel of the firm have trafficked as defined in § 271.2.” Trafficking is defined, in part, in 7 CFR § 271.2, as, “The buying, selling, stealing, or otherwise effecting an exchange of SNAP benefits . . . for cash or consideration other than eligible food, either directly, indirectly, in complicity or collusion with others, or acting alone . . .” Trafficking is further defined, in 7 CFR § 271.2, to include “(5) Intentionally purchasing products originally purchased with SNAP benefits in exchange for cash or consideration other than eligible food.”

7 CFR § 278.6(f)(1) states in relevant part, “FNS may impose a civil money penalty as a sanction in lieu of disqualification when the firm is selling a substantial variety of staple food items, and the firm’s disqualification would cause hardship to SNAP households. A civil money penalty for hardship to SNAP households may not be imposed in lieu of a permanent disqualification.”

7 CFR § 278.6(i) states, inter alia: “FNS may impose a civil money penalty in lieu of a permanent disqualification for trafficking . . . 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, inter alia: “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 consideration for a civil money penalty in lieu of a permanent disqualification for trafficking and submit documentation and evidence of its eligibility within the 10 days specified in Part 278.6(b)(1), the firm shall not be eligible for such a penalty.



In addition, 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 this 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’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 is a small grocery in an impoverished neighborhood selling many staple foods from Africa not found at most area retailers. The owner has had the store since April 2019 and has been SNAP authorized most of this time. The firm has never been accused of trafficking or any other SNAP violations. The firm has a better selection of imported foods than the only other African market in the area and longer hours. Many customers are believed to walk to the store;
- The charge letter did not specify which sub-section of the definition trafficking found in 7 § CFR 271.2 was violated. The firm disagrees with the factual contentions in Exhibits C, D, and E related to the trafficking allegations; denies that the Store used the undercover investigator’s EBT card at another retailer; and denies that the Store exchanged SNAP benefits for cash. It is also important to note that on each of those occasions, FNS’s investigator purchased eligible food items from the Store with SNAP benefits;
- Exhibit C references the alleged purchase of the investigator’s EBT card for cash by a store clerk on October 22, 2020, and that this clerk removed \$25.00 from the Store’s cash register and gave it to the investigator. Exhibit C contains no specifics regarding the use of that EBT card at Agori International or at any other SNAP retailer at any time by anyone other than the investigator;
- Exhibit D references the alleged payment of \$175.00 cash by the clerk to the investigator on October 27, 2020, and does not allege that the cash was from the Store’s register and does not indicate any specifics regarding the use of the undercover investigator’s EBT card other than a vague reference to “10242020 - \$400.00.” Neither the name of the SNAP retailer nor the date of use of the EBT card is identified in Exhibit D or elsewhere in the Charge Letter. And while Exhibit D alleges that “Marcy” utilized the undercover investigator’s EBT card, that is a wholly unsupported belief based entirely on speculation because the identity of the person who uses an EBT card is not contained in EBT transaction history available to FNS (or any other federal or state agency). Moreover, there is no way for the undercover investigator to know who used that EBT card between

- October 22 and 27, 2020, since it was not in his possession;
- Exhibit E alleges that on November 6, 2020, the clerk paid the investigator \$20.00 cash from the Store's register. It does not allege that an Agori International clerk deducted any amount from his EBT card at that or another time other than an amount equal to the value of items (including three eligible food items) purchased at the Store earlier that day;
  - In Exhibits C and D, the investigator contends that the firm purchased his EBT card in exchange for cash and used it at another SNAP retailer. At no time did Agori International purchase an EBT card from the investigator as stated in the owner's declaration. Moreover, at no time were any Store funds used to purchase the EBT card. This is supported by the Store's daily reconciliations which demonstrate that no Store cash was used to pay the investigator any cash at any time, including for the EBT card referenced in Exhibits C through E to the Charge Letter. Had the Store's cash been used, the register would have been short by \$25.00 on October 22, 2020, by \$175.00 on October 27, 2020, and by \$20.00 on November 6, 2020. It is also important to note that the alleged violations took place long before the Charge Letter was issued, thereby hindering the firm's ability to fully respond thereto. Had the Charge Letter been issued promptly, the Store would have been able to review the surveillance recordings from Agori International. Unfortunately, those recordings are erased on a monthly basis. Additionally, no receipts or other records that FNS will review in making its determination were provided to the Store despite specific request for all such records. On February 18, 2021, the Administrative Review Officer advised counsel that any requests for records would need to be submitted to the FNS FOIA Office. Appellant objects to the issuance of any FNS decision based on records not provided to the Store or undersigned counsel. A federal agency should not permanently disqualify a retail food store from participating in the SNAP program without affording it a full and fair opportunity to seek review and any Final Agency Decision based on records never provided to the retailer is inequitable, unfair, and has disparate impacts on immigrants, in violation of USDA's civil rights regulations and policies;
  - Neither the Charge Letter nor the Permanent Disqualification Determination state which sub-section of 7 C.F.R. §271.2 the Store is accused of violating. As such, it is improperly vague as the Store does not know the legal basis for the issuance of the Charge Letter. Review of each sub-section leads to the belief that sub-section (1) is the regulatory basis. While that sub-section prohibits the purchase, sale, and exchange of SNAP benefits on an EBT card, it does not expressly prohibit the sale of an EBT card. Neither the Charge Letter nor the Permanent Disqualification Determination contains any evidence regarding the purchase, sale, or exchange of SNAP benefits on the investigator's EBT card. To the contrary, there is no evidence that the Store purchased, sold, or exchanged SNAP benefits by using the investigator's EBT card at another SNAP-authorized retailer at any time. Additionally, neither the Charge Letter nor the Permanent Disqualification Determination contains any evidence that the Store or its manager used the benefits on that EBT card at any time. In order to for FNS to make a finding that a retail food store or firm has engaged in trafficking by violating 7 CFR § 271.2(1), FNS needs to determine by a preponderance of the evidence that SNAP benefits were purchased, sold, or exchanged. Merely purchasing or exchange cash for an EBT card does not satisfy the agency's regulatory requirements for making a trafficking determination. And if a preponderance

of the evidence does not conclusively demonstrate that the Store engaged in trafficking, the Final Agency Decision must determine that the Store did not engage in trafficking in Exhibits C and D and reverse the Permanent Disqualification Determination; and,

- With respect to the allegations that trafficking took place in Exhibit E, the Investigative Report reveals that the investigator allegedly purchased four items worth \$53.97 in exchange for \$53.97 in SNAP benefits. Exhibit E notes that the investigator purchased three eligible food items and one nonfood item on November 6, 2020. The total price of those items is \$53.97, the precise amount redeemed on the undercover investigator's EBT card. And while the sale of perfume and other non-foods are not permitted by FNS's SNAP regulations, these facts do not constitute trafficking in violation of FNS's SNAP regulations. Additionally, the narrative describing the alleged exchange of \$20.00 in exchange for SNAP benefits on November 6, 2020, does not indicate that any additional SNAP benefits were exchanged other than the \$53.97 in SNAP benefits which were redeemed in exchange for the four items the undercover investigator purchased. The owner's declaration also notes that the Store's register did not have a shortfall on November 6, 2020, thereby providing further support that no exchange of SNAP benefits in exchange for cash took place at that time and that no trafficking occurred as alleged in Exhibit E. There is no direct evidence other than the statement of the investigator to establish that the Store redeemed any SNAP benefits in exchange for cash on November 6, 2020, or at any other time. No records, including receipts from the unnamed retailer at which the SNAP benefits on the EBT card were allegedly redeemed between October 22 and 27, 2020, or copies of any cash allegedly from the Store's register were produced despite requests for all relevant records by undersigned counsel. Finally, for the reasons noted above and in the owner's declaration, even if all of the allegations in Exhibits C, D, and E are true, it would not constitute trafficking in violation of 7 CFR § 271.2 because the Store's cash was not used at any time, because the Store never used the undercover investigator's EBT card at any time, because the Store derived no benefit therefrom, and with respect to the allegations in Exhibit E, no cash was exchanged by anyone for SNAP benefits.

Appellant submitted a declaration by the store owner in support of these contentions.

## **ANALYSIS AND FINDINGS**

It is important to clarify for the record that the purpose of this review is to either validate or to invalidate the earlier decision of the Office of Retailer Operations and Compliance and is limited to what circumstances were at the basis of the Office of Retailer Operations and Compliance action at the time such action was made. There is no provision in the SNAP regulations for waiver or reduction of an administrative penalty assessment on the basis of corrective actions implemented subsequent to investigative findings of program violations. 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.

SNAP regulations at 7 CFR § 271.2 define trafficking in part as, “The buying, selling, stealing, or otherwise effecting an exchange of SNAP benefits for cash or consideration other than eligible food”. Both the SNAP retailer application and retailer reauthorization application contain a certification page whereby applicants must confirm their understanding of and agreement with SNAP retailer requirements in order to complete the application and the reauthorization process. When store ownership signed the certification page of the SNAP retailer authorization application to become a SNAP retailer, it confirmed it understood and agreed to abide by program rules and regulatory provisions. It also agreed to accept responsibility on behalf of the firm for SNAP violations including those committed by any of the firm’s employees, paid or unpaid, new, full-time or part-time regardless of the amount of time the owner(s) is present at the subject firm and that ownership is accountable for the proper training of staff and the monitoring and handling of all SNAP benefit transactions. 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.

USDA investigators are thoroughly trained before entering any retail establishment and all protocols, including, but not limited to what can and cannot be said, are met and affirmed, under penalty of perjury after each store visit. The investigator’s signature on the investigative report is redacted to protect the identity of the investigator. An unsubstantiated denial by store ownership is not sufficient evidence that any interactions or conversations did not occur. It is also highly questionable that the clerk responsible for the charge letter transactions, including the illicit trafficking transactions, and the store owner were not at all suspicious when a total stranger, who was using SNAP for purchases at the Appellant firm, offered to sell its SNAP benefits in exchange for cash.

The investigative report shows that the clerk in Exhibits C, D, and E allowed the purchase of ineligible, nonfood items, including four major ineligible items, using SNAP by the investigator with no questions or concerns. The report also clearly shows that the clerk and her husband, the store owner, did agree to purchase \$400 in SNAP benefits from the investigator’s EBT card as stated in Exhibit C and also permitted the exchange of SNAP benefits for cash in Exhibits C, D, and E. That the clerk and store owner readily permitted these violative SNAP transactions for a complete stranger is strong evidence that this was a normal business practice at the Appellant firm indicating an ongoing pattern of SNAP violations.

The firm’s itemized receipt for Exhibit C shows the purchase of an item classified as “grocery” in the amount of \$16.00 which matches the amount of the necklace and earrings described in the narrative. A separate transaction was conducted beforehand for the three eligible food items. The photo taken by the investigator for the items purchased during this Exhibit corroborates the investigative report narrative.

The firm’s itemized receipt for Exhibit D shows the purported purchase of Milo powdered drink mix and Peak powdered milk corroborating the narrative which states that the clerk “rang-up

these items because “she needed to scan those items for the price of the necklace and the cash so that it would appear that those products were purchased.” The investigator did not leave the store with those items and the clerk then completed the transaction and manually keyed in the price of \$7.99 for the cocoa butter and \$38.00 for the box of cologne. The photo taken by the investigator for the items purchased during this Exhibit corroborates the investigative report narrative. Appellant also incorrectly states that the investigator purchased eligible food items using SNAP benefits in Exhibits C, D, and E. However, the investigative report clearly states that no eligible food items were actually purchased in Exhibit D.

Appellant claims that the investigative report for Exhibit E reveals that the investigator allegedly purchased four items, three eligible food items and one nonfood item, worth \$53.97 in exchange for \$53.97 in SNAP benefits. The total price of those items is \$53.97, the precise amount redeemed on the undercover investigator’s EBT card. And while the sale of perfume and other non-foods are not permitted by FNS’s SNAP regulations, these facts do not constitute trafficking in violation of FNS’s SNAP regulations. Additionally, Appellant contends the narrative describing the alleged exchange of \$20.00 in exchange for SNAP benefits on November 6, 2020, does not indicate that any additional SNAP benefits were exchanged other than the \$53.97 in SNAP benefits which were redeemed in exchange for the four items the undercover investigator purchased. Contrary to the Appellant’s claims, the Investigative Transaction Report for Exhibit E clearly states that a total of \$73.97, not \$53.97, was charged using the investigator’s SNAP EBT card. A review of the firm’s itemized receipt for Exhibit E shows the purchase of red beans, plantain fufu, Jasmine [rice], a “grocery” purchase for \$44.00 [the perfume], and a “grocery” purchase for \$20.00 [the cash] that total \$73.97. The investigator’s photo of these purchases matches the firm’s itemized receipt and the investigative report in addition to including a photo of the \$20.00 bill, including its serial number.

The copy of the investigative report attached to the charge letter shows the denominations for cash paid by the Appellant firm’s clerk to the investigator in Exhibits C, D, and E. Additionally, photos of the bills showing their serial numbers are also included in the investigative record along with photos of all items purchased at the Appellant firm, both eligible and ineligible, as well as photos of the itemized purchase receipts.

There is no indication that the clerk or the owner in the three violative Exhibits were forced, coerced, or intimidated into conducting violative transactions nor is there any evidence to support that the investigator entrapped the clerk or the owner. The investigator’s actions were not improper as the investigator was merely doing what SNAP recipients will occasionally attempt to do in real life situations by giving the clerk and the owner an opportunity to violate the program. FNS provides SNAP retailers with training materials and videos in order to respond to these real life situations without violating SNAP rules and regulations. The investigative report and narrative do not reveal any evidence that the investigator did not follow acceptable procedures for an undercover compliance visit.

The investigative report shows that the nature and scope of the violations under review do violate SNAP regulations and a review of the report shows no errors or discrepancies. The transaction amounts cited in the report have been matched to SNAP transactions posted by the Appellant

firm and also by the firm where the \$400.00 from the investigator's EBT card was used with no disagreements and a comparison of the dates/times/amounts on the firm's itemized POS receipts given to the investigator correspond to the dates/times/amounts provided to FNS by the firm's EBT processor when it submitted the transactions to FNS for reimbursement. FNS documentation consisting of photos of the eligible and ineligible items purchased, photos of the POS receipts with the firm's name, photos of the money given to the investigator by the firm in exchange for SNAP benefits, and detailed donation records signed by a local charitable organization provides conclusive evidence supporting the details provided in the investigative report. The exchange of cash for SNAP benefits (Exhibits C, D, and E) constitutes trafficking as previously defined in SNAP regulations with the penalty being permanent disqualification. There is no regulatory threshold for the dollar value of the items purchased or for the amounts of cash paid for them.

While FNS cannot confirm the identity of the individual who used the investigator's EBT card and PIN to purchase \$400.00 worth of goods at another store, the investigative report shows that the clerk and the owner had possession of the EBT card and the PIN on October 22, 2020, and returned the EBT card to the investigator on October 27, 2020, along with a cash payment per the owner's previous agreement to purchase the investigator's SNAP benefits. This evidence shows that the firm's owner or his spouse, the firm's clerk, more likely than not used the SNAP benefits from the investigator's EBT card for this purchase.

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.

Based on the discussions above, there is not any valid basis for dismissing the charges or for mitigating the penalty imposed.

### **Other Contentions**

Appellant's reference to the firm being located in an impoverished neighborhood is noted. SNAP recipients are by definition low income and most cities and towns have low income neighborhoods so it is not unusual for SNAP authorized retail stores to be located in low income areas with many SNAP recipients. While these characteristics are common to many SNAP retailers, being located in an impoverished neighborhood does not provide a justification or explanation for the charge letter transactions.

Regarding Appellant's contentions relating to the FOIA, the FOIA process is governed by current FOIA rules and regulations and falls outside of the purview of this review. Appellant's objection to the issuance of any FNS decision based on records never provided to the retailer being inequitable, unfair, and has disparate impacts on immigrants, in violation of USDA's civil rights regulations and policies is also noted. The administrative review process does not include an assessment of the constitutionality of the laws, regulations, and procedures under which USDA FNS imposed its adverse action. Constitutional challenges to the laws and regulations governing the SNAP are more appropriately the province of judicial review in a court of law. Accordingly, no further findings or conclusions are rendered in this regard.

Counsel for Appellant stated in its brief that this Review Officer "...did not respond to undersigned counsel's written inquiry regarding whether the Final Agency Decision would be based upon any records not provided to the Store or undersigned counsel." It is noted for the record that Counsel failed to state that his written request was sent via a routine email on Thursday, February 18, 2021, and the brief submitted the following day.

Additionally, contrary to Appellant's claim that the alleged violations "took place long before the charge letter was issued", a review of the evidence shows that the charge letter was issued on December 17, 2020, only 41 days after the last purchase (Exhibit E) at the Appellant firm.

### **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 Office of Retailer Operations and Compliance determined that the Appellant was not eligible for a trafficking CMP in lieu of a disqualification under 7 CFR 278.6(i) because it did not request a CMP or 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 Office of Retailer Operations and Compliance determined that Appellant was not eligible for a trafficking CMP in lieu of permanent disqualification.

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 request or provide substantial evidence that it met all four criteria required by 7 CFR §278.6(i). Based on the above, the Office of Retailer Operations and Compliance's decision not to impose a CMP in lieu of disqualification is sustained as appropriate pursuant to 7 CFR §278.6(i).

### **CONCLUSION**

A review of the evidence in this case supports that the program violations at issue did occur as charged. As noted previously, the charges of violations are based on the findings of a formal USDA investigation. All transactions cited in the letter of charges were conducted by a USDA

investigator, signed under penalty of perjury, and all are thoroughly documented. A review of this documentation has yielded no indication of error or discrepancy in any of the reported findings. Rather, the investigative record is specific and accurate with regard to the dates of the violations, the specific exchange of items purchased with SNAP benefits for cash, and in all other critically pertinent detail. Additionally, the decision by the Office of Retailer Operations and Compliance that Appellant was not eligible for a trafficking CMP is also found to be correct.

Based on the discussion above, the determination by the Office of Retailer Operations and Compliance to impose a permanent disqualification against the Appellant business from participating as an authorized retailer in SNAP is sustained. However, the determination is modified to remove the fiscal claim of \$230.00.

### **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

April 23, 2021





**United States  
Department  
of  
Agriculture**

Food and Nutrition  
Service

Retailer  
Compliance  
Division

August 24, 2021

**Stewart D Fried c/o  
John Agori  
Agori International African Market #N/A  
4701 Atlantic Ave  
Ste 111  
Raleigh, NC 27604-8107**

RE: Agori  
International African  
Market #N/A  
FNS # 0666189  
4701 Atlantic Ave  
Ste 111  
Raleigh, NC 27604-  
8107

Dear Owner/retailer:

Reference is made to our Charge Letter dated December 17, 2020 and Determination Letter dated January 15, 2021. We are formally rescinding our Letters. FNS will not be taking further action in this matter, and consider this case closed.

As a result of the rescission, your store has been reinstated effective August 24, 2021.

Current SNAP regulations are available online:  
<https://www.fns.usda.gov/snap/retailer/training>.

Sincerely,

A handwritten signature in cursive script, appearing to read "Sanela Ocanovic".

Sanela Ocanovic  
Section Chief  
Retailer Compliance Division  
Investigative Analysis Branch  
USDA Food and Nutrition Service  
Supplemental Nutrition Assistance Program

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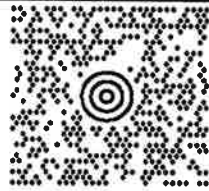
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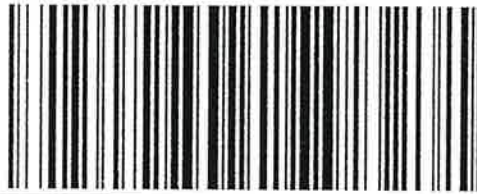
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