

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

**Kwik Pantry,**

**Appellant,**

**v.**

**Retailer Operations Division,**

**Respondent.**

**Case Number: C0253138**

**FINAL AGENCY DECISION**

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS), that there is sufficient evidence to support a finding that a permanent disqualification from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP) was properly imposed against Kwik Pantry (hereinafter “Kwik Pantry” or “Appellant”) by the Retailer Operations Division of FNS.

**ISSUE**

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

**AUTHORITY**

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

**CASE CHRONOLOGY**

In a letter dated May 19, 2022, the Retailer Operations Division informed the Appellant that Kwik Pantry was in violation of the terms and conditions of the SNAP regulations, 7 CFR § 270 –282, based on EBT SNAP benefit transactions that "establish clear and repetitive patterns of unusual, irregular, and inexplicable SNAP activity for your type of firm." The letter also noted that the Appellant could request a trafficking civil money penalty (CMP) in lieu of a permanent disqualification within 10 days of receipt under the conditions specified in 7 CFR § 278.6(i). Per UPS confirmation of delivery, the charge letter was delivered to the Appellant at the store address of record on May 20, 2022.

In responses to the Retailer Operations Division of May 23, 2022, May 24, 2022, and May 29, 2022, the Appellant, through counsel, replied to the letter of charges. The record reflects that the Retailer Operations Division received and considered the information provided prior to making a determination.

After considering the Appellant's responses and the evidence in the case, the Retailer Operations Division issued a determination letter dated August 1, 2022, informing the Appellant that Kwik Pantry was being permanently disqualified from participation in the SNAP in accordance with 7 CFR § 278.6(e)(1) for trafficking violations. The letter also stated that the Appellant was not eligible for a trafficking civil money penalty (CMP) in accordance with 7 CFR § 278.6(i) as the Appellant did not submit sufficient evidence to demonstrate that the firm had established and implemented an effective compliance policy and program to prevent violations of the SNAP.

In a letter postmarked August 3, 2022, the Appellant, through counsel, requested an administrative review of the Retailer Operations Division's determination. FNS granted the Appellant's request for administrative review by letter dated August 15, 2022. In email correspondences of August 30, 2022, the Appellant, through counsel, submitted additional information in support of the request for administrative review.

### **STANDARD OF REVIEW**

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

### **CONTROLLING LAW**

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

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

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

7 CFR § 278.6(a) states, *inter alia*:

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

7 CFR § 278.6(e)(1)(i) states:

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

7 CFR § 271.2 states, *inter alia*:

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

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

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

7 CFR § 278.6(i) states, inter alia:

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

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

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

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

### **SUMMARY OF CHARGES**

The Appellant was charged and determined to be trafficking based on an analysis of EBT transaction data from August 2021 through January 2022. This involved the following SNAP transactions patterns which are indicative of trafficking:

- There were multiple transactions made from the accounts of individual households within a set time period; and
- There were EBT transactions conducted that are large based on the observed store characteristics and recorded food stock.

The issue in this review is whether, through a preponderance of evidence, it is more likely true than not true that questionable transactions were the result of trafficking.

### **APPELLANT'S CONTENTIONS**

The following represents a brief summary of the Appellant's contentions in this matter. Please be assured, however, that in reaching a decision, full attention and consideration was given to all contentions presented, including any not specifically recapitulated or specifically referenced herein.

In the replies to the charge letter, in the administrative review request, and in subsequent correspondence, the Appellant, through counsel, stated the following summarized contentions, in relevant part:

- The Appellant has been an authorized SNAP retailer since 2018.
- The Appellant has never violated any laws related to Section 271.2 and 278.6(e)(1).
- The Appellant's transactions are based on the sale of qualified merchandise.
- The Appellant holds itself as a fully functioning grocery store.
- Most of the Appellant's customers buy groceries for their entire household as would a customer at a grocery store.
- With regard to the transactions documented in Attachment 1, the Appellant has ensured that the store is in good standing conditions according to USDA policies by training staff periodically to ensure the store is in compliance with the SNAP rules and that no violations occur. However, with the pandemic gravely affecting the economy with inflation, the Appellant has done its best to help its local community with sale incentives such as "Buy one, get one free" incentives. Many families separated their transactions to take advantage of the sale incentive and provide more food for their large household families.
- Many families request to separate their purchases. The Appellant does not question customers' shopping habits when they request to make separate purchases. The Appellant does not restrict customers' purchases as the SNAP rules do not permit retailers to limit purchases.
- The Appellant tries to assist customers with special needs in bad weather by carrying their groceries home for them.
- Most of the Appellant's loyal neighborhood customers shop at the store multiple times a day as they appreciate that they do not have to drive to get to bigger grocery stores.
- If the Appellant does not have items that its customers are looking for they provide the store with a list and the store buys these items for them. Some customers have special needs and the Appellant tries to assist them by buying special items for them.
- During the pandemic, some of the store's customers lost their jobs and were struggling so the Appellant allowed them to purchase essential groceries on credit.
- With regard to the transactions documented in Attachment 2, the Appellant has invested a significant amount of time into the community by making sure the store has a large variety and stock of inventory to accommodate all customers. The Appellant maintains its inventory by shopping multiple times a day from different wholesale and bigger grocery stores.
- The Appellant frequently rotates between periods of high volume and low volume stock and sales as a result.
- The Appellant has attempted to maintain its goods at a reasonable price for the local community throughout the economic issue caused by the ongoing pandemic. However, inflation has significantly further impacted the economy and caused the Appellant to suffer. Because of inflation, the Appellant has been forced to raise prices. Although these transactions may appear to be large, they are adequate with the current circumstances of the Appellant having to raise prices.
- Furthermore, with the Appellant being located in the heart of many low-income neighborhoods with Section 8 and elderly homes, families often come in to make large purchases for their households.
- The Appellant caters to customers who are disabled and in wheelchairs and who often come in weekly to buy their groceries for the week.
- Additionally, the hotel located down the street supports housing for individuals in financial need and who often receive SNAP benefits. The Appellant is the most convenient store nearby that has enough goods to supply large families and individuals who primarily depend on SNAP

benefits. These transactions may appear large, but they are sufficient for these large, generational families.

- Page 8 of the USDA SNAP manual titled “Respect Your SNAP Customers” states that store owners are not allowed to restrict the time or purchase amount of customers.
- By adhering to the rules of the SNAP manual, the Appellant is abiding by the law by not questioning the large and/or frequent purchases.
- A SNAP disqualification would impose a significant hardship on area customers as the Appellant is close to their homes and most of them walk to buy their household items. Families who use the daycare next door often come to the store to buy their children snacks and fulfill other needs. These customers would have to travel further distances and spend more money on expensive SNAP goods at the next closest competitor located miles away.
- The Appellant has implemented more cameras within the store to carefully monitor EBT transactions and is keeping more detailed reports of each transaction to prevent any violations.
- The Appellant implemented a legitimate training program for its employees. The Appellant implemented an effective compliance program to prevent violations of SNAP Section 271.2 and meets the eligibility requirements for a civil money penalty under Section 278.6(e)(1).
- No violations occurred with intent.
- With regard to Criterion 1, since being authorized as a SNAP retailer in 2018, the owner has been active in ensuring full compliance with his employees and their obligations to FNS. A photocopied booklet is provided to each employee and issues and concerns regarding EBT processing are addressed as questions and issues arise. The Appellant’s compliance policy states the following: (1) There is no exchange for cash for EBT card swipes; and (2) and only sell qualified EBT grocery items to your customers.
- The Appellant has a training policy in place for its employees. Using the url: [http://www.fns.usda.gov/sites/default/files/Retailer Training Guide.pdf](http://www.fns.usda.gov/sites/default/files/Retailer%20Training%20Guide.pdf), the Appellant has provided in-store training and a copy of the manual to all employees and store operators. The contents of the manual are discussed and reviewed with employees and partners of the business on a semi-annual basis. Each employee is reminded by the Appellant to never engage in the following: (a) Giving back cash in return for EBT purchases; (b) Disallowing sales to known friends of the card user if it appears as though the card user is outright paying for the groceries of a person that is not part of their household; and (c) Disallow sales on unqualified EBT items.
- With regard to Criterion 2, the firm shall establish that both its compliance policy and program were in operation at the location where the violation(s) occurred prior to the occurrence of the violations cited in the charge letter.
- With regard to Criterion 3, the firm developed and instituted an effective training program as specified in Section 271.2. The training program implemented by the Appellant includes: A review of the FNS handbook with each new employee and instructions to call USDA or the store owner if employees have any questions.
- With regard to Criterion 4, firm ownership was not aware of, did not approve of, did not benefit from or was not in any way involved in the conduct or approval of the trafficking violations; or it is only the first occasion in which a member of firm management was aware of, approved, benefited from, or was involved in the conduct of any trafficking violations by the firm.

In support of these contentions, the Appellant, through counsel, submitted the following information for review:

- Numerous inventory purchase invoices;
- A hand-written credit log;
- 2021 U.S. Income Tax Return for an S Corporation;

- Store Tracking Accounts (Excel report) noting sum of amount purchased [from vendors] as well as a grand total for 2021 and 2022;
- Two pages of register and EBT receipts dated outside of the review period of August 2021 – January 2022;
- Affidavit of store owner;
- SNAP Training Acknowledgements of three employees;
- SNAP Training Log;
- Affidavits of 20 customers attesting to shopping habits at Appellant;
- Numerous food stock photos. Some of the photos show price tags on foods;
- A photo of a new security camera installed in store;
- Two EBT register receipts dated May 24, 2022 (one for \$24.32 and the other \$32.02) with corresponding photos of food items at checkout counter;
- Ten (10) photos of low income housing apartments/facilities in area;
- Photos of a sign posted on the store’s freezer door stating “Buy any 2 pizzas Get Any 2-liter soda for only \$1.00”;
- A photo of Niagara bottled water stored on floor with a sign stating “24 pack water \$7.99”;
- A photo of sodas stored on shelves with a sign stating “12 pk soda \$7.99”;
- A photo of a sign posted on the store’s freezer door stating “Jack/Palermos [pizza] 2 for \$10.00 or \$5.99 each” and “Digiorno box pizza 2 for \$20.00 or \$10.99 each”; and
- A photo of a sign posted on the store’s freezer door stating “All pint ice cream \$4.99; 1.5 quart ice cream \$7.00; ice pops bags \$8.00”.

## **ANALYSIS AND FINDINGS**

### **SNAP Authorization**

FNS authorized Kwik Pantry for participation in the SNAP on May 16, 2018. During the review period of August 2021 through January 2022, Kwik Pantry was classified as a convenience store. The owner signed a SNAP application for the store and acknowledged he was aware of the SNAP regulations and understood those regulations. That application included a certification and confirmation that the owner would “accept responsibility on behalf of the firm for violations of the SNAP regulations, including those committed by any of the firm’s employees, paid or unpaid, new, full-time or part-time.” The violations listed on this certification include accepting SNAP benefits in exchange for cash, otherwise known as trafficking, and other violations such as accepting SNAP benefits as repayment on credit accounts or in exchange for ineligible items.

### **Store Visit Observations**

The case file indicates that in reaching a disqualification determination, the Retailer Operations Division considered information obtained during a March 9, 2022 store visit conducted by a FNS contractor to observe the nature and scope of the firm’s operation, stock, and facilities. The available inventory of SNAP-eligible food at the time of the store visit showed food stock that would be typical of a convenience store, where households normally purchase a limited number of items. The SNAP-eligible food stocked by the store was generally of a low dollar value, consisting mainly of inexpensive canned and packaged goods, snack foods, single-serving food items and accessory food items. This information obtained from the store visit was also used to ascertain if there were justifiable explanations for the firm’s irregular SNAP transactions. The store visit report and photographs documented the following store size, description, and characteristics:

- Approximately 1,800 square feet in size with approximately 402 square feet of storage area outside of public view which stocked predominantly drinks;
- Had a storage walk-in cooler which stocked predominantly drinks and alcohol;
- Did not have storage freezers;
- No shopping carts and four hand-held baskets available for customer use;
- One small checkout counter area with limited check-out counter space and the register was surrounded by a plexiglas barrier with only a small slit to place items for purchasing;
- One cash register and one EBT point-of-sale (POS) device for use in ringing-up SNAP transactions;
- Had an optical scanner;
- No signs posted or flyers available advertising the availability of bulk foods offered at a discounted rate to include meats in bulk, foods sold by the case, and grocery package deals;
- No meat/seafood specials or bundles or fruit/vegetable boxes that might sell for high prices;
- No evidence of a wholesale business such as posted prices or separate entrances for wholesale customers;
- Did not utilize an unusual pricing structure, such as prices ending in \$.x9 or \$.00;
- Transaction totals were not rounded up or down at the checkout counter;
- Telephone and on-line orders were not taken and delivery was not offered;
- Did not stock any specialty items;
- Had empty/scantily-filled shelves;
- Had dusty cans/packages;
- Had expired foods;
- The six most expensive (i.e., costing \$5.00 and above) SNAP-eligible food items in stock were Homerun pizza at \$19.99 per 2-30 ounce pizzas (3 units in stock); Folgers coffee at \$14.99 per 51 ounces (1 unit in stock); Banquet fried chicken at \$14.99 per 29 ounces; Tyson chicken wings at \$9.99 per 2 pounds (4 units in stock); VandeKamp fish sticks at \$9.99 per 24.6 ounces; and Roundy's bacon at \$9.99 per 1 pound;
- No fresh meats, poultry, or seafood;
- No frozen unprocessed meats other than a few units of ground beef; No frozen unprocessed poultry or seafood;
- Frozen food stock included such items as ice cream, Hot Pockets, pizza, pot pies, meals, hamburgers, potatoes (french fries, hash browns, tater tots), Uncrustables, and burritos;
- Did not have a kitchen; The only hot foods sold were hot beverages;
- Did not have a deli or prepared food area and deli meats and cheeses were not sold by the pound;
- Meat items included units of eggs, meat jerky, canned/potted meat, packaged deli meat, hot dogs, bacon, and canned fish;
- Dairy included milk (dairy and coconut varieties), butter, sour cream, and cheese;
- Had a minimal variety and amount of fresh produce stock;
- Other staple foods available for purchase included such items as juice, loaf bread, buns/rolls, pasta, rice, cereal, oats, baking mix, flour, tortillas, corn meal, and canned goods;
- Much of the remaining food stock consisted of accessory foods such as candy, carbonated and non-carbonated drinks, condiments, cakes/pastries, snack foods, spices, and sugar; and
- Ineligible nonfood items included health and beauty aids, paper products, household cleaning supplies, tobacco products, clothing, lottery tickets, automotive supplies, gift wrap and greeting cards, household items, pet food, and alcohol.

## **Charge Letter Attachments**

On review, the investigative materials provided by the Retailer Operations Division, including computer printouts of transaction data available from Federal records, store visit observations, information regarding area competitor firms, and household shopping patterns, were analyzed.

Government analyses of stores caught in trafficking violations during on-site investigations have found that transactions involving trafficking consistently display particular characteristics or patterns. These patterns include, in part, those cited in the letter of charges. Based on this empirical data, and in the absence of any reasonable explanations for such transaction patterns, a conclusion can be drawn through a preponderance of evidence that the most likely explanation for “unusual, irregular, and inexplicable” transactions and patterns cited in the letter of charges is trafficking. Transactions having such characteristics sometimes do have valid explanations that support that they were the result of legitimate purchases of eligible food items. This is why opportunities are afforded to charged retailers to explain the questionable transactions cited. In this case, the Retailer Operations Division determined that the Appellant’s contentions did not outweigh the evidence. The issue in this review is whether, through a preponderance of evidence, it is more likely true than not true that questionable transactions were the result of trafficking. As patterns of unusual transactions appear across multiple Attachments, the case of trafficking becomes more convincing.

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

This charge letter Attachment documents 40 sets of transactions (106 total transactions) that total \$4,742.20 in SNAP benefits to meet the parameters of this scan. These transactions were conducted by 24 different SNAP households. Multiple transactions conducted by the same household account within a short period of time is a method which violating stores use to avoid single high dollar transactions that cannot be supported by a retailer’s inventory and structure.

The Appellant contends that the store does not restrict customers’ purchases as the SNAP rules do not permit retailers to limit purchases.

Although it is not uncommon for customers to have more than one transaction per day and there are no limits on the number of times EBT cards may be used or the amount of eligible foods that may be purchased, it is not common that such multiple transactions are for large dollar amounts. The SNAP transactions noted in the charge letter are questionable not because they exceed any limits for use, but rather because they display characteristics of use inconsistent with the nature and extent of the Appellant’s stock and facilities and are therefore, indicative of trafficking.

### **5 U.S.C. § 552 (b)(7)(E).**

Although many SNAP households do shop early in the month as opposed to later in the month, most households do not spend all or a majority of their monthly benefit allotment in just one or two days, especially from a convenience store like the Appellant firm that has a moderate food stock, a minimal variety and amount of fresh produce stock, no fresh meats, poultry, or seafood, no frozen unprocessed meats other than a few units of ground beef, no frozen unprocessed poultry or seafood, and a moderate variety and amount of frozen food stock.

The available inventory of SNAP-eligible food is typical of a convenience store, where households normally purchase a limited number of items. The SNAP-eligible food stocked by the store was generally of a low dollar value, consisting mainly of inexpensive canned and packaged goods, snack foods, single-serving food items and accessory food items. The second, third, and subsequent transactions in each set



are too large to consist of forgotten items. While research reports acknowledge the rapid spending habits of SNAP participants as normal practices, it is expected SNAP benefits are expended in establishments with adequate inventory to support purchases. Such inventory was not confirmed in the subject store.

The Appellant contends that the store has done its best to help its local community with sale incentives such as “Buy one, get one free” incentives. Many families separated their transactions to take advantage of the sale incentive and provide more food for their large household families. The Appellant provided the following photos: Photos of a sign posted on the store’s freezer door stating “Buy any 2 pizzas Get Any 2-liter soda for only \$1.00”; a photo of Niagara bottled water stored on floor with a sign stating “24 pack water \$7.99”; a photo of sodas stored on shelves with a sign stating “12 pk soda \$7.99”; a photo of a sign posted on the store’s freezer door stating “Jack/Palermos [pizza] 2 for \$10.00 or \$5.99 each” and “Digiorno box pizza 2 for \$20.00 or \$10.99 each”; and a photo of a sign posted on the store’s freezer door stating “All pint ice cream \$4.99; 1.5 quart ice cream \$7.00; ice pops bags \$8.00”.

However, the store visit report, which was completed in collaboration with and signed by the store manager, and photographs from the store visit as well as the food stock photos provided by the Appellant offer no explanation as to why SNAP customers would routinely shop at Kwik Pantry multiple times during a short period or purchase such a large volume of items, there being no great variety or advertisements of products, price advantage, profusion of large packages, or significant bulk items or food cases for sale. The food stock photos provided by the Appellant do not show any signs in the store advertising the availability of “2 for 1” or “Buy 1, Get 1 Free” sale items nor do they show a profusion of bulk items stocked in the store. No evidence was submitted by the Appellant, 5 U.S.C. § 552 (b)(7)(E), substantiating that sale incentives were provided to customers during the review period.

The Appellant contends that many families request to separate their purchases. The Appellant does not question customers’ shopping habits when they request to make separate purchases. However, out of the 40 transaction sets included in Attachment 1, only six of the transaction sets occurred with an elapsed time of less than one-half hour. That means the vast majority of these sets are not supported by this explanation. If households are shopping together or splitting transactions to benefit from sales incentives, these transactions would be close together in time, just a few minutes apart. However, 34 of the transactions sets made by households in Attachment 1 took anywhere over 37 minutes to over 46 hours to split transactions. As such, this is an unlikely explanation for the Attachment 1 transactions.

The Appellant contends that if the store does not have items that its customers are looking for they provide the store with a list and the store buys these items for the customers. Some customers have special needs and the Appellant tries to assist them by buying special items for them. However, no evidence was provided by the Appellant substantiating these claims. The store visit observations indicate that the firm offered no special or custom services to customers, such as on-line or telephone orders and/or delivery services, the firm taking orders for food items from customers, or a profusion of specialty or ethnic goods which would entice SNAP customers to utilize the subject store over other area authorized retail stores. There was only one small checkout counter with limited check-out counter space, one cash register which was surrounded by a plexiglas barrier with only a small slit to place items for purchasing and one EBT POS device for use in ringing-up customers, no shopping carts available to customers for transporting multiple food items within the store, and no conveyor belts to expedite high dollar or rapid consecutive purchases. The customers have no place to put multiple purchases or carry the items while shopping.

The Appellant contends that during the pandemic, some of the store’s customers lost their jobs and were struggling so the Appellant allowed them to purchase essential groceries on credit. In support of its credit extension contention, the Appellant submitted a hand-written credit log.

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

The Retailer Operations Division evaluated the credit extension documentation provided and properly determined that the information was insufficient to support the Appellant's credit extension contention. **5 U.S.C. § 552 (b)(7)(E)**. Therefore, although the firm may have, on a rare occasion, accepted SNAP benefits as repayment on credit accounts, the evidence submitted by the Appellant does not support its contention that the irregular SNAP transactions listed in the charge letter are due to repayment on credit accounts.

The Appellant contends that if the firm was disqualified from the SNAP, customers would have to travel further distances and spend more money on expensive SNAP goods at the next closest competitor located miles away. It is recognized that sometimes a firm may have unusual transaction patterns due to a recipient's lack of access to other SNAP authorized stores. However, during the review period there were 14 SNAP authorized retailers of comparable or larger size located within a 1.0 mile radius of Kwik Pantry, including 2 super stores, 2 large grocery stores, 3 medium grocery stores, and 7 other convenience stores (two of which are located less than 0.5 miles away), that could meet the nutritional needs of SNAP customers. In addition, there were 45 SNAP authorized stores of comparable or larger size located within a 2.0 mile radius of the subject firm, including 4 super stores, 3 supermarkets, 2 large grocery stores, 9 medium grocery stores, 1 small grocery store, and 26 other convenience stores. Some of these authorized SNAP stores are larger than Kwik Pantry and offer a greater quantity and variety of food products at comparable or better prices as compared to the subject store. No evidence was submitted by the Appellant substantiating its claim that SNAP-eligible foods offered at area stores are more expensive than those offered at the subject store.

The Appellant contends that most of the store's loyal neighborhood customers shop at the store multiple times a day as they appreciate that they do not have to drive to get to bigger grocery stores. However, the record indicates that SNAP customers who shopped at Kwik Pantry during the review period also shopped at other area grocery stores and, therefore, transportation to other stores is not an issue for these customers. **5 U.S.C. § 552 (b)(7)(E)**. Therefore, lack of access to other authorized stores or the availability of other food stores does not appear to be an explanation for the Appellant's abnormally high SNAP transaction amounts conducted within a short timeframe of each other.

The Appellant has not provided any evidence to show that the transactions listed in this Attachment were legitimate purchases of eligible foods and not the result of trafficking of SNAP benefits. The arguments presented by the Appellant hold little weight without some kind of evidence to substantiate its claims. The Appellant has the burden to provide relevant evidence to rebut the trafficking charges. This burden has not been met.

### **Excessively Large Purchase Transactions (Charge Letter Attachment 2)**

This charge letter Attachment documents 319 SNAP transactions, as large as \$180.00, that total \$18,415.07. These large transaction amounts are not consistent with the store's observed characteristics and food inventory. The frequency of high dollar purchases in the review period calls into question the legitimacy of these transactions.

The Appellant contends that the store holds itself as a fully functioning grocery store. Most of the Appellant's customers buy groceries for their entire household as would a customer at a grocery store. The Appellant has invested a significant amount of time into the community by making sure the store has a large variety and stock of inventory to accommodate all customers. The Appellant maintains its inventory by shopping multiple times a day from different wholesale and bigger grocery stores.

However, the food stock and facilities of the Appellant as reported in the store visit documentation do not appear sufficient to provide for all of one's food needs. People generally do not spend large sums at such stores. They usually stop at convenience stores to pick up a few staple food items, such as bread, milk, or a can or two of food that they may consider are not worth a trip to the supermarket to purchase. The Appellant contends that the large transactions are not the result of trafficking of SNAP benefits. However, it is rare for a convenience store such as Kwik Pantry to have purchases like those included in this Attachment to the charge letter.

The FNS store visit report, which was completed in collaboration with and signed by the store manager, as well as the store visit photos and the food stock photos provided by the Appellant show that Kwik Pantry offers a moderate stock of SNAP-eligible foods with no fresh meats, poultry, or seafood, no frozen unprocessed meats other than a few units of ground beef, no frozen unprocessed poultry or seafood, a limited variety and amount of fresh produce stock, and a lack of an abundant depth and breadth of staple foods. The store had empty/scantily-filled shelves and dusty cans/packages and expired foods indicating that food inventory is not sold on a regular or consistent basis.

The store visit observations also show only a few expensive eligible foods in stock, some of which were in limited quantities, that would account for these large amounts, no signs posted or flyers available advertising the availability of bulk foods offered at a discounted rate to include meats in bulk, foods sold by the case, specials such as buy one food item and get one for free, and grocery package deals, no evidence of meat/seafood specials or bundles or fruit/vegetable boxes that might sell for high prices, and no evidence of a wholesale business such as posted prices or separate entrances for wholesale customers.

While there is no definition in the SNAP regulations for an excessively large purchase or transaction, FNS makes its determination based on the store type, characteristics and stocked inventory. The burden is on the Appellant to prove transactions FNS identified as large for the store type (in this case, a convenience store) are for legitimate purchases. According to the store visit, the subject store did not have inventory to support the numerous large transactions. The Appellant did not provide adequate evidence of continuously purchasing inventory throughout the review period to satisfy the large transactions (see invoice analysis included in the Supporting Documents section of this Final Agency Decision).

The Appellant contends that these large transactions are the result of the firm having to raise prices due to inflation. In addition, the Appellant is located in the heart of many low-income neighborhoods with families coming into the store to make large purchases for their households. These transactions may appear large, but they are sufficient for these large, generational families. However, these factors are not an indication that questionable transactions would be occurring at any given store. The subject store shows unusual transaction patterns that are not displayed in other similarly stocked stores. If specific household needs and/or inflation are causing these questionable transactions at the subject store, it would be expected that similar patterns would also present themselves at nearby firms as well. But this is simply not the case.

The Appellant submitted for review affidavits of 20 customers attesting to their shopping habits at the store with some customers attesting that they do not have a car to travel to other stores. The Retailer

Operations Division was able to identify 15 of the customers via the state administrative terminal database. 5 U.S.C. § 552 (b)(7)(E).

5 U.S.C. § 552 (b)(7)(E). Even if it is assumed that all customer statements provided were 100% accurate and accepted as evidence of legitimate transactions, they could account for just a small percentage of the transactions in the charge letter as the flagged transactions 5 U.S.C. § 552 (b)(7)(E). As such, these statements are not found to be more persuasive of legitimate SNAP transactions for eligible foods than the evidence supporting trafficking.

5 U.S.C. § 552 (b)(7)(E).

Based on the store layout, infrastructure, and available inventory, it is not credible that the Appellant would so frequently conduct large transactions closely resembling those typically found at a supermarket or super store. It is not plausible that the firm's customers would regularly carry very large amounts of merchandise around the store without the benefit of shopping carts, especially since larger, better-stocked stores are readily available and in the vicinity of the Appellant firm. The Appellant is not set up to process high-dollar transactions, as indicated by its lack of equipment to facilitate large transactions and limited counter space. There are no legitimate bases for SNAP customers' unusual attraction to the firm such as a superior selection of staple foods, price advantages, package specials, bulk or promotional items, an extensive variety of otherwise unavailable ethnic food items, or special services rendered. The Appellant failed to provide convincing evidence to establish the legitimacy of these excessively large transactions, 5 U.S.C. § 552 (b)(7)(E). Based on all of these factors discussed in this section, the large volume of transactions for high-dollar amounts is unlikely to indicate a pattern of legitimate food purchases.

Based on the discussion above and in the absence of credible evidence for such transaction patterns, a conclusion can be drawn through a preponderance of evidence that the "unusual, irregular, and inexplicable" transactions and patterns cited in the letter of charges evidence trafficking as the most likely explanation. Nevertheless, transactions having such characteristics do sometimes have valid explanations that support that they were the result of legitimate purchases of eligible food items, and this is why opportunities are afforded to charged retailers to explain the questionable transactions cited. In this case, however, the Retailer Operations determined that the Appellant's contentions did not outweigh the evidence. Assertions that the firm has not violated program regulations, by themselves and without supporting evidence and rationale, do not constitute valid grounds for dismissal of the current charges of violations. As noted herein, the Appellant has the burden of providing credible, relevant evidence, which 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. This burden has not been met.

USDA employs a computerized fraud detection tool to identify EBT transactions that form patterns that have characteristics indicative of trafficking. However, this tool does not, by itself, determine or conclude that trafficking has occurred. The Retailer Operations Division analyzes the transaction data and patterns along with other documentation such as, information from the onsite store visit report including photographs of stock and the store layout, an analysis of recipient shopping behavior, and comparisons with similar store types in local area, to render a determination as to whether or not the questionable transaction patterns were, more likely than not, the result of trafficking. The regulations at 7 CFR § 278.6(a) 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, and that such disqualification shall result from a finding of a violation on the basis of evidence that may include facts established through, inconsistent redemption data, and evidence obtained through a transaction report under an electronic benefit transfer system.

## **Supporting Documents**

The Appellant submitted numerous (1,583) purchase inventory receipts/invoices to substantiate the firm's inventory and demonstrate that there was adequate eligible food items to account for the transactions during the review period. Of the invoices submitted for review, 494 were dated within the review period and were included in the analysis. Purchases of ineligible nonfood items were excluded from the invoice analysis. The analysis shows that the firm mostly stocks sodas, chips, frozen meals, and snack foods. 5 U.S.C. § 552 (b)(7)(E), the invoice analysis indicates that the firm lacked sufficient purchased food stock (5 U.S.C. § 552 (b)(7)(E)) to cover its SNAP redemptions for the review period. The analysis also does not account for any non-SNAP purchases (cash, credit and debit card, etc.) of food items at the Appellant. In sum, the invoices do not explain the questionable transactions at the Appellant. The Store Tracking Accounts (Excel report) provided for review is self-reported and purchases of SNAP-eligible food items cannot be differentiated from ineligible nonfood items. As such, this information provides little probative value.

The tax documents do not shed light on the transactions questioned in Attachments 1 and 2 of the charge letter as profits made from trafficking cannot be differentiated from profits made from legitimate sales. As such, this information provides little probative value. The submitted two pages of register receipts and EBT receipts as well as the two EBT register receipts dated May 24, 2022 (one for \$24.32 and the other \$32.02) with corresponding photos are all dated outside of the review period. As such, this information does not substantiate that the transactions noted in the charge letter are the result of legitimate sales of eligible foods and not the result of trafficking.

## **Owner Affidavit**

With regard to the owner affidavit provided by the Appellant which purports to establish that questionable transactions were legitimate and that no trafficking occurred, the truth of such declarations can neither be confirmed nor denied. Although such affidavits may be sworn to and notarized, that does not mean that they are necessarily truthful. One would not expect store owners to admit that questionable transactions were not legitimate, were it really so. On the contrary, one would expect that any owner affidavit provided would attest to questionable transactions being legitimate.

## **Customer Hardship**

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

## **Corrective Action**

The Appellant contends that it has implemented more cameras within the store to carefully monitor EBT transactions and is keeping more detailed reports of each transaction to prevent any violations.

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 Retailer Operations Division. This review is limited to what circumstances were at the basis of the Retailer Operations Division action at the time such action was made. It is not the

authority of this review to consider what subsequent remedial actions may have been taken so that the store may begin to comply with program requirements. There is no provision in the SNAP regulations or internal agency policy directives for waiver or reduction of an administrative penalty assessment on the basis of after-the-fact corrective action implemented subsequent to investigative findings of program violations. Therefore, the Appellant's contention that it has taken or will take corrective actions, though they would have been valuable towards preventing future program violations, does not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

### **Compliance History**

The Appellant contends that the firm has not been cited for any prior SNAP violations. However, a record of participation in the 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.

Neither the Food and Nutrition Act of 2008, as amended, nor the accompanying regulations 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 extremely serious, even when the exchange of SNAP benefits for cash is dollar-for-dollar or is conducted by a nonmanagerial 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, § 278.6(e)(1)(i) of the SNAP regulations states that FNS must 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.

### **CIVIL MONEY PENALTY**

In the May 19, 2022 charge letter the Appellant was informed by the Retailer Operations Division that, under certain conditions, FNS may impose a civil money penalty (CMP) of up to \$59,000 in lieu of permanent disqualification of a firm for trafficking. Per Section 278.6(i) of the SNAP regulations, four criteria must be met in order to be considered for a trafficking civil money penalty. If requesting a trafficking CMP, an Appellant must meet each of the four criteria listed and provide the documentation as specified within ten days of the Appellant's receipt of their charge letter. As specified in 7 CFR § 278.6(i), in determining the minimum standards of eligibility of a firm for a civil money penalty in lieu of trafficking, the firm shall, at a minimum, establish by substantial evidence its fulfillment of each of the following four criteria:

Criterion 1. The firm shall have developed an effective compliance policy as specified in 7 CFR § 278.6(i)(1);

Criterion 2. The firm shall establish that both its compliance policy and program were in operation at the location where the violations(s) occurred prior to the occurrence of violations cited in the charge letter;

Criterion 3. The firm had developed and instituted an effective personnel training program as specified in 7 CFR § 278.6(i)(2); and

Criterion 4. Firm ownership was not aware of, did not approve, did not benefit from, or was not in any way involved in the conduct or approval of trafficking violations.

In the Appellant's reply to the charge letter and in the request for administrative review, the Appellant, through counsel, requested consideration for a civil money penalty in lieu of permanent disqualification. The Appellant contends that it implemented a legitimate training program for its employees and an effective compliance program to prevent violations of SNAP Section 271.2 and meets the eligibility requirements for a civil money penalty under Section 278.6(e)(1). In support thereof, the Appellant submitted SNAP Training Acknowledgements of three employees and a SNAP Training Log.

The Retailer Operations Division determined that the Appellant was not eligible for a trafficking civil money penalty in lieu of a disqualification under 7 CFR § 278.6(i) because the Appellant failed to submit sufficient evidence to demonstrate that the firm had established and implemented an effective compliance policy and program to prevent SNAP violations. For example:

**5 U.S.C. § 552 (b)(7)(E).**

Of important note is that the SNAP Training Acknowledgements and training log provided for review are the exact same SNAP Training Acknowledgements and training log provided by counsel for four other compliance cases (5 U.S.C. § 552 (b)(7)(E)) recently assigned to this Administrative Review Officer. It is improbable that five different stores with five different owners and located in five different states would have the same SNAP Training Acknowledgements and training logs. As such, it appears that the submitted SNAP Training Acknowledgements and training log was fabricated in an effort to support the Appellant's contentions with regard to SNAP training of employees.

The standards of eligibility for a trafficking CMP are high. They require substantial proof that a compliance policy and program was established and implemented prior to the occurrence of violations. These standards exist to thwart attempts to falsely present compliance policies and programs that were not actually implemented prior to violations. As the Appellant did not provide the required supporting documentation, the Retailer Operations Division's decision not to impose a civil money penalty in lieu of disqualification is sustained as appropriate pursuant to 7 CFR § 278.6(i).

## **CONCLUSION**

The Retailer Operations Division's analysis of the Appellant's EBT transaction record, upon which charges of violations are based, together with observations made during the store visit and an analysis of customer shopping behaviors, provide substantial evidence that questionable transactions during the focus period have characteristics and display patterns that are not consistent with legitimate sales of eligible food to SNAP benefit customers at a store of this type, size and makeup. Rather, the characteristics are indicative of illegal trafficking in program benefits. The Appellant's contentions do not outweigh this evidence.

The record has yielded no indication of error or discrepancy in the reported findings by the Retailer Operations Division that program benefits were accepted in exchange for cash or consideration other than eligible food. Therefore, based on a review of the evidence in this case, it is more likely true than not true that program violations did, in fact, occur as charged. Therefore, the decision to impose a permanent disqualification from participation in the SNAP against Kwik Pantry is sustained.

## **RIGHTS AND REMEDIES**

Your attention is called to Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. 2023) and to Section 279.7 of the Regulations (7 CFR § 279.7) with respect to your right to a judicial review of this determination. Please note that if a judicial review is desired, the Complaint, naming the United States as the defendant, must be filed in the U.S. District Court for the district in which you reside or are engaged



in business, or in any court of record of the State having competent jurisdiction. If any Complaint is filed, it must be filed within thirty (30) days of receipt of this Decision.

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

LORIE L. CONNEEN  
ADMINISTRATIVE REVIEW OFFICER

October 17, 2022