

**Department of Health and Human Services  
DEPARTMENTAL APPEALS BOARD  
Civil Remedies Division**

Center for Tobacco Products,  
(FDA No. FDA-2017-H-3534)

Complainant

v.

Tower Petroleum Corporation  
d/b/a BP,

Respondent.

Docket No. T-17-4665

Decision No. TB2628

Date: April 12, 2018

**INITIAL DECISION**

The Center for Tobacco Products (CTP) seeks to impose a civil money penalty (CMP) against Respondent, Tower Petroleum Corporation d/b/a BP, located at 35025 Harper Avenue, Clinton Township, Michigan 48035, for five violations of the Federal Food, Drug, and Cosmetic Act (Act), 21 U.S.C. § 301 *et seq.*, and its implementing regulations, 21 C.F.R. pt. 1140, within a 36-month period. Specifically, CTP alleges that Respondent violated the Act by impermissibly selling cigarettes to minors, on three separate dates, and failing to verify, by means of photo identification containing a date of birth, that the purchasers were 18 years of age or older, on two of those dates.

**I. BACKGROUND AND PROCEDURAL HISTORY**

CTP began this matter by serving an administrative complaint, seeking a \$5,591 civil money penalty, on Respondent at 35025 Harper Avenue, Clinton Township, Michigan 48035, and by filing a copy of the complaint with the Food and Drug

Administration's (FDA) Division of Dockets Management. Respondent timely answered CTP's complaint denying the violations as alleged.

On July 20, 2017, I issued an Acknowledgment and Pre-Hearing Order setting forth case procedures and exchange deadlines. On October 11, 2017, CTP filed its pre-hearing exchange, which included an Informal Brief of Complainant, and 14 exhibits (CTP Ex. 1-14). The 14 exhibits included the direct testimony, in the form of declarations, for two witnesses – Senior Regulatory Counsel Laurie Sternberg and Inspector Justin Bishop. On October 30, 2017, Respondent filed its pre-hearing exchange, which included an Informal Brief of Respondent (Resp. Informal Brief) and three exhibits (Resp. Ex. 1-3). Respondent did not offer any direct testimony.

On November 28, 2017, I held a pre-hearing conference in this case. I explained to the parties that the sole purpose of an administrative hearing is to afford the parties an opportunity for cross-examination of the witnesses. Respondent communicated its desire to cross-examine Inspector Bishop. On January 10, 2018, I held a hearing in this case. During the course of the hearing, Respondent cross-examined Inspector Bishop, and I admitted each party's exhibits into evidence.

On January 30, 2018, I made the hearing transcript available to the parties and set a March 1, 2018 deadline for the parties to submit their post-hearing briefs. CTP did not file a post-hearing brief. Respondent timely filed its post-hearing brief (Resp. Post-hearing Brief). As the briefing period is over, I now render my decision.

## **II. ISSUES**

- A. Whether Respondent BP sold cigarettes to a minor and failed to verify that the tobacco product purchaser was of sufficient age, on April 6, 2017, in violation of 21 C.F.R. §§ 1140.14(a)(1) and 1140.14(a)(2)(i).
- B. Whether the penalty amount sought by CTP is reasonable.

## **III. ANALYSIS**

### **A. Violations**

CTP determined to impose a civil money penalty against Respondent pursuant to the authority conferred by the Act and implementing regulations at Part 21 of the Code of Federal Regulations. The Act prohibits the misbranding of tobacco products while they are held for sale after shipment in interstate commerce. 21 U.S.C. § 331(k). FDA and its agency, CTP, may seek civil money penalties from any person who violates the Act's requirements as they relate to the sale of

tobacco products. 21 U.S.C. § 331(f)(9). The sale of tobacco products to an individual who is under the age of 18 and the failure to verify the photographic identification of an individual who is not over the age of 26 are violations of implementing regulations. 21 C.F.R. §§ 1140.14(a)(1), (a)(2)(i).

CTP alleges that Respondent committed five violations of the Act and its implementing regulations within a 36-month period. Complaint at 1. Specifically, CTP alleges that, on April 6, 2017, Respondent sold cigarettes to a minor and failed to verify, by means of photo identification containing a date of birth, that the purchaser was 18 years of age or older. *Id.* at 4. The complaint also alleges that Respondent previously admitted to three violations of regulations found at 21 C.F.R. pt. 1140. *Id.* at 4-5. CTP's case against Respondent rests on the testimonies of Ms. Sternberg and Inspector Bishop, and the corroborating evidence.

Inspector Bishop is an FDA-commissioned officer with the state of Michigan whose duties include determining a retailer's compliance with the age and photo identification requirements relating to the sale of tobacco products. CTP Ex. 4 at 1-2. His inspections entail accompanying trained undercover minors who attempt to purchase tobacco products from retail establishments such as the one operated by Respondent. *Id.*

Inspector Bishop testified that on April 6, 2017, he and a minor conducted a follow-up undercover buy compliance check inspection at Respondent's place of business, located at 35025 Harper Avenue, Clinton Township, Michigan 48035. *Id.* at 2. Before the inspection, Inspector Bishop confirmed that the minor possessed his/her true and correct photographic identification and that the minor did not have any tobacco products in his/her possession. *Id.* 2-3.

Inspector Bishop parked his car near Respondent's establishment. He watched the minor enter Respondent's establishment first, and he entered the establishment moments after. *Id.* at 3. He took a position where he had a clear, unobstructed view of the sales counter and the minor. *Id.* Inspector Bishop observed the employee of the establishment sell the minor a package of cigarettes. *Id.* He also observed that prior to the purchase the minor did not present any identification to the employee. *Id.* After the transaction, Inspector Bishop and the minor returned to the vehicle where immediately upon entering, the minor handed the inspector the package of cigarettes. *Id.* Inspector Bishop observed that the package of cigarettes were Marlboro cigarettes. *Id.* Inspector Bishop processed the evidence according to procedure and completed a narrative report. *Id.*

Ms. Sternberg, Senior Regulatory Counsel for CTP's Office of Compliance and Enforcement, testified that the Marlboro brand cigarettes purchased during the

April 6, 2017 inspection, were manufactured or processed for commercial distribution at facilities in Virginia. CTP Ex. 3 at 2-3. The manufacturer of Marlboro brand cigarettes does not have any production facilities in Michigan, where the cigarettes were purchased. *Id.* at 3.

Respondent has denied the allegations arguing that it “did not purposely or intentionally sell tobacco to a minor.” Resp. Post-hearing Brief at 1. Under 21 C.F.R. § 1140.14(a)(1), no retailer may sell cigarettes or smokeless tobacco to any person younger than 18 years of age. A violation of §1140.14(a)(1) only requires that a sale to a minor occurred, and does not take into account a retailer’s intent to determine liability. Here, Respondent does not dispute that a sale to a minor occurred but argues that its clerk “thought the purchaser was at least 27 years old, so she did not think that an ID was necessary.” Under 21 C.F.R. § 1140.14(a)(2)(i), retailers must verify, by means of photographic identification containing a purchaser’s date of birth, that no cigarette or smokeless tobacco purchasers are younger than 18 years of age. This verification is not required for any person over the age of 26. Section 1140.14(a)(2)(i) is purely objective, it does not consider a retailer’s subjective inquiry about the appearance of tobacco product purchasers.

Respondent further argues that “it is unfair to charge a violation for both selling to a minor and failing to ask for ID as if they were two separate incidents.” Resp. Post-hearing Brief at 2. CTP’s method of calculating the number of violations is permissible under the regulations. *See Orton Motor, Inc. d/b/a Orton’s Bagley v. United States Department of Health and Human Services*, No. 16-1299, WL 1386141, (D.C. Cir. Mar. 20, 2018).

Respondent has not offered any evidence or testimony to rebut CTP’s allegations, or refute the sworn testimony of Inspector Bishop and Ms. Sternberg that it sold tobacco products to a minor and failed to verify the minors’ identification on April 6, 2017. As a result, I find that the facts as outlined above establish Respondent Tower Petroleum Corporation d/b/a BP is liable for five (5) violations under the Act.

### **B. Civil Money Penalty**

Pursuant to 21 U.S.C. § 333(f)(9), Respondent Tower Petroleum Corporation d/b/a BP is liable for a civil money penalty not to exceed the amounts listed in FDA’s civil money penalty regulations at 21 C.F.R. § 17.2. In its Complaint, CTP sought to impose the maximum penalty amount, \$5,591, against Respondent for five violations of the Act and its implementing regulations within a 36-month period. Complaint ¶ 1-2.

I find that Respondent committed five violations of the Act and its implementing regulations within a 36-month period. When determining the amount of a civil money penalty, I am required to take into account “the nature, circumstances, extent and gravity of the violations and, with respect to the violator, ability to pay, effect on ability to continue to do business, any history of prior such violations, the degree of culpability, and such other matters as justice may require.” 21 U.S.C. § 333(f)(5)(B).

**a. Nature, Circumstances, Extent and Gravity of the Violations**

I find that Respondent committed three violations of selling tobacco products to minors, and two violations for failing to verify, by means of photo identification containing a date of birth, that the purchasers were 18 years of age or older. The repeated inability of Respondent to comply with federal tobacco regulations is serious in nature and the civil money penalty amount should be set accordingly.

**b. Respondent’s Ability to Pay And Effect on Ability to do Business**

Respondent has stated that the penalty amount is too high. Answer at 2. However, Respondent has not presented any evidence that it does not have the ability to pay the \$5,591 Civil Money Penalty sought by CTP.

**c. History of Prior Violations**

The current action is the second civil money penalty action that CTP has brought against Respondent. On January 10, 2017, CTP initiated a previous CMP action, CRD Docket Number T-17-1305, FDA Docket Number FDA-2016-H-4464, against Respondent for three violations of 21 C.F.R. pt. 1140 within 24-month period. Complaint at 4-5. The previous action concluded when Respondent admitted the allegations contained in the Complaint issued by CTP, and agreed to pay a monetary penalty in settlement of that claim. *Id.* While Respondent has already paid a civil money penalty for its previous violations, its continued inability to comply with the federal tobacco regulations calls for a more severe penalty.

**d. Degree of Culpability**

I find that Respondent committed the five violations as alleged in complaint, and I hold it fully culpable for all five violations of the Act and its implementing regulations.

### e. Additional Mitigating Factors

Respondent has not expressed any remorse for its repeated violations and has suggested that the violations should be directed to its employees, and not the business owner. Resp. Informal Brief at 4. Respondent states “[w]hen an employee violates the law it is the business that suffers and there is nothing that occurs to the person that actually violated the law. Resp. Post-Hearing Brief at 1. Though I understand Respondent cannot be at its business all the time, it is Respondent’s responsibility to assure its employees comply with the law.

It appears Respondent recognizes this responsibility as it conducts employee training and holds weekly meetings to assure employees are aware that they are not to sell tobacco products to minors. Resp. Informal Brief at 2. Respondent also has established procedures to “educate our employee to check ID and card every customer.” Answer at 2. Respondent assured that it will “continue to train my employees to prevent the sale of tobacco to minors, and I will look for new ways to help prevent the sale of tobacco to minors.” Resp. Post-Hearing Brief at 1.

Though Respondent’s attempts to train employees and deter tobacco sales to minor are commendable, they have been ineffective, and I do not find any mitigating factors. Respondent has not provided any evidence that it has implemented new policies for its employees about when to verify the age of tobacco product purchasers. Because this is Respondent’s second CMP action, and Respondent has had ample opportunity to correct its violations and come into compliance, I find that a civil money penalty of \$5,591 is appropriate.

### IV. PENALTY

Based on the foregoing reasoning, I find a penalty amount of \$5,591 to be appropriate under 21 U.S.C. §§ 333(f)(5)(B) and 333(f)(9).

### V. CONCLUSION

Pursuant to 21 C.F.R. § 17.45, I enter judgment in the amount of \$5,591 against Respondent, Tower Petroleum Corporation d/b/a BP, for five violations of the Federal Food, Drug, and Cosmetic Act (Act), 21 U.S.C. § 301 *et seq.*, and its implementing regulations, 21 C.F.R. pt. 1140, within a 36-month period.

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/s/  
Catherine Ravinski  
Administrative Law Judge