

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

Center for Tobacco Products,
(FDA No. FDA-2017-H-3288)

Complainant

v.

Rohan Petroleum, Inc.
d/b/a Tiger Mart / Exxon,

Respondent.

Docket No. T-17-4435

Decision No. TB3034

Date: August 24, 2018

INITIAL DECISION

The Center for Tobacco Products (CTP) seeks to impose a civil money penalty (CMP) against Respondent, Rohan Petroleum, Inc. d/b/a Tiger Mart / Exxon, located at 2244 Sarno Road, Melbourne, Florida 32935, 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 and/or smokeless tobacco 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 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 2244 Sarno Road, Melbourne, Florida 32935, 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 11, 2017, I issued an Acknowledgment and Pre-Hearing Order setting forth case procedures and exchange deadlines. On August 27, 2017, Respondent filed its pre-hearing exchange, which included an employee written statement, various policy documents, and multiple photographs. Respondent did not offer any written direct testimony, in accordance with the regulations at 21 C.F.R. §§ 17.25(a) and 17.37(b), by its exchange due date. Likewise, Respondent did not submit any exhibits by its exchange due date. On September 29, 2017, CTP filed its pre-hearing exchange, which included an Informal Brief of Complainant, and 14 exhibits (CTP Exhibits (Exs.) 1-14). The 14 exhibits included the direct testimony, in the form of declarations, for two witnesses – Senior Regulatory Counsel Laurie Sternberg and Inspector Christopher Castiello.

On November 30, 2017, I held a pre-hearing conference in this case. I explained to the parties that the sole purpose of an administrative hearing was to afford the parties an opportunity for cross-examination of the witnesses. Respondent communicated its desire to cross-examine Inspector Castiello. On April 12, 2018, I held a hearing in this case. During the course of the hearing, I admitted CTP's exhibits into evidence, and Respondent cross-examined Inspector Castiello.

On May 15, 2018, the hearing transcript was made available to the parties. On May 16, 2018, I issued an Order that set a June 14, 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 Tiger Mart / Exxon sold cigarettes to a minor and failed to verify that the cigarette purchaser was of sufficient age, on February 27, 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 (CMP) 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 February 27, 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 ¶ 9. The complaint also alleges that Respondent previously admitted to three violations¹ of regulations found at 21 C.F.R. pt. 1140. *Id.* at ¶ 11. CTP's case against Respondent rests on the written declaration of Ms. Sternberg, the written declaration and hearing testimony of Inspector Castiello, and the corroborating evidence.

During the relevant period, Inspector Castiello was an FDA-commissioned officer with the State of Florida whose duties included 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 entailed accompanying trained undercover minors who attempted to purchase tobacco products from retail establishments such as the one operated by Respondent. *Id.* at 2.

Inspector Castiello testified that on February 27, 2017, he and an undercover minor (Minor A) conducted a follow-up undercover buy (UB) compliance check inspection at Respondent's place of business, located at 2244 Sarno Road, Melbourne, Florida 32935. CTP Ex. 4 at 2. Before the inspection, Inspector Castiello confirmed that Minor A possessed his/her true and correct photographic identification and that Minor A did not have any tobacco products in his/her possession. *Id.*

Inspector Castiello also testified that he parked his car near Respondent's establishment. He accompanied Minor A into Respondent's establishment. *Id.* at 3; *see also* Hearing Transcript (Tr.) at 13. Inspector Castiello took a position where he had a clear, unobstructed view of the sales counter and Minor A. *Id.* He

¹ Two violations were documented on October 9, 2015, and two on June 5, 2016. In accordance with customary practice, CTP counted the violations at the initial inspection as a single violation, and all subsequent violations as separate individual violations.

observed the employee of the establishment sell Minor A a package of cigarettes. *Id.* He also observed that prior to the purchase Minor A did not present any identification to the employee. CTP Ex. 4, at 3. After the transaction, Inspector Castiello and Minor A returned to the vehicle where immediately upon entering, Minor A handed the inspector the package of cigarettes. *Id.*; Tr. at 13-14. Inspector Castiello observed that the package of cigarettes were Newport cigarettes. CTP Ex. 4, at 3. After driving to a safe location, Inspector Castiello processed the evidence according to procedure and completed a narrative report. *Id.*

In her written direct testimony, Ms. Sternberg, Senior Regulatory Counsel for CTP's Office of Compliance and Enforcement, testified that the Newport brand cigarettes purchased during the February 27, 2017 inspection, were manufactured or processed for commercial distribution at facilities in North Carolina. CTP Ex. 3, at 3. The manufacturer of Newport brand cigarettes does not have any production facilities in Florida, where the cigarettes were purchased. *Id.*

Respondent does not dispute that a sale to a minor occurred, but asserts that different employees were involved during each violation. Answer at 1; Resp. Post-hearing Brief at 1. Concerning the sale of cigarettes and smokeless tobacco, Respondent states that according to its employees "they had not sold [to] any minor." Answer at 1. However, Respondent concedes that its employees did sell cigarettes to a minor by stating "I had try (sic) to saw (sic) the video and try (sic) to convince there (sic) mistake, they left the job, fired." *Id.* 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 section 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.

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. Respondent does not address whether its employees verified the purchaser's age. However, Respondent does assert that it trains each employee to check the identification of cigarette or tobacco product purchasers. Answer at 2. Section 1140.14(a)(2)(i) is purely objective and does not consider a retailer's training program or the effectiveness of the training.

Respondent has not offered any evidence or testimony to rebut CTP's allegations, or refute the sworn declarations and testimony of Inspector Castiello and Ms. Sternberg; specifically, that it sold cigarettes or smokeless tobacco to a minor and failed to verify the minor's identification on February 27, 2017. As a result, I find

that the facts as outlined above establish Respondent Rohan Petroleum, Inc. d/b/a Tiger Mart / Exxon is liable for five violations under the Act within a 36-month period.

B. Civil Money Penalty

Pursuant to 21 U.S.C. § 333(f)(9), Respondent Rohan Petroleum, Inc. d/b/a Tiger Mart / Exxon 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 at ¶ 1.

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 a total of five violations of selling tobacco products to minors, and 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. Nor has Respondent presented evidence that the penalty will affect the Respondent's the ability to continue to do business.

c. History of Prior Violations

The current action is the second civil money penalty action that CTP has brought against Respondent. On January 3, 2017, CTP initiated a previous CMP action, CRD Docket Number T-17-1320, FDA Docket Number FDA-2016-H-4478, against Respondent for three violations of 21 C.F.R. pt. 1140 within a 24-month period. Complaint at ¶ 11. The previous action concluded when Respondent admitted the allegations contained in the Complaint issued by CTP, and paid the agreed upon monetary penalty in settlement of that claim. *Id.* at ¶ 12. 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

Although it appears Respondent recognizes that it bears some responsibility for training its employees that they are not to sell tobacco products to minors, Respondent has not expressed any remorse for its repeated violations and has suggested that responsibility for the violations should be directed to its employees, and not the business owner. Answer at 1-2. Resp. Post-hearing Brief at 1. Respondent asserts that before hiring an employee, it trains the candidates for employment of the importance of checking identification and that there are store policies about selling cigarettes and tobacco products. Respondent also asserts that each employee is required to watch an FDA video related to sales of tobacco products and a video distributed by the Florida Petroleum Marketers Association that includes content on tobacco sales. Answer at 2. Further, Respondent asserts that “As Business owner, we had provided all training, procedure to identify proper driver (sic) license, tool to check birthday, decal to check ID date, swipe system in register, signs NO ID No Sales Tobacco/Beer Sale . . .” Resp. Post-hearing Brief at 1-2.

Though Respondent’s attempts to train employees and deter tobacco sales to minors 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, Rohan Petroleum, Inc. d/b/a Tiger Mart / Exxon, 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.

/s/
Wallace Hubbard
Administrative Law Judge