

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Center for Tobacco Products,

Complainant

v.

Dyna Computer Center and Investment, Inc.
d/b/a Marathon,

Respondent.

Docket No. T-16-438
FDA Docket No. FDA-2016-H-0813

Decision No. TB1370

Date: May 30, 2017

INITIAL DECISION

The Center for Tobacco Products (“CTP”) seeks to impose a civil money penalty (“CMP”) of \$500 against Respondent, Dyna Computer Center and Investment, Inc. d/b/a Marathon located at 4403 North Armenia Avenue, Tampa, Florida 33603 for three 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. Specifically, CTP alleges Respondent violated the Act by impermissibly 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.

I. Procedural History

CTP began this matter on May 18, 2016, by serving an administrative complaint on Respondent, at 4403 North Armenia Avenue, Tampa, Florida 33603 as provided for in 21 C.F.R. §§ 17.5 and 17.7. (“Complaint”). Respondent timely answered the Complaint on June 14, 2016. CTP forwarded Respondent’s Answer to the Departmental Appeals Board on June 23, 2017. In its answer, Respondent admitted the allegations. (“Respondent’s Answer”). On July 1, 2016, I issued an Acknowledgement and Prehearing Order that set deadlines for the parties to file their pre-hearing exchanges. On July 27, 2016, the parties filed a Joint Status Report to inform me that their attempt to settle the matter was unsuccessful. Respondent filed its pre-hearing exchange on July 29, 2016. Respondent’s exchange consisted of a brief that is identified as Respondent’s Brief.

On September 6, 2016 CTP filed a Motion to Compel Discovery and Motion to Extend Prehearing Deadlines. I allowed Respondent until September 29, 2016 to file an objection to the Motion to Compel and temporarily suspended the prehearing deadlines. Respondent failed to file an objection by September 29, 2016. On October 17, 2016 I granted CTP’s Motion to Compel ordering Respondent to reply to CTP’s document request by November 1, 2016. I also extended the pre-hearing deadlines. On November 3, 2016 Respondent submitted a letter indicating that it did not have any of the documents requested by CTP. On November 14, 2016 CTP filed another Motion to Extend Prehearing Deadlines which I granted on November 15, 2016. CTP filed its pre-hearing exchange on December 15, 2016. CTP’s exchange consists of a brief and twenty-nine proposed exhibits that are identified as CTP Ex. 1- CTP Ex. 29.

On January 24, 2017, I scheduled this matter for a pre-hearing conference. The prehearing conference was held as scheduled on February 9, 2017 at 10:00 a.m. Eastern Time. During the conference, the Respondent had a family member join him on the call for the purpose of translating the conversation into Arabic. I offered to reschedule the conference and explained that the Departmental Appeals Board would provide professional translation services in Arabic to the Respondent at no cost to him. The Respondent waived his right to translation services and communicated through his family member that he wished to proceed with the pre-hearing conference call as scheduled.

The parties agreed that an administrative hearing was not required in this case and consented to a decision based on the administrative record. On March 9, 2017, both parties submitted final statements for my consideration. (“Complainant’s Additional Statement” and “Respondent’s Letter”). Accordingly, I am issuing a decision on the record in this case. I receive CTP’s Informal Brief, CTP Ex. 1-

CTP Ex. 29, and Complainant's Additional Statement into the record. I also receive Respondent's Answer, Respondent's Brief, and Respondent's Letter into the record.

II. Analysis

A. Issues

The issues presented are:

1. Whether Respondent sold tobacco products to minors, in violation of 21 C.F.R. § 1140.14(a), and failed to verify the age of tobacco products purchasers, in violation of 21 C.F.R. § 1140.14(b)(1), as alleged in the Complaint;
2. Whether a civil money penalty in the amount of \$500, for three violations within a twenty-four month period, is appropriate under 21 C.F.R. § 17.2.

B. Findings of Fact and Conclusions of Law

There is no dispute in this case that Respondent does business as Marathon, located at 4403 North Armenia Avenue, Tampa, Florida 33603. Respondent's business includes the sale of tobacco products to the general public.

a. Violations

CTP determined to impose a civil money penalty against Respondent pursuant to the authority conferred by the Federal Food, Drug, and Cosmetic Act (Act) and implementing regulations at Part 21 of the Code of Federal Regulations (C.F.R.). 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), (b)(1).

There is no dispute that Respondent offers tobacco products for sale to the public. At issue in this case is whether Respondent unlawfully: sold tobacco products to minors; and failed to check the identification of minor purchasers of tobacco products.

CTP alleges that on December 29, 2014, at approximately 10:35 p.m., a person under the age of 18 years of age was able to purchase a package of Kodiak smokeless tobacco and that Respondent failed to check the minor's identification on that date in violation of 21 C.F.R. § 1140.14(a) and § 1140.14(b)(1). Complaint at 10. CTP also alleges that on November 12, 2015, at approximately 8:53 p.m., a person under the age of 18 year of age was able to purchase a package of 305's Menthol Kings cigarettes and that Respondent failed to check the minor's identification on that date in violation of 21 C.F.R. § 1140.14(a) and § 1140.14(b)(1). Complaint at 8.

To support the December 29, 2014 allegations, CTP submitted evidence including the declaration of Inspector Shaun Griffin, the inspector's narrative report of the alleged incident, and four photographs of the Kodiak Premium Wintergreen Smokeless tobacco product allegedly purchased on December 29, 2014. CTP Exs. 3, 5-8, and 25. CTP also submitted Respondent's response to the Warning Letter notifying Respondent of the December 29, 2014 violation. CTP Ex. 10.

In his declaration, Inspector Griffin states that he accompanied a minor to Respondent's facility on December 29, 2014. CTP Ex. 25 at 1-2. Inspector Griffin states that before the inspection began he confirmed that the minor had photographic identification but did not have any tobacco products before entering the store. *Id.* Inspector Griffin states that he did not accompany the minor into the store because he felt his "presence would compromise the undercover nature of the inspection." *Id.* Inspector Griffin states that after the minor exited the store, they returned to Inspector Griffin's vehicle where the minor "immediately handed me the package of smokeless tobacco. I observed that the package of smokeless tobacco was Kodiak...I labeled the smokeless tobacco as evidence and photographed all of the panels of the package." *Id.*

In a warning letter dated February 5, 2015, CTP informed Respondent of Inspector Griffin's documented violations, and that such actions violate federal law, 21 C.F.R. §§ 1140.14(a) and (b)(1). CTP Ex. 9. In response to the February 5, 2015 warning letter, Respondent admitted the December 29, 2014 violation. Respondent states, "[w]e deeply regret that the mentioned incident took place in our store...This retailer was on the probation period and he is no longer one of the staff." CTP Ex. 10.

To support the November 12, 2015 allegations, CTP submitted evidence including the declaration of Inspector Timothy Pulliam, the inspector's narrative report of the alleged incident, and five photographs of the 305's Menthol Kings Cigarettes allegedly purchased on November 12, 2015. CTP Exs. 15-20, and 26.

In his declaration, Inspector Pulliam states that he accompanied a minor to Respondent's facility on November 12, 2015. CTP Ex. 26 at 2-3. Inspector Pulliam states that before the inspection began he confirmed that the minor had photographic identification but did not have any tobacco products in his possession before entering the store. *Id.* Inspector Pulliam states that he watched the minor enter the store but remained outside where he had an "unobstructed view of the sales counter and Minor. . . [.]” *Id.* Inspector Pulliam states that he observed the minor purchase a package of cigarettes from an employee at Respondent's establishment without presenting any identification to the employee. *Id.* Inspector Pulliam states that after the minor exited the store, they returned to Inspector Pulliam's vehicle where the minor "immediately handed me the package of cigarettes. I observed that the package of cigarettes were 305's cigarettes. I labeled the cigarettes as evidence and photographed all of the panels of the package.” *Id.*

On its face this evidence is more than sufficient to prove that Respondent violated the law on December 29, 2014 and November 12, 2015. In fact, Respondent admitted to the December 29, 2014 violations in their response to CTP's February 5, 2015 warning letter. *See*, CTP Ex. 10. Respondent also admitted to the November 12, 2015 violations. Respondent's Answer (Respondent selected the option labeled "I admit all of the allegations"). As a defense, Respondent asserted that its employees and not the president were responsible for the violations. *See* Respondent's Answer. In its brief, Respondent does not explicitly admit nor deny the violations and instead states "I am not sure 100% that these two incidents happen[ed] at my store.” Respondent's Brief at 3. While Respondent's Brief may be an attempt to deny the allegations, Respondent does not offer any evidence to rebut the allegations. Respondent's failure to offer any rebuttal evidence considered in conjunction with its previous admission of the violations and CTPs evidence; leads me to conclude that the facts as outlined above establish Respondent Dyna Computer Center and Investment, Inc. d/b/a Marathon's liability under the Act.

b. Civil Money Penalty

CTP proposes to impose a civil money penalty of \$500 based on the fact that Respondent committed three violations of law in the period commencing

December 29, 2014, and running through November 12, 2015. The proposed penalty is the maximum allowed by law. 21 C.F.R. § 17.2.

Respondent has repeatedly expressed its belief that the civil money penalty amount sought is too high. *See* Respondent's Answer; Respondent's Brief; and Respondent's March 9, 2017 Letter. Respondent argues that "[t]he complaint mentioned 2 incidents only. The 1st one dated December 29, 2014. The second one dated November 12, 2015. According to the attached schedule, 2 incidents are not entitled for \$500 penalty." Respondent's Answer at 2.

To be clear, failure to check identification is a separate violation from an unlawful sale. CTP alleges that Respondent sold tobacco products and failed to check the purchaser's identification on December 29, 2014 and again on November 12, 2015. In accordance with customary practice, CTP counted the violations at the initial inspection on December 29, 2014 as a single violation, and all subsequent violations as separate individual violations. Additionally, an appellate panel of the Departmental Appeals Board upheld CTP's counting practice in *Orton Motor Company, d/b/a Orton's Bagley*, DAB 2717, at 24 (2016). I do so here as well and find that Respondent committed three violations.

Respondent also argues that the penalty should be assessed against the store clerk who committed the violations and not the store owner. *See* Respondent's Answer; Respondent's Brief; and Respondent's Letter. Respondent states, "[t]he blame is supposed to be officially against the clerk not the company owning the store specially that the company and the management did and still doing whatever it takes to apply the state statutes concerning this critical issue." Respondent's Letter.

Federal tobacco regulations specifically place the responsibility to uphold the law on the retailer. "Each manufacturer, distributor, and retailer is responsible for ensuring that the cigarettes or smokeless tobacco it manufactures, labels, advertises, packages, distributes, sells, or otherwise holds for sale comply with all applicable requirements under this part." 21 C.F.R. § 1140.10; *United States v. Dotterweich*, 320 U.S. 277, 281-285 (1943) (holding the only way in which a corporation can act is through the individuals who act on its behalf).

Although Respondent states it has placed signs reminding its employees and customers that identification is required to purchase tobacco products, informed its employees to check all identification, and enabled them to do so using the cash register; its employees continue to violate the law. Furthermore, Respondent does not appear to appreciate the seriousness of the violations. In its Answer, Respondent states, "[w]e are (the store) is a busy residential area. People come to this store many times a day. We cannot check their ID every single visit."

Respondent's Brief at 6. The civil money penalty sought is meant to deter retailers from selling highly addictive and extremely harmful products to minors and retailers should take every measure to ensure these violations do not occur. Respondent's repeated sale of tobacco products to a minors and failure to verify the age of tobacco products purchasers, in violation of law, creates the risk of serious harm. Thus, I have no choice but to sustain the penalty amount sought by CTP. In sustaining the penalty I have considered whether Respondent lacks the financial wherewithal to pay a civil money penalty of \$500. Respondent has offered no evidence to show that it is incapable of doing so. In light of that, there is no basis for me to mitigate the penalty amount.

Order

For these reasons, I enter judgment in the amount of \$500 against Respondent Dyna Computer Center and Investment, Inc. d/b/a Marathon.

/s/
Margaret G. Brakebusch
Administrative Law Judge