

**Department of Health and Human Services**

**DEPARTMENTAL APPEALS BOARD**

**Civil Remedies Division**

Center for Tobacco Products,

Complainant

v.

J. Peaceful, L.C.  
d/b/a Town Market,

Respondent.

Docket No. C-15-2711  
FDA Docket No. FDA-2015-H-1881

Decision No. CR4614

Date: May 24, 2016

**INITIAL DECISION**

I sustain the determination of the Center for Tobacco Products (CTP) of the United States Food and Drug Administration (FDA) to impose a civil money penalty of \$250 against Respondent, J. Peaceful, L.C. d/b/a Town Market.

**I. Background**

Respondent requested a hearing in order to challenge CTP's determination to impose a \$250 civil money penalty against it. I held a hearing by telephone on February 18, 2016. At the hearing I received exhibits into evidence from CTP that are identified as CTP Ex. 1-CTP Ex. 16. I heard the cross-examination testimony of James Naso, an inspector working on behalf of CTP. Respondent offered no exhibits.

CTP filed a brief in support of its position. Respondent filed a pre-hearing brief and a post-hearing brief.

## **II. Issues, Findings of Fact and Conclusions of Law**

### **A. Issues**

The issues are whether Respondent violated regulations governing the sale of tobacco products to minors and whether a civil money penalty of \$250 is reasonable.

### **B. Findings of Fact and Conclusions of Law**

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 sells tobacco products to members of the public. What is in dispute in this case is whether Respondent sold tobacco products to a minor in violation of applicable regulations.

An agent, James Naso, working on behalf of CTP, inspected Respondent's establishment on September 24, 2014 and January 29, 2015. On both occasions Mr. Naso was accompanied by a minor who worked under his supervision. CTP Ex. 1 at 2. On each of these occasions, Mr. Naso verified that the minor did not have cigarettes in her possession prior to entering Respondent's establishment. *Id.* at 3, 4. On September 24 Mr. Naso entered the establishment and personally observed the minor purchase a package of cigarettes from an employee. He observed also that the employee did not check the minor's identification. *Id.* at 3.

On January 29, 2015, Mr. Naso waited outside while the minor entered the store. She subsequently exited the store and advised him that she had purchased a package of cigarettes from an employee. The minor provided Mr. Naso with a package of Marlboro Gold Pack cigarettes, which Mr. Naso labeled and photographed. CTP Ex. 1 at 4; CTP Ex. 13.

I find this evidence to be more than sufficient to prove that Respondent sold tobacco products (cigarettes) unlawfully to a minor on two occasions, September 24, 2014 and January 29, 2015, and that on one occasion (September 24) Respondent unlawfully failed to check a minor's identification before selling tobacco products to that individual. I find Mr. Naso's observations of the September 24 transaction to be reliable. I am also persuaded by the fact that the minor exited the store on January 29, 2015 with a package of Marlboro Gold Pack Cigarettes to be persuasive evidence that she purchased them in the store, given that Mr. Naso verified that the minor did not have tobacco products in her possession prior to entering the store.

Respondent offered no evidence on its behalf but it challenged the credibility of Mr. Naso's testimony and the other evidence offered by CTP. I do not find that Respondent successfully rebutted the evidence that CTP offered.

Respondent argues, first, that any testimony offered by the minor – and the accounts that she gave to Mr. Naso of her experiences inside Respondent's establishment are hearsay and unreliable. I agree with Respondent that the minor's statements are hearsay and not necessarily reliable. But, in this case, CTP produced independent proof of Respondent's violations in the form of Mr. Naso's observations of the September 24 transaction and the package of Marlboro Gold Pack Cigarettes that the minor obtained on January 29. Indeed, CTP's case does not depend on anything that the minor said, but rather, on Mr. Naso's observations, which are not hearsay, and on the physical evidence obtained on January 29, 2015.

Respondent also argues that CTP rested its entire case on the credibility of the minor purchaser. That is incorrect. As I have discussed, the minor's credibility is not at issue here because CTP relies on evidence that is independent of anything that the minor said to Mr. Naso.

Respondent argues also that the minor's failure to obtain receipts for her purchases on September 24, 2014 and January 29, 2015 undercut CTP's case. Certainly, receipts would be dispositive proof that transactions occurred on the two dates. But, Mr. Naso's observations and the physical evidence that was obtained on January 29, 2015 are, in and of themselves, adequate to prove CTP's case. The absence of receipts doesn't derogate from that evidence. Moreover, Mr. Naso explained that it was policy not to request a receipt if one isn't offered. Tr. at 17.

Respondent has not argued that it is incapable of paying a civil money penalty of \$250. The penalty amount is authorized by regulations. 21 C.F.R. § 17.2. I agree with CTP's characterization of the penalty amount as "nominal." Informal Brief of Complainant at 10. Tobacco products are highly addictive and extremely

harmful. Respondent's repeated sale of tobacco products to a minor, in violation of law, creates the risk of serious harm.

\_\_\_\_\_  
/s/  
Steven T. Kessel  
Administrative Law Judge