

**Department of Health and Human Services**

**DEPARTMENTAL APPEALS BOARD**

**Civil Remedies Division**

Center for Tobacco Products,

Complainant

v.

Joy and Evergreen Petro, Inc.  
d/b/a Sunoco,

Respondent.

Docket No. C-15-2362  
FDA Docket No. FDA-2015-H-1536

Decision No. CR4698

Date: September 6, 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 \$11,000 against Respondent, Joy and Evergreen Petro, Inc.

**I. Background**

Respondent requested a hearing in order to challenge CTP's determination to impose an \$11,000 civil money penalty against it. CTP filed a brief plus seven proposed exhibits that are identified as CTP Ex. 1- CTP Ex. 7. It also filed a stipulation in which it averred that it did not contest Respondent's assertions concerning its business income. Respondent filed a brief plus five proposed

exhibits that are identified as Respondent's Exhibit 1-Respondent's Ex. 4; and Respondent's Exhibit 7.<sup>1</sup>

I scheduled an in-person hearing so that the parties would have the opportunity to cross-examine each other's witnesses. Neither CTP nor Respondent indicated a desire to conduct cross-examination. Therefore, I canceled the hearing but allowed the parties an opportunity to file written objections to proposed exhibits. Neither party filed objections.

I receive the parties' proposed exhibits and stipulation into evidence and decide this case based on their written exchanges.

## **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 \$ 11,000 is reasonable.

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

There is no dispute in this case that Respondent is a business that sells tobacco products to the general public.

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).

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<sup>1</sup> Respondent initially filed a total of eight exhibits. Three of these exhibits (Respondent's Exhibits 5, 6 and 8) consisted of excerpts from federal income tax returns. These exhibits were made unnecessary because CTP stipulated as to Respondent's business income. Therefore, I ordered them returned to Respondent.

The alleged violations that are at issue here are not the first instance in which Respondent was charged with violating law and regulations concerning the sale of tobacco products. CTP filed a previous administrative complaint against Respondent on September 9, 2014, alleging that Respondent: on March 29, 2014 unlawfully sold tobacco products to a minor and failed to verify the minor purchaser's age by means of photographic identification; and on April 9, 2014 unlawfully sold single cigarettes to customers. In that complaint CTP alleged additionally that on October 19, 2013 Respondent also had unlawfully sold cigarettes to a minor and failed to verify the minor's age by means of photographic identification. CTP Ex. 1. These previous allegations of noncompliance are administratively final and are not subject to challenge by Respondent. On October 8, 2014, Respondent's attorney signed an acknowledgment in which Respondent admitted to the allegations in the September 9, 2014 complaint and waived the right to challenge these allegations.

What are at issue here are two additional alleged violations by Respondent that allegedly occurred on January 10, 2015. CTP alleges that, on that date Respondent unlawfully sold cigarettes to a minor and failed to verify the minor's age through photographic identification, in violation of 21 C.F.R. § 1140.14(a) and (b)(1).

CTP offered uncontroverted proof that Respondent violated the law as is alleged. That proof consists of the sworn testimony of Timothy Shafto, an FDA-commissioned officer charged with inspecting retail establishments for possible unlawful sales of tobacco products, as well as corroborating photographs. CTP Ex. 4. Mr. Shafto testified that, on January 10, 2015, he went to Respondent's place of business in the company of a minor. *Id.* at 2. He verified that the minor had photographic identification in her possession and did not possess any tobacco products. *Id.* He entered Respondent's business with the minor and then witnessed an employee of the business sell the minor a package of cigarettes without checking the minor's identification. *Id.* at 3. Mr. Shafto took possession of the package of cigarettes, labeled them with an identification number and the date and time of purchase, and made photographs of the package. *Id.* at 3, 9-10.

I find CTP's evidence to be conclusive proof of an unlawful sale by Respondent of tobacco products to a minor and failure to check identification. Respondent offered no evidence to rebut CTP's evidence. Respondent asserted only that it is in position to affirm or deny the evidence offered by CTP.

CTP proposes to impose a civil money penalty of \$11,000 based on the fact that Respondent committed six violations of law in the period commencing October 19, 2013 and running through January 10, 2015. The proposed penalty is the maximum allowed by law. 21 C.F.R. § 17.2.

I find that the evidence amply justifies the penalty sought by CTP. Respondent is not only a repeat offender but it has on multiple occasions sold a dangerously addictive product to minors, individuals who are among the most vulnerable in our society. It has done so in the face of repeated warnings by CTP of the adverse consequences of unlawful sales of tobacco products and in the face of findings of prior violations of law.

Respondent contends that it lacks the financial wherewithal to pay a civil money penalty of \$11,000, going so far as to contend that a penalty in that amount would effectively put it out of business. As support for this assertion Respondent contends that its ordinary business income in 2013 was only [REDACTED], reduced further to [REDACTED] in 2014. CTP stipulated to these amounts and I accept them as accurate.

However, I find that the evidence offered by Respondent is insufficient to prove that it lacks the wherewithal to pay an \$11,000 civil money penalty. Respondent's business income is not irrelevant to the issue of its ability to pay a penalty. But, it is inadequate; standing by itself, to prove that Respondent is incapable of paying the penalty that is at issue here. Respondent has provided no evidence as to its assets – no proof as to its cash reserves, its creditworthiness, or other potential sources of capital – all of which are highly relevant to the issue of ability to pay a penalty.

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Steven T. Kessel  
Administrative Law Judge