

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Center for Tobacco Products,
(FDA No. FDA-2018-H-1326)

Complainant

v.

R and R Family, Inc.
d/b/a Riverfront Liquor Shoppe,

Respondent.

Docket No. T-18-1799

Decision No. TB3482

Date: January 28, 2019

INITIAL DECISION

I sustain in part the determination of the Center for Tobacco Products (CTP) of the United States Food and Drug Administration (FDA) to impose a civil money penalty against Respondent, R and R Family, Inc. d/b/a Riverfront Liquor Shoppe, 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, Respondent violated the Act by impermissibly selling cigarettes to minors on May 2, 2015, May 11, 2016, and March 11, 2018. On the same dates, Respondent also violated the requirement that retailers verify, by means of photo identification containing the bearer's date of birth, that no cigarette purchaser is younger than 18 years of age. However, I conclude that reducing the civil money penalty from \$5,591 to \$1,118 is appropriate.

I. Background

CTP began this matter by serving an administrative complaint seeking a \$5,591 civil money penalty on Respondent, at 25110 Grand River Avenue, Redford, Michigan 48240, and by filing a copy of the complaint with the FDA Division of Dockets Management. Respondent timely answered CTP's complaint, denying the allegations.

The parties filed pre-hearing exchanges and exhibits. CTP filed a pre-hearing brief (CTP Br.) and 14 exhibits (CTP Exs. 1-14), including the written direct testimony of two witnesses (CTP Exs. 4, 6). Respondent filed a pre-hearing brief (R. Br.; *see* electronic case filing (ECF) 7), and two exhibits I identify as R. Ex. A (*see* ECF 3a), and R. Ex. B (*see* ECF 9a).¹ Following my extension of the pre-hearing exchange schedule, Respondent filed nine exhibits² (R. Exs. 1-9; *see* ECF 14-14h), including the written direct testimony of two witnesses (R. Exs. 1, 9).

On September 13, 2018, I conducted a hearing for the purpose of cross-examination and for the admission of the parties' proffered exhibits. During the hearing, I received into evidence CTP Exs. 1-14 absent objection (Tr. at 13), R. Exs. 1-9 over objection (Tr. at 22), and R. Exs. A-B (Tr. at 53) absent objection. *See* Tr. at 6-22, 53 (identifying exhibits, addressing objections, and ruling on admission).³ Respondent cross-examined CTP's witness, Justin Bishop, an FDA-commissioned inspector. CTP cross-examined Respondent's witness, Rafid Jammaa, owner of Respondent's establishment, and Jalal Kattoula, manager of Respondent's establishment. The parties filed post-hearing briefs (CTP Post-Hrg. Br.; R. Post-Hrg. Br.).

II. Issues

- (1) Whether Respondent sold cigarettes to a minor and failed to verify the age of the purchaser by means of photographic identification containing the bearer's date of birth on March 11, 2018, in violation of 21 C.F.R. § 1140.14(a)(1) and (a)(2)(i); and if so,

¹ The hearing transcript erroneously identified the exhibit at ECF 9a as "Respondent Exhibit D." Transcript (Tr.) at 11. I correct line nine of the transcript to read as follows: "that as Respondent Exhibit B." Tr. at 11. I note that page 25 of the transcript correctly identifies ECF 9a as Respondent's Exhibit B.

² Respondent submitted a document titled "Informal Brief of Respondent," which contained the sworn written direct testimony of Rafid Jammaa. I identified and admitted this submission as Respondent's Exhibit 9. *See* Tr. at 17-22.

³ In discussions of Respondent's written declaration, the transcript erroneously transcribed "misstatement" rather than "statement." Tr. at 20. I correct line two of the transcript to read as follows: "presented, and you also included the statement to." Tr. at 20.

- (2) Whether the civil money penalty amount of \$5,591 that CTP seeks is appropriate.

III. Analysis, Findings of Fact, and Conclusions of Law

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 is a violation of implementing regulations. 21 C.F.R. § 1140.14(a)(1). The failure to verify, by means of photo identification containing the bearer's date of birth, that no cigarette purchaser is younger than 18 years of age is also a violation of implementing regulations. 21 C.F.R. § 1140.14(a)(2)(i).

Prior violations

This is the second civil money penalty action against Respondent. Complaint at 4; CTP Ex. 2. The prior complaint charged Respondent with:

- (1) Selling cigarettes to a minor on May 2, 2015, and May 11, 2016, in violation of 21 C.F.R. § 1140.14(a)(1); and
- (2) Failing to verify the age of the purchaser by means of photographic identification on the same dates, in violation of 21 C.F.R. § 1140.14(a)(2)(i).

CTP Ex. 2; Complaint at 4. The previous action resulted in settlement and concluded after Respondent admitted to three violations⁴ of regulations and paid the agreed upon penalty. Complaint at 4; CTP Ex. 3. In settling the prior complaint, Respondent expressly waived its right to contest these violations in subsequent actions. CTP Ex. 3. These violations are now administratively final.

⁴ In accordance with FDA guidance, CTP counted the violations observed at the initial inspection as a single violation, and the violations observed at subsequent inspections as separate individual violations. See *Orton Motor, Inc. d/b/a Orton's Bagley v. U.S. Dep't of Health & Human Servs.*, No. 16-1299 (D.C. Cir. Mar. 20, 2018).

Current violations at issue

I now turn to whether the remaining allegations in the complaint are true, and, if so, whether Respondent's actions constitute a violation of law. 21 C.F.R. § 17.45(b).

Specifically, I must determine whether on March 11, 2018, at approximately 4:08 PM, Respondent:

- (1) Sold cigarettes to a minor in violation of 21 C.F.R. § 1140.14(a)(1); and
- (2) Failed to verify the age of the purchaser by means of photographic identification containing the bearer's date of birth, in violation of 21 C.F.R. § 1140.14(a)(2)(i).

CTP has the burden to prove Respondent's liability by a preponderance of the evidence. 21 C.F.R. § 17.33(b). It is Respondent's burden to prove any affirmative defenses also by a preponderance of the evidence. 21 C.F.R. § 17.33(c). As I detail below, I find that based on the evidence of record, it is more likely than not that Respondent sold cigarettes to a minor and failed to verify photographic identification of the purchaser on March 11, 2018, in violation of 21 C.F.R. § 1140.14(a)(1) and (a)(2)(i).

CTP asserts that on March 11, 2018, at approximately 4:08 PM, Respondent sold cigarettes to a minor and failed to verify the age of the purchaser by means of photographic identification containing the bearer's date of birth. Complaint at 3.

CTP's case against Respondent rests on the testimony of Inspector Bishop supported by corroborating evidence including contemporaneous notes and photographs. CTP Exs. 4-11. Inspector Bishop is an FDA-commissioned officer for the state of Michigan whose duties include determining whether retail outlets unlawfully sell tobacco products to minors or fail to comply with the photo identification requirements relating to the sale of tobacco products. CTP Ex. 6 at 1-2. Inspector Bishop's inspections entail accompanying and providing direct field oversight to minors who attempt to purchase tobacco products from retail establishments such as the one operated by Respondent. *Id.* Inspector Bishop testified that he conducted such an inspection of Respondent's establishment on March 11, 2018, at approximately 4:08 PM. CTP Ex. 6 at 2-3.

Inspector Bishop testified that on March 11, 2018, he went to Respondent's establishment accompanied by a minor. CTP Ex. 6 at 2-3. He verified that the minor had no tobacco products in the minor's possession prior to entering the establishment but that the minor possessed true and accurate photographic identification showing the minor's actual date of birth. *Id.* at 2. Inspector Bishop entered Respondent's establishment following the minor, and took up a position from which he had an unobstructed view of Respondent's sales counter and the minor. *Id.* at 3. He watched the minor purchase a package of cigarettes and observed the clerk fail to check the minor's identification. *Id.*

Inspector Bishop testified that after the purchase, he and the minor exited the establishment, and returned to the vehicle where the minor immediately gave him the pack of cigarettes. CTP Ex. 6 at 3. Inspector Bishop labeled the cigarettes as evidence, photographed all of the panels of the package, and processed the evidence in accordance with standard procedures. *Id.* Shortly after the inspection, Inspector Bishop recorded the inspection in the FDA's Tobacco Inspection Management System and created a Narrative Report. *Id.*

CTP corroborated Inspector Bishop's testimony by offering as evidence photographs that Inspector Bishop took of the cigarettes that the minor purchased on the date in question. CTP Exs. 10-11. CTP also submitted the Tobacco Inspection Management System inspection detail and the Narrative Report Inspector Bishop created contemporaneously with the inspection. CTP Exs. 8-9.

Rafid Jammaa is Respondent's owner and representative in this matter.⁵ Mr. Jammaa stated that he and his manager, Jalal Kattoula, were the only two clerks on duty that day. Neither Mr. Jammaa nor Mr. Kattoula recall selling tobacco products to a minor. R. Post-Hrg. Br. at 3; R. Ex. 1 at 1.

Specifically, Mr. Jammaa testified that he does not know whether he or his staff sold the tobacco product to the minor. Tr. at 40. Mr. Jammaa stated:

. . . [I]f I ask myself, if I sell to a minor, I'll say no, because I don't remember what happened and I wish I had the video cameras that record more than four days or seven days in a month, I wish. I just wanted to know what I did is right, [or] what I did is wrong. And [if] I did that. That's the whole point of this whole case. That's what I'm trying to figure out, what I did.

Id.

After the hearing, Mr. Jammaa asserted "I'm not trying to deny something I have done or I'm not trying to run away from a penalty but in fact I just don't know if this ever happened or not." R. Post-Hrg. Br. at 3. Mr. Jammaa stated, "Your Honor, I wish I had better surveillance cameras to go back and check if the violations really occurred at my location." *Id.* He emphasized, ". . . we don't sell to minors willingly, so it's very hard for my employees and I to remember and admit something unknown to us." *Id.*

⁵ The transcript erroneously identified Mr. Jammaa as "Rafid Jammaa, Esq." Tr. at 2. I correct the record to reflect that Mr. Jammaa appeared pro se on behalf of Respondent.

Respondent's manager, Jalal Kattoula, testified similarly. "I don't recall or remember selling tobacco products to a minor or anybody else that looks under the age of 30. . . . Rafid Jammaa and I were the only ones in the store that day. I'm really good at checking [identifications] of customers that look under the age of 30 when they attempt to buy tobacco products." R. Ex. 1 at 1; *see* Tr. at 43.

Mr. Jammaa admits that he does not know whether he or his manager sold cigarettes to a minor and failed to verify the identification of the purchaser, and he does not attempt to shirk his responsibilities. However, he also believes that CTP has not submitted sufficient evidence to show that his establishment made the illegal sale. R. Post-Hrg. Br. at 3. Mr. Jammaa testified: "Now, if they ask me, is there evidence of you now to prove to me that I sold to a minor, I will say, no, too, because the only evidence that you -- or the pack of cigarettes, which they can get from everywhere in the state. I'm not the only one who sells Marlboro" Tr. at 40. Respondent stated: "[T]here was no surveillance cameras, no cash register receipt of the transaction, and no price for the merchandise the minor purchased." R. Post-Hrg. Br. at 3. Respondent submitted cash register receipts that do not show a cigarette sale on March 11, 2018, at approximately 4:08 PM. R. Ex. 6 at 9-10. Respondent takes exception to the Inspector's testimony that he did not know how much the minor paid for the cigarettes, but estimated "right around \$7." R. Post-Hrg. Br. at 3; Tr. at 26. Respondent explained: "The price is important to me, so I can determine if the pack of Marlboro cigarettes came out of my store." R. Post-Hrg. Br. at 3.

Respondent takes issue with what he describes as unfair inspection procedures as CTP's policy. Specifically, Respondent takes exception to CTP's policy to not notify the establishment at the time of the asserted violation. R. Post-Hrg. Br. at 2-4. Respondent expressed frustration at not being able to determine if and how the violations occurred, and accordingly whether to take responsibility or to deny the allegations. R. Post-Hrg. Br. at 2-5; Tr. at 36, 40. However, how CTP conducts its inspections is not at issue before me.

At issue before me is whether the allegations in the complaint are true, and, if so, whether these actions constitute a violation of law. 21 C.F.R. § 17.45. I must determine whether – based on a preponderance of the evidence legal standard – Respondent sold cigarettes to a minor and failed to verify the purchaser's identification on March 11, 2018. 21 C.F.R. § 17.33.

I found Mr. Jammaa extraordinarily credible. He testified truthfully, honestly, and accurately, even when it was against his interests. I found his testimony markedly sincere and of authentic character. His statements were consistent, earnest, and believable.

I find that Mr. Jammaa testified credibly that he did not know whether his establishment sold cigarettes to a minor on March 11, 2018. I am persuaded that he does not know. I

also find that Inspector Bishop testified credibly that on March 11, 2018, he watched a minor purchase a package of cigarettes from Respondent's establishment and observed the clerk fail to check the minor's identification. I am persuaded that his account of what he observed is truthful and accurate.

The testimony of Inspector Bishop supported by corroborating evidence (CTP Exs. 4-11) is sufficient to establish that it is more likely than not that on March 11, 2018, at approximately 4:08 PM, Respondent's establishment sold cigarettes to a minor and failed to verify the age of the purchaser by means of photographic identification containing the bearer's date of birth in violation of 21 C.F.R. § 1140.14(a)(1) and (a)(2)(i). 21 C.F.R. § 17.33(b). I do not find Respondent's evidence sufficient to merit an affirmative defense to negate liability. 21 C.F.R. § 17.33(c).

Accordingly, I find that the facts as outlined above establish Respondent's liability under the Act.

B. Civil Money Penalty

I have found that Respondent committed five violations of the Act and its implementing regulations within a 36-month period. The FDA, and its 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. § 333 (f)(9). In its Complaint, CTP sought to impose the maximum penalty amount, \$5,591, against Respondent. Complaint ¶ 1. Accordingly, I now turn to whether a \$5,591 civil money penalty is appropriate.

i. Determining Amount of Civil Money Penalty

When determining the amount of a civil money penalty, I am required to take into account "the nature, circumstances, extent, and gravity of the violation or 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); *see also* 21 C.F.R. § 17.34.

1. Nature, Circumstances, Extent and Gravity of the Violations

Respondent has failed to comply with the Act and its implementing regulations five times over a three-year period. Specifically, on, May 2, 2015, May 11, 2016, and March 11, 2018, Respondent sold cigarettes to a minor and failed to verify photographic identification of the purchaser. Each violation was serious because it contravened federal laws enacted to protect minors from the adverse health effects associated with tobacco use. 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.

2. Respondent's Ability to Pay and Effect on Respondent's Ability to Continue to Do Business

Respondent argues that it does not have the ability to pay the penalty amount and that such a penalty would adversely affect Respondent's ability to continue to do business. Respondent provided very little documentary evidence to support this assertion. R. Ex. 7. However, Mr. Jammaa testified under penalty of perjury to this assertion. R. Ex. 9 at 10. Specifically, Mr. Jammaa testified that "[t]he penalty amount will have a negative impact on my business and myself." *Id.* Mr. Jammaa testified that his "business is slow and barely making it through." *Id.* He attested, "I don't have this much money" *Id.* As I have detailed, I found Mr. Jammaa's testimony to be distinctly credible, and again, I believe him. I conclude Mr. Jammaa's credible assertion is sufficient to support a finding of a reduction in penalty on this basis.

3. History of Prior Violations

Respondent previously violated three regulations over a two-year period. Specifically, Respondent sold cigarettes to a minor and failed to verify the purchaser's identification on May 2, 2015, and May 11, 2016. Respondent's continued inability to comply with the federal tobacco regulations, as this is Respondent's second CMP, calls for an increased penalty in this instance.

4. Degree of Culpability

Based on my finding that Respondent committed the most recent violations in the current complaint, I hold it responsible for five violations of the Act and its implementing regulations.

5. Other Matters as Justice May Require

Sales of tobacco products to minors are unlawful because younger individuals are more susceptible to making decisions that will endanger their lives down the road. Retailers who choose to sell such a highly dangerous and addictive product bear a heavy burden to assure that they make their sales in compliance with law.

I believe that Respondent understands this. Mr. Jammaa's testimony, including his demeanor and inflection, showed that he recognized the seriousness of the offense and was authentically troubled that it may have occurred. *See* Tr. at 40. Even after the hearing, Mr. Jammaa stated that the allegation has made him "seriously mentally and emotional sick." R. Post-Hrg. Br. at 4. He states:

. . . this past 7 months have been really hard on me, this case is driving me crazy. When I go to sleep I think about it, it is

in my thoughts when I eat, I am always thinking about it and it won't leave me alone.

R. Post-Hrg. Br. at 4. It is apparent that Respondent takes allegations of such violations very seriously. It is clear that Mr. Jammaa is deeply troubled that either he or his manager may have mistakenly sold cigarettes to a minor.

Respondent has taken additional steps to mitigate the chance of additional violations. Mr. Jammaa states that he takes these violations very seriously and implemented stricter policies. Answer at 4. For instance, he states that he is carding every tobacco product customer, even if that customer appears over 30 years old. R. Post-Hrg. Br. at 4. Respondent also expressed interest in additional resources to prevent any future occurrence.⁶ Throughout the course of this administrative proceeding, I have been impressed with Mr. Jammaa's effort to comply with judicial directives and to follow rules and procedures that are unfamiliar to him. I believe that he intends to institute sufficient prevention measures to avoid further unlawful sales.

I have found the testimony on Respondent's behalf to be extraordinarily credible and the statements truthful and made in earnest. Respondent understands the gravity of its actions when it sold - whether intentionally or not - tobacco products to minors and failed to verify the identification of the purchasers. I believe that Respondent has been significantly impacted by this matter and will take all necessary measures to prevent a reoccurrence. Accordingly, I do not think that a \$5,591 penalty is necessary or appropriate in this case. I conclude that a reduced civil money penalty is appropriate.

ii. Appropriate Penalty

Based on the foregoing reasoning, I find a penalty amount of \$1,118 to be appropriate under 21 U.S.C. § 333(f)(5)(B) and (f)(9).

Conclusion

Pursuant to 21 C.F.R. § 17.45, I enter judgment in the amount of \$1,118 against Respondent, R and R Family, Inc. d/b/a Riverfront Liquor Shoppe, for five violations of

⁶ Respondent may review the materials available at <https://www.fda.gov/Tobacco/Products/GuidanceComplianceRegulatoryInformation/Retail/default.htm>, including access to free age verification calendars and other materials through CTP's "This is Our Watch" program as well as links to an "FDA Age Calculator" smartphone app.

the Act, 21 U.S.C. § 301 *et seq.*, and its implementing regulations, 21 C.F.R. pt. 1140, within a 36-month period. Pursuant to 21 C.F.R. § 17.45(d), this order becomes final and binding upon both parties after 30 days of the date of its issuance.

/s/

Margaret G. Brakebusch
Administrative Law Judge