

**Department of Health and Human Services**

**DEPARTMENTAL APPEALS BOARD**

**Civil Remedies Division**

Center for Tobacco Products,  
(FDA No. FDA-2016-H-1428)

Complainant

v.

J-Mart, LLC  
d/b/a J Mart,

Respondent.

Docket No. T-16-784

Decision No. TB971

Date: March 20, 2017

**INITIAL DECISION**

The Center for Tobacco Products (CTP) seeks to impose a civil money penalty against Respondent, J-Mart, LLC d/b/a J Mart, located at 3912 Maiden Down Road, Marion, South Carolina 29571, 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, within a twenty-four month period. Specifically, CTP alleges that Respondent violated the Act by impermissibly selling tobacco products to minors, on two separate occasions, 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 one occasion.

## **Procedural History**

CTP began this matter by serving an administrative complaint seeking a \$500 civil money penalty on Respondent, at 3912 Maiden Down Road, Marion, South Carolina 29571, 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. In its answer, Respondent denied the allegations.

CTP filed its pre-hearing exchange on October 3, 2016. CTP's pre-hearing exchange included the declarations of two witnesses. Respondent did not file a pre-hearing brief or exhibits.

On December 8, 2016, I held a pre-hearing conference in this case. Following the pre-hearing conference, I issued an Order that scheduled the hearing for January 12, 2017. That Order noted that during the pre-hearing conference, Respondent indicated that it wanted to cross examine one of CTP's witnesses, Inspector Richard A. Fields.

In addition, CTP noted that in the event the Respondent's written statements of record (answer and informal brief) were to be treated as testimony rather than pleadings, it would move for them to be excluded from evidence. CTP also reserved the right to cross-examine the Respondent if her statements were considered testimony.

On January 12, 2017, a hearing was held in this case. The purpose of the hearing was to allow Respondent to cross examine Inspector Richard A. Fields. I ruled that the Respondent's statements in its pleadings were not testimonial and therefore were not excluded from evidence. Hearing Transcript at 5-6.

On February 6, 2017, I informed the parties that the Court had received the transcript of the hearing, and set the deadline for the parties' post-hearing brief submissions as March 10, 2017. Neither party filed a post-hearing brief.

## **Analysis**

### **I. 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. 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).

In its Complaint, CTP alleges that Respondent committed three violations of the Act and its implementing regulations within a twenty-four month period. Respondent filed a handwritten letter and an answer that both denied selling tobacco products to a minor. Answer; Letter from Respondent.

CTP's case against Respondent rests on the testimony of Mr. Fields plus corroborating evidence. CTP Ex. 3. Mr. Fields is an FDA-commissioned officer whose duties include determining whether retail outlets are unlawfully selling tobacco products to minors. *Id.* at 1-2. Mr. Fields' inspections entail accompanying minors who attempt to purchase tobacco products from retail establishments such as the one operated by Respondent. *Id.*

Mr. Fields testified that he went to Respondent's place of business on March 18, 2015 at approximately 11:59 a.m. CTP Ex. 3 at 2-3. Mr. Fields testified that before the inspection, he confirmed that the minor was carrying her photographic identification, and that she did not have tobacco products in her possession. *Id.* Mr. Fields testified that during the inspection, he remained in his vehicle because his identity was known to the Respondent and felt his presence would compromise the undercover nature of the investigation. *Id.* at 3. Mr. Fields testified that he observed the minor enter the establishment. *Id.*

Mr. Fields testified that a few minutes later, the minor exited the store and returned to his vehicle, where the minor immediately gave him the pack of cigarettes. The cigarettes were observed to be a package of Marlboro Gold Pack cigarettes. CTP Ex. 3 at 3. Mr. Fields testified that he then labeled the cigarettes as evidence, and took photographs of the package. *Id.* Mr. Fields then testified that shortly after the inspection he recorded the inspection in the FDA's Tobacco Inspection Management System. *Id.* at 4.

Mr. Fields testified that he conducted a follow-up inspection of Respondent's place of business on December 9, 2015. CTP Ex. 3 at 4. Before the December 9, 2015 inspection, Mr. Fields testified he confirmed that the minor was carrying her photographic identification, and that she did not have tobacco products in her possession. *Id.* Mr. Fields testified that he parked his vehicle where he had a clear view of the sales counter through the front door, but remained in his vehicle because his identity is known to the Respondent. *Id.* Mr. Fields testified that he observed the minor enter the establishment and purchase a package of cigarettes

from an employee of Respondent. Mr. Fields testified that he did not observe the minor present any identification to the employee and that the employee did not provide the minor with a receipt after purchase. *Id.*

Mr. Fields testified that after the purchase, the minor exited the store and returned to his vehicle, where the minor immediately gave him the pack of cigarettes. The cigarettes were observed to be a package of Marlboro Gold Pack cigarettes. CTP Ex. 3 at 4-5. Mr. Fields testified that he then labeled the cigarettes as evidence, and took photographs of the package. *Id.* at 5. Mr. Fields further testified that shortly after the inspection he recorded the inspection in the FDA's Tobacco Inspection Management System. *Id.*

Mr. Fields testified at the hearing that the time stamps associated with the inspections are generated using his I-Phone, which is synchronized with Apple technology. Hearing Transcript at 12-13.

The testimony of Mr. Fields plus the corroborating evidence consisting of photographs of the packs of cigarettes that were obtained from each minor on March 18, 2015 and December 9, 2015, are proof that Respondent unlawfully sold tobacco products to a minor, and failed to check the minor's identification before making the sales.

As a result, I find that the facts as outlined above establish Respondent J-Mart, LLC d/b/a J Mart's liability under the Act.

## **II. Civil Money Penalty**

Pursuant to 21 U.S.C. § 333(f)(9), Respondent J-Mart, LLC d/b/a J Mart 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, \$500, against Respondent for three violations of the Act and its implementing regulations within a twenty-four month period. Complaint ¶ 1-2.

In its Answer, Respondent denied any obligation to pay a civil money penalty because it did not violate the regulations.

I have found that Respondent committed three violations of the Act and its implementing regulations within a twenty-four 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). Respondent’s sole arguments have been that it should not have to pay a civil money penalty because it did not commit the violations and that it is a small business that cannot afford the penalty.

**i. Nature, Circumstances, Extent and Gravity of the Violations**

I have found that Respondent committed two violations of selling tobacco products to minors, and one violation for 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.

**ii. Respondent’s Ability to Pay And Effect on Ability to do Business**

While Respondent has argued it is unable to pay the \$500 Civil Money Penalty sought by CTP, Respondent has not presented any evidence that it does not have the ability to pay.

**iii. History of Prior Violations**

The current action is the first civil money penalty action brought against Respondent for violations of the Act and its implementing regulations. As noted above, Respondent has twice violated the prohibition against selling tobacco products to persons younger than 18 years of age, 21 C.F.R. § 1140.14(a), and once violated the requirement that retailers verify, by means of photo identification containing a purchaser’s date of birth, that no tobacco purchasers are younger than 18 years of age, 21 C.F.R. § 1140.14(b)(1).

**iv. Degree of Culpability**

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

**v. Additional Mitigating Factors**

Respondent has not provided evidence of any mitigating factors.

**vi. Penalty**

Based on the foregoing reasoning, I find a penalty amount of \$500 to be appropriate under 21 U.S.C. §§ 333(f)(5)(B) and 333(f)(9).

**Conclusion**

Pursuant to 21 C.F.R. § 17.45, I enter judgment in the amount of \$500 against Respondent, J-Mart, LLC d/b/a J Mart, 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, within a twenty-four month period.

/s/

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Catherine Ravinski  
Administrative Law Judge