BOARD OF APPEALS, CITY & COUNTY OF SAN FRANCISCO

Appeal of
MONESH JOSAN dba "7-ELEVEN",)
Appellant(s))
)
vs.)
)
DEPARTMENT OF PUBLIC HEALTH,)
Respondent

Appeal No. **14-122**

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN THAT on June 23, 2014, the above named appellant(s) filed an appeal with the Board of Appeals of the City and County of San Francisco from the decision or order of the above named department(s), commission, or officer.

The substance or effect of the decision or order appealed from is the SUSPENSION on June 11, 2014, of Tobacco Sales Establishment Permit (25-day suspension for selling tobacco products to minors) at 43 Drumm Street.

DIRECTOR'S CASE NO. SMK-1407

FOR HEARING ON August 27, 2014

Address of Appellant(s):	Address of Other Parties:
Monesh Josan dba "7-Eleven", Appellant 43 Drumm Street San Francisco, CA 94111	N/A

Date Filed:

BOARD OF APPEALS
JUN 23 2014
APPEAL # 14-122

CITY & COUNTY OF SAN FRANCISCO
BOARD OF APPEALS

PRELIMINARY STATEMENT OF APPEAL

I / We, **Monesh Josan dba "7-Eleven"**, hereby appeal the following departmental action: **SUSPENSION** of **Tobacco Sales Establishment Permit - DIRECTOR'S CASE NO. SMK-1407** by the **Department of Public Health** which was issued or became effective on: **June 11, 2014**, for the property located at: **43 Drumm Street**.

BRIEFING SCHEDULE:

The Appellant may, but is not required to, submit a one page (double-spaced) supplementary statement with this Preliminary Statement of Appeal. No exhibits or other submissions are allowed at this time.

Appellant's Brief is due on or before: **August 07, 2014, (no later than three (3) Thursdays prior to the hearing date)**, up to 12 pages in length, double-spaced, with unlimited exhibits, with an original and 10 copies delivered to the Board office by 4:30 p.m., and with additional copies delivered to the other parties the same day.

Respondent's and Other Parties' Briefs are due on or before: **August 21, 2014, (no later than one (1) Thursday prior to hearing date)**, up to 12 pages in length, doubled-spaced, with unlimited exhibits, with an original and 10 copies delivered to the Board office by 4:30 p.m., and with additional copies delivered to the other parties the same day.

Only photographs and drawings may be submitted by the parties at hearing.

Hearing Date: **Wednesday, August 27, 2014, 5:00 p.m., City Hall, Room 416,** One Dr. Carlton B. Goodlett Place.

All parties to this appeal must adhere to the briefing schedule above, however if the hearing date is changed, the briefing schedule MAY also be changed. Written notice will be provided of any change to the briefing schedule.

In order to have their documents sent to the Board members prior to hearing, **members of the public** should submit an original and 10 copies of all documents of support/opposition no later than one (1) Thursday prior to hearing date by 4:30 p.m. Please note that names and contact information included in submittals from members of the public will become part of the public record. Submittals from members of the public may be made anonymously.

Please note that in addition to the parties' briefs, any materials that the Board receives relevant to this appeal, including letters of support/opposition from members of the public, are distributed to Board members prior to hearing. All such materials are available for inspection at the Board's office. You may also request a copy of the packet of materials that are provided to Board members at a cost of 10 cents per page, per S.F. Admin. Code Ch. 67.28.

If you have any questions please call the Board of Appeals at 415-575-6880

The reasons for this appeal are as follows:

see attached.

Appellant or Agent (Circle One):

Signature: [signature]

Print Name: MONESH PAL JOSAN

7-Eleven

43, Drumm Street, San Francisco CA-94111

Phone: 415-837-0161, Fax: 415-837-0977

Email: moneshjosan@comcast.net.

June 23rd 2014

BOARD OF APPEALS
JUN 23 2014
APPEAL # 14-12

San Francisco Board Of Appeals
1650 Mission Street, Room # 304
San Francisco, CA

Ref: Department Of Public Health Case # SMK1407

I wish to file an appeal against the Deputy Health officer`s decision to suspend my license for the sale of tobacco products for 25 days. I wish to bring to the notice of the honorable Board members certain facts which may cause this decision to be waived. I will present my case in a formal written draft for the members and will also make a presentation at the Board hearing. I request that a hearing date be scheduled for this purpose. I have attached a Money order # 14-791900825, for $300 (Three Hundred Dollars) as the appeal filing fee.

Thank You

Monesh Josan

Franchise Owner

Mobile : 510-717-0646

City and County of San Francisco
DEPARTMENT OF PUBLIC HEALTH

Edwin M. Lee, Mayor
Barbara A. Garcia, MPA, Director of Health

ENVIRONMENTAL HEALTH

Richard J. Lee, MPH, CIH, REHS
Acting Environmental Health Director

BOARD OF APPEALS
JUN 23 2014
APPEAL # 14-122

Date: 6/11/14

Hearing Date: 6/11/14
Director's Hearing Case # SMK1407
Re: 43 Drumm St.
DBA: 7 Eleven

Moneshpal Singh Josan & Namarta Josan.
7- Eleven
43 Drumm St
San Francisco, CA 94111

Dear Operator,

On the basis of the facts presented at the Department of Public Health Director's Hearing on 6/11/14, it was determined that you violated San Francisco Health Code Article 19H, Section 1009.61 and the California Penal Code, Section 308(a) for selling tobacco or tobacco products to minors as documented, and the following are ordered:

1. Pursuant to Section 1009.66 of the San Francisco Health Code, your permit to sell tobacco shall be suspended for **25 DAYS** beginning fifteen (15) days from the date of this letter commencing on 6/26/14.
2. **You shall not begin serving the suspension of your permit to sell tobacco until you are informed of the start and end date in writing by the Health Inspector.**
3. You may appeal the Director's order to suspend your permit through the Board of Appeals located at 1650 Mission Street, Room 304 (Tel.: 575-6880), San Francisco, as prescribed in Article 1 of the San Francisco Business and Tax Regulation Code.
4. If a notice to appeal the Director's orders is not filed within fifteen (15) days from the date of this notice with a copy sent to our office, the decision to suspend your permit shall be deemed final and the Inspector shall post the Notice of Suspension in your establishment.
5. Upon suspension, you shall remove all tobacco and e-cigarette products from sale shelves and discontinue selling tobacco/e-cigarettes in the establishment.
6. Failure to comply as ordered, or the removal of the posted sign, may result in the revocation of your permit to sell tobacco/e-cigarettes and referral to the City Attorney Code Enforcement Division with a recommendation to file an injunctive action against you.

The foregoing is a true copy of the orders issued in the name of the Director of Public Health in the City and County of San Francisco on the 11th day of June, 2014. If you have any questions, please call Senior Inspector Larry Kessler at (415) 252-3841.

Sincerely,

Tomas Aragon

Tomas Aragon, M.D., Dr. PH
Deputy Health Officer

SFDPH Environmental HEALTH

RETAIL TOBACCO PROGRAM
1390 Market Street, Suite 210 San Francisco, CA 94102
Phone 415-252-3841 Fax 415-252-3894

JULIA M. JAYNE (State Bar No. 202753)
E-Mail: *julia@jaynelawgroup.com*
JAYNE LAW GROUP, P.C.
260 California Street, Suite 1001
San Francisco, California 94111
Telephone: (415) 623-3600
Facsimile: (415) 623-3605

Attorney for Appellant Moneshpal Josan dba 7-Eleven

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CITY HALL

CITY AND COUNTY OF SAN FRANCISCO

MONESHPAL JOSAN dba 7-ELEVEN,

Appellant,

v.

DEPARTMENT OF PUBLIC HEALTH,

Respondent,

Appeal No. 14-122
Permit No. CASE NO. SMK-1407

APPELLANT MONESHPAL JOSAN'S OPPOSITION TO SUSPENSION OF TOBACCO SALES ESTABLISHMENT PERMIT

Date: October 8, 2014
Time: 5:00 pm
Room: 416 City Hall

TO THE BOARD OF APPEALS – CITY AND COUNTY OF SAN FRANCISCO:

PLEASE TAKE NOTICE THAT on October 8, 2014 in room 416 located at San Francisco City Hall at One Dr. Carlton B. Goodlette Place, San Francisco, California, or soon thereafter as the matter may be heard, Appellant Moneshpal Josan dba 7-Eleven, by and through his undersigned counsel, hereby appeals the underlying suspension of its permit for selling of tobacco for twenty-five days.

This appeal is based on this notice, the attached declaration of Attorney Julia M. Jayne and exhibits, the attached memorandum, the constitutions of the United States of America and the State of California, and on any other evidence that may be presented at the hearing of this appeal.

Dated: September 17, 20014

JAYNE LAW GROUP, P.C.

By: _____
Julia M. Jayne
Attorney for Appellant,
Moneshpal Josan dba 7-Eleven

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MEMORANDUM OF POINTS AND AUTHORITIES

I.

STATEMENT OF THE CASE

This matter is on for appeal of the 25-day suspension by The Department of Public Health – City And County of San Francisco. A hearing was held on June 11, 2014 by the Director of the Department of Public Health. A determination was made that 7-Eleven was in violation of San Francisco Health Code Article 19H, Section 1009.61 and California Penal Code Section 308(a) for selling tobacco products to minors. The Notice of Suspension was served on June 11, 2014 in Director's Hearing Case No. SMK1407 for the 7-Eleven located at 43 Drumm Street in the Financial District. On June 23, 2014, Mr. Josan timely appealed.

II.

STATEMENT OF FACTS

Moneshpal Josan (hereinafter "Mr. Josan") and his wife, Namarta Josan, operate the 7-Eleven franchise located at 43 Drumm Street as franchisees. Mr. Josan has been licensed to sell cigarettes for the past ten years at this location. Since Mr. Josan became the owner of the Drumm Street 7-Eleven, he has conducted its operations in a lawful manner, maintained its licensing and permits, and consistently paid its taxes and fees with the City and County of San Francisco Office of the Treasury and Tax Collector and the California State Board of Equalization.

On the front of his building, Mr. Josan has posted signs informing customers that it is illegal for persons under the age of 18 to purchase cigarette and tobacco products. These signs are prominently displayed on the storefront and entry doors. These signs read, "Under 18 No Tobacco – We Card – Please Have ID Ready" and "Buying Tobacco for Minors Could Cost You." (True and correct copies of photographs depicting the exterior of the building are attached hereto as **Exhibit One**.) These signs are prominently displayed and can be seen by patrons when they first enter the store.

Inside the store are additional signs informing customers that the store will not sell cigarette and tobacco products to minors. Signs posted on the countertops where the cash registers

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are located state: "We Check I.D. If You Look Under 30. We Will Scan Your I.D." and "The Sale of Tobacco Products to Persons Under 18 Years of Age – Is Prohibited by Law and Subject to Penalties – To Report an Unlawful Tobacco Sale Call: 1-800-5 ASK-4-ID – Valid Identification May Be Required – Business and Professions Code Section 22962." These signs are prominently displayed for all patrons who are at either of the two cash registers: the signs are displayed at each register. (True and correct photographs depicting the signs posted at the cash register area where the cigarette and tobacco products are located are attached hereto as **Exhibit Two**.) The signs are visible to anyone standing in front of the cash register counter.

Moreover, facing the direction visible to each cashier on each register is a system which requires the cashier to scan the customer's identification prior to selling tobacco products. The system includes a scanning function which directs the cashier to scan the I.D., which then allows for the computer system to inform the cashier whether the purchaser is over the age of 18. (True and correct photographs depicting a screen shots of the cash registers are attached hereto as **Exhibit Three**.) The cashiers are not supposed to manually enter the dates of birth of the customer unless the scanner fails to read (because the I.D. may be demagnetized, scratched, etc) or if the customer isn't comfortable having his/her I.D. scanned. **Exhibit Three** shows what happens when the customer is under age: the cash register system rejects the purchase, and doesn't allow the cashier to sell to the under-age customer. This system was installed by Mr. Josan to ensure that the cashier's wouldn't have to do any math to calculate the customer's age, and to eliminate any extra work or confusion by the cashier: the system does the work for the cashier to ensure no under-age sales of tobacco products.

Additionally, Mr. Josan requires each of his employees to participate in an Internal Training Program entitled "Come of Age Program." This annual training educates and reminds the employees on the rules, restrictions, and procedures with respect to age-related products (tobacco and alcohol). Each employee must re-certify every year and must have a 100% passing score or the employee must re-take the course. (True and correct copies of two certificates received by employee Bethlhem Gebreamlak are attached hereto as **Exhibit Four**.) Certificates

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are not printed unless the employee scores 100%.

While Mr. Josan is not physically present every hour that the 7-Eleven is open to the public, he regularly visits the store and reminds his employees, as a matter of practice, about the rules and regulations regarding age-related products. He makes it his regular practice to give verbal warnings to the cashiers. Mr. Josan respects and complies with all laws related to age-related products and has done everything within his power to ensure that his employees follow the law.

On the early evening of April 30, 2014, store employee Bethlhem Pavlos Gebreamlak was working behind the cash register at 7-Eleven. Fifteen minutes prior to the decoy's entry into the store, Mr. Josan was at the 7-Eleven. Upon his departure, Mr. Josan clearly recalls reminding Ms. Gebreamlak to be careful when selling cigarettes or alcohol; he reminded her to check identifications. He then left the store.

As stated, fifteen minutes later, a 17 year-old working undercover with the Department of Health entered the store, approached the cash register counter and asked for a pack of Newport cigarettes. For a reason entirely inexplicable to Mr. Josan, the cashier failed to scan the decoy's identification; instead, Ms. Gebreamlak manually entered a completely random date of birth. (True and correct copies depicting the screen shot of the manual override are attached hereto as **Exhibit Five.**) Ms. Gebreamlak acted 100% out of accordance with the policies, procedures, trainings, and reminders provided by Mr. Josan. She acted as an out-of-character rogue employee. Mr. Josan is at a loss as to what more he could have done to make Ms. Gebreamlak act in accordance with the laws he has been so diligent to comply with and to educate his employees about. She had been employed by Mr. Josan at 7-Eleven for approximately one year prior to the incident and had never expressed confusion or uncertainty about the process of checking identifications and using the automated register scanning system.

As a result, Ms. Gebreamlak has been fired by Mr. Josan and received a citation for violating Penal Code section 308 by the San Francisco County District Attorney's Office. Her case was "discharged" by the District Attorney's Office, which means that criminal charges were

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not filed. (See Declaration of Julia M. Jayne.) In other words, Ms. Gebreamlak – the actual offender – was not penalized, and yet Mr. Josan – who did nothing wrong – faces penalties as a result of Ms. Gebreamlak's solo actions.

7-Eleven received a notice of violation and a hearing was held on June 11, 2014. Mr. Josan attended the hearing *in pro per* and was unable to adequately articulate the various factual and legal points to the Department of Public Health.

On June 11, 2014, Mr. Josan received a letter dated June 11, 2014 stating that on the basis of facts presented at the Department of Public Health Director's Hearing on June 11, 2014, it was determined 7-Eleven violated San Francisco Health Code Article 19H, Section 1009.61 and California Penal Code, section 308(a) for selling tobacco products to minors. A twenty-five day suspension was ordered. (A true and correct copy of the Department of Public Health's letter dated June 11, 2014 is attached hereto as **Exhibit Six**.) On June 23, 2014, Mr. Josan filed an appeal by letter requesting an appeal to the Board members. (A true and correct copy of the letter drafted by Mr. Josan is attached hereto as **Exhibit Seven**.)

After a continuance was granted, a hearing was scheduled for October 8, 2014.

III.

ARGUMENT

A. The Standard of Review is *De Novo*.

At hearing, Mr. Josan dba 7-Eleven, through his counsel, shall present evidence that Mr. Josan's operation were in compliance with the law. This Board shall hear the evidence outlined above and is permitted to evaluate it on a *de novo* basis. At the conclusion, Mr. Josan will respectfully request that the Board not suspend his permit on the basis of: (1) Mr. Josan's complete compliance efforts and (2) San Francisco Police Departments' violation of California Business & Professions Code § 22952 regarding minor decoys.

B. Mr. Josan Made Every Possible Effort to Ensure Compliance with the Law.

Mr. Josan made a concerted effort to see that his employees followed the law and carded anyone appearing under thirty both for the sale of alcohol and the sale of tobacco products. Mr.

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Josan understands and respects the public health concerns regarding sales of tobacco products to minors. Mr. Josan has no interest or intention of skirting the laws pertaining to sales of cigarettes to minors. He is aware of the 2010-2011 CA Healthy Kids Survey results from the San Francisco Unified Students, which shows the ease with which students are able to obtain cigarettes.

For these reasons, Mr. Josan posted conspicuous signs throughout his establishment warning patrons and employees alike that the sale of tobacco products to minors was unlawful and would not be tolerated in 7-Eleven. These signs were prominently displayed and could be viewed by customers from all vantage points within the store's premises. Mr. Josan placed signs: 1) outside his store, 2) inside his store viewable from the entry way, 3) conspicuously on top of the countertop upon which the cash register was located, and 4) the cashier's computer system mandated checking identification.

The Department of Public Health may argue that because the minor was able to purchase cigarettes on April 30, 2014, the signs and precautions did not have a deterrent effect. This argument is flawed in this instance because the minor was a decoy – someone whose goal and instruction was to enter the store and buy cigarettes. The decoy could not have feared retribution in the same way that non-decoy minors may as a result of the warning signs in the store.

Mr. Josan was not present during the alleged purchase on April 30, 2014, but upon learning of the employee's infraction, he fired Ms. Gebreamlak. Short of hovering over every employee at every hour of the day – there is nothing more Mr. Josan could have done in this situation. He trained Ms. Gebreamlak, set up as foolproof system as possible to force her to scan the I.D., he gave verbal reminders, and yet still, Ms. Gebreamlak decided to break the law. It is she – not Mr. Josan – who should be punished. And yet, ironically, she received no punishment and Mr. Josan, who himself did nothing wrong, faces a 25-day license suspension. Mr. Josan is confident the Board of Appeals is well aware of the financial hardships and implications of such a suspension.

Based on the rogue actions of the store employee, Mr. Josan is respectfully requesting this Board to overturn the Director of Public Health's decision to suspend his tobacco sales permit. He

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San Francisco, California 94111

requests that the Board find that a store owner who does everything in his power to ensure compliance with the law should not be penalized for the singular actions of one negligent (or intentional?) employee. Had evidence been presented that Mr. Josan himself was negligent or careless in ensuring legal compliance and employee training, then a suspension would be justified.

In the alternative, Mr. Josan respectfully requests that this Board lessen the number of days it seeks to suspend his permit to 7 days or, as a third alternative: allow Mr. Josan to pay an enhanced fine in lieu of any days of suspension.

C. <u>During its Ten Years, 7-Eleven has Lawfully Maintained its Operations.</u>

Pursuant to Article 19H: Permits for the Sale of Tobacco:

> It shall be unlawful for any person to engage in tobacco sales, or to allow tobacco sales, in any establishment without first obtaining and maintaining a valid tobacco sales permit from the Department for each location where tobacco sales are conducted. Nothing in this Article shall be construed to grant any person obtaining and maintaining a tobacco sales permit any status or right other than the right to act as a tobacco retailer at the location identified on the face of the permit. The obtaining of a permit does not in and of itself transform a business into a retail tobacco or wholesale shop within the meaning of California Labor Code section 6404.5. It shall be unlawful for any person to engage in tobacco sales, or to allow tobacco sales, at an establishment for which the Director has suspended the tobacco sales while the period of suspension remains in effect. It shall be unlawful for any person to engage in or allow tobacco sales at an establishment for which the Director has revoked the tobacco sales permit for three years from the date of revocation. Permits are valid as long as the annual license fees are paid.

Since taking ownership of the Drumm Street franchise, Mr. Josan has maintained the required permits and licenses with the Department of Public Health and the State Board of Equalization of the State of California. He has undoubtedly been subject to countless decoy operations and evidently, has passed.[1] Thus, he has done everything a responsible business owner who sells tobacco products can do, and has expended as much money in training and advanced computer systems to ensure that no cigarettes get sold to minors. Short of working every cash register himself, there is nothing more Mr. Josan could have done in this instance.

[1] Note: in 2010, Mr. Josan was subject to suspension, but the matter was overturned at a hearing due to an irregularity with the decoy's identification, which was inspected by the store employee.

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D. **The City Violated State Law in Using an Informant Over the Age of 16, in Violation of Business & Professions Code § 22952**

California Business & Professions Code § 22952 regulates the limitations on selling tobacco products to persons under 18 years of age and includes the following language in section (d):

> (d) In accordance with Chapter 3.5 (commencing with Section 11340) of Part I of Division 3 of Title 2 of the Government Code, the department [of Public Health] shall adopt and publish guidelines for the use of persons under 18 years of age in inspections conducted pursuant to subdivision (c) that shall include, but not be limited, to all of the following:
>
> > (1) an enforcing agency may use persons under 18 years of age who are **15 or 16 years of age** in random inspections to determine if sales of cigarettes or other tobacco products are being made to persons under 18 years of age.

Cal. Bus. & Prof. Code § 22952(d) (emphasis added). The decoy's age in the instant case at the time of the sale was 17 years old; this information was presented at the hearing on June 11, 2014. *See* Declaration of Julia M. Jayne. Section 1009.61 of the San Francisco Healthy code rests upon a violation of California Penal Code § 308; in other words, state law. Accordingly, the procedures followed by the San Francisco Police Department in employing minor decoys must comply with state law. Because the decoy used was not 15 or 16 years old, the sting operation itself was in violation of state law and the sting operation in its entirety should be disregarded for consideration by this Board.

On May 1, 2014, Mr. Josan received a letter from the Tobacco Free Project Director informing Mr. Josan that he had been subject to a decoy sting operation. In an apparent deference to Cal. Bus. & Prof. Code § 22952(d), the letter stated that the decoy was 16 years or younger. (A true and correct copy of the letter from the Tobacco Free Project attached hereto as **Exhibit Eight**.) This letter was inaccurate or intentionally false. The decoy was nearly 18 years old.

As a result of the non-compliance with state law as to the procedures for the sting operation, Mr. Josan respectfully requests that the Board of Appeals dismiss this action in its entirety. Since the law enforcement agency did not comply with state law in its use of informants, the Department of Public Health cannot now argue that Mr. Josan failed to comply with state law. Accordingly, Mr. Josan respectfully requests this Board to dismiss the action against him and 7-Eleven.

IV.

CONCLUSION

Based on the above, Mr. Josan and 7-Eleven respectfully request that the decision by the Director of the Department of Public Health be overturned, or in the alternative, if the interests of justice so requires, that the length of the suspension be shortened.

Dated: September 17, 20014

JAYNE LAW GROUP, P.C.

By: _____
Julia M. Jayne
Attorney for Appellant,
Moneshpal Josan dba 7-Eleven

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JULIA M. JAYNE (State Bar No. 202753)
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Attorney for Appellant Monesh Josan dba 7-Eleven

CITY HALL

COUNTY OF SAN FRANCISCO

MONESH JOSAN dba 7-ELEVEN,

Appellant,

v.

DEPARTMENT OF PUBLIC HEALTH,

Respondent,

Appeal No. 14-122

Permit No. CASE NO. SMK-1407

DECLARATION OF JULIA M. JAYNE IN SUPPORT OF APPELLANT MONESH JOSAN'S OPPOSITION TO SUSPENSION OF TOBACCO SALES ESTABLISHMENT PERMIT

Date: October 8, 2014
Time: 5:00 pm
Room: 416 City Hall

I, Julia Jayne, declare:

1. I represent Monesh Josan dba 7-Eleven, the Appellant, in the above-captioned case.

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San Francisco, California 94111

2. On August 15, 2014, I contacted the San Francisco District Attorney's Office regarding Bethlelhem Gebreamlak's notice to appear for a violation of Penal Code section 308. I was informed that the case had been "discharged" or not filed. In other words, Ms. Gebreamlak was not facing criminal charges.

3. I have been informed by my client that at the hearing on June 11, 2014, the program Manager for the retail Tobacco Enforcement Program, Larry Kessler, stated to the hearing officer Dr. Tomas Aragon (Deputy Health officer) that the decoy in Mr. Josan's case was to turn 18 years old the following month. I received a police report purportedly regarding the April 30, 2014 incident, attached as **Exhibit 9.** Notably, the police report entirely omits the date of birth of the alleged decoy. It also lists a different date of inspection than the incident occurrence date. Upon information and belief, evidence was presented at the June 11, 2014 hearing that the decoy was 17 years or older.

I declare, under penalty of perjury, that the foregoing is true and correct.

Executed September 17, 2014 in the City and County of San Francisco, State of California.

Julia Mezhinsky Jayne, Declarant

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San Francisco, California 94111

PROOF OF SERVICE

STATE OF CALIFORNIA)
COUNTY OF SAN FRANCISCO)

JOSAN v. DPH
Appeal No. 14-122

I am a citizen of the United States and am employed in the County of San Francisco, State of California. I am over the age of eighteen years, and a party to the above-entitled action. My business address is:

43 Drumm Street
San Francisco, California 9411

On September 18, 2014, I personally served a copy of the attached **APPELLANT MONESHPAL JOSAN'S OPPOSITION TO SUSPENSION OF TOBACCO SALES ESTABLISHMENT PERMIT** addressed to:

Aleeta Van Runkle
Deputy City Attorney
Dept of Public Health
1390 Market Street, 5th Floor
San Francisco, CA 94102

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

DATED: September 18, 2014

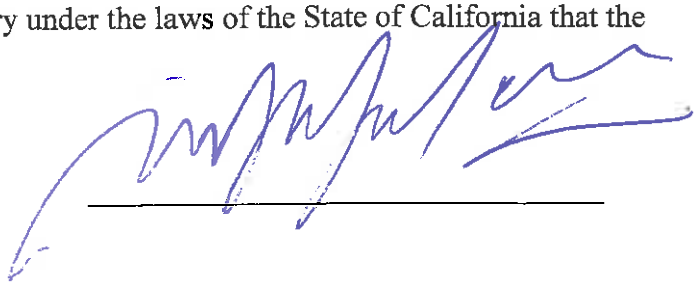
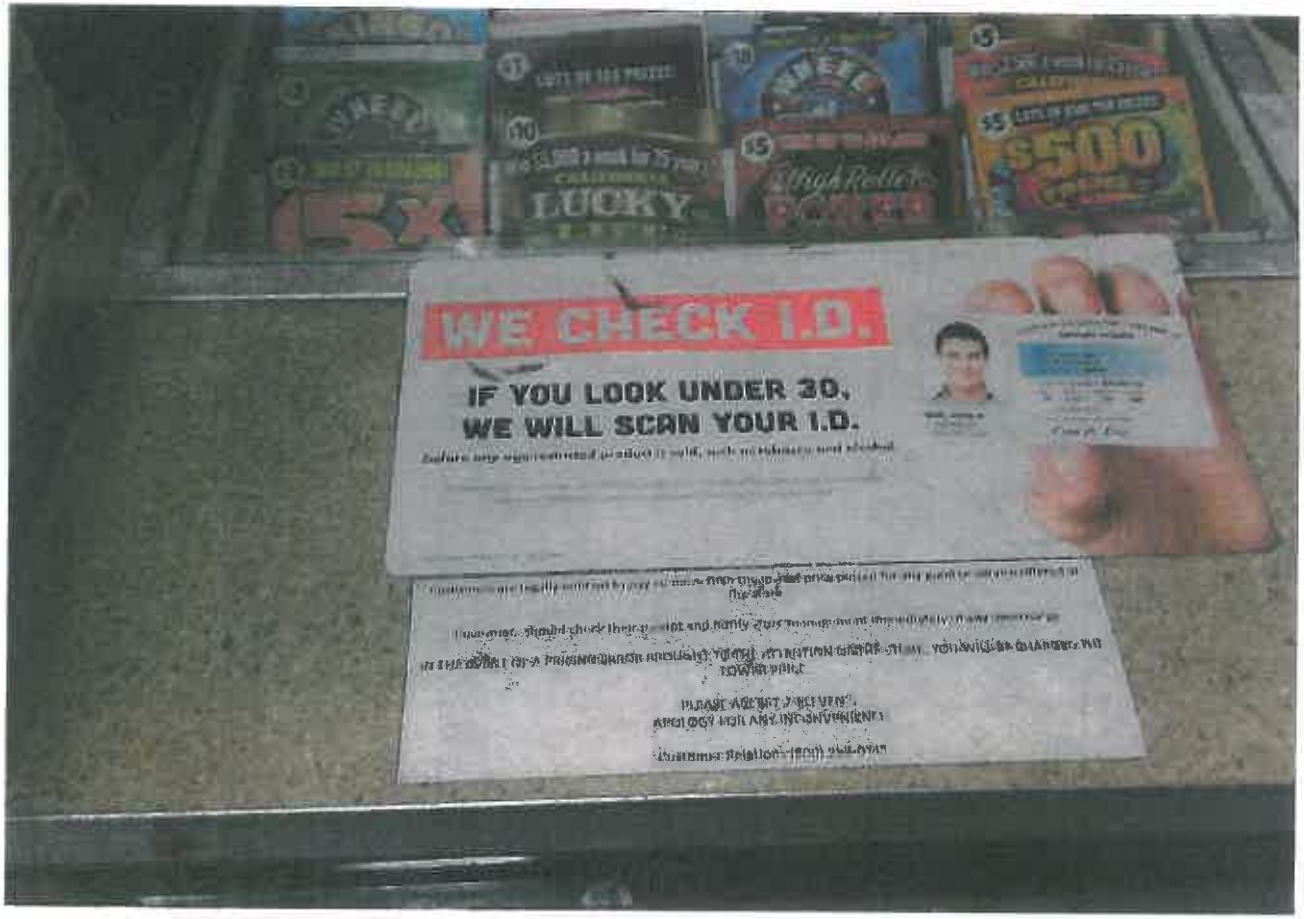


EXHIBIT 1


BUYING
TOBACCO
FOR MINORS
COULD COST
YOU.

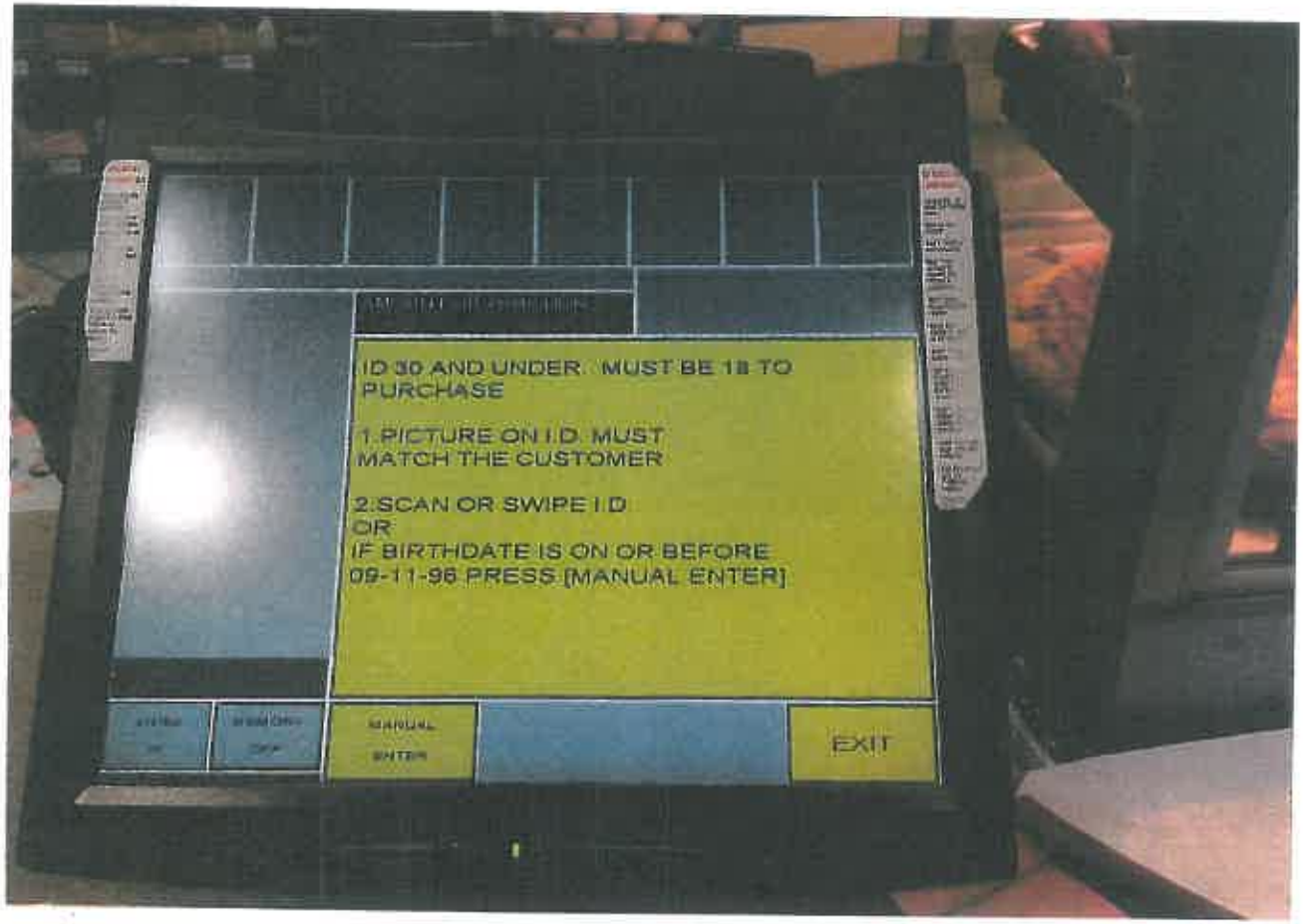

Under 18
No Tobacco
We
Card
Please Have ID Ready

EXHIBIT 2


WE CHECK I.D.
IF YOU LOOK UNDER 30,
WE WILL SCAN YOUR I.D.
LUCKY
$500


WE CHECK I.D.
IF YOU LOOK UNDER 30,
WE WILL SCAN YOUR I.D.
To Report an Unlawful Tobacco Sale Call:
1-800-5 ASK-4-ID

EXHIBIT 3


ID 30 AND UNDER MUST BE 18 TO PURCHASE
1.PICTURE ON I.D. MUST MATCH THE CUSTOMER
2.SCAN OR SWIPE I.D
OR
IF BIRTHDATE IS ON OR BEFORE 09-11-96 PRESS [MANUAL ENTER]
EXIT

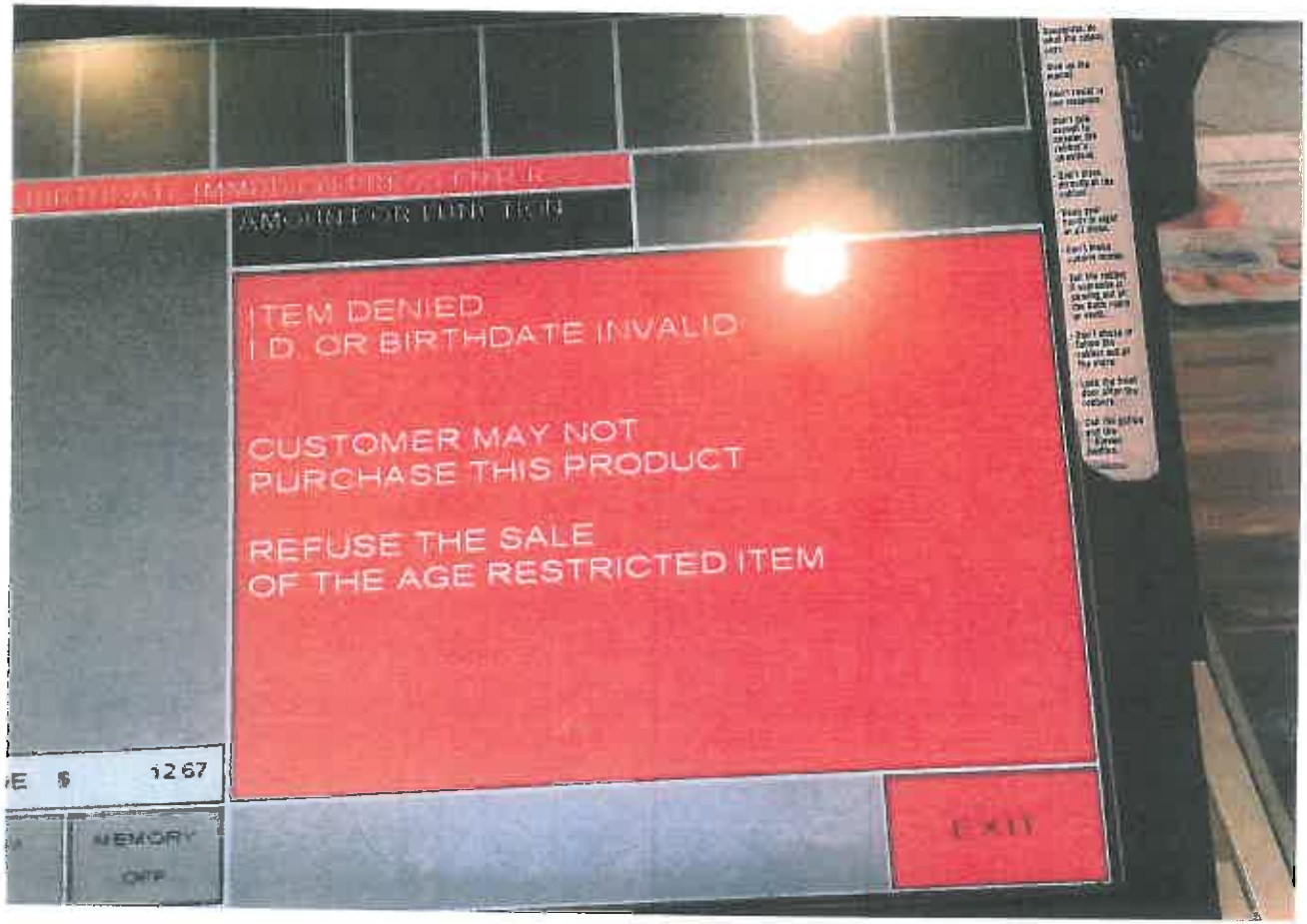

ITEM DENIED
I.D. OR BIRTHDATE INVALID
CUSTOMER MAY NOT
PURCHASE THIS PRODUCT
REFUSE THE SALE
OF THE AGE RESTRICTED ITEM
EXIT
MEMORY
OFF

EXHIBIT 4

Certificate of Acheivement

BETHLHEM GEBREAMLAK

Has Successfully Completed

Working Safely/Operation Alert

Trainer

1/23/2014
Date

Certificate of Acheivement

BETHLHEM GEBREAMLAK

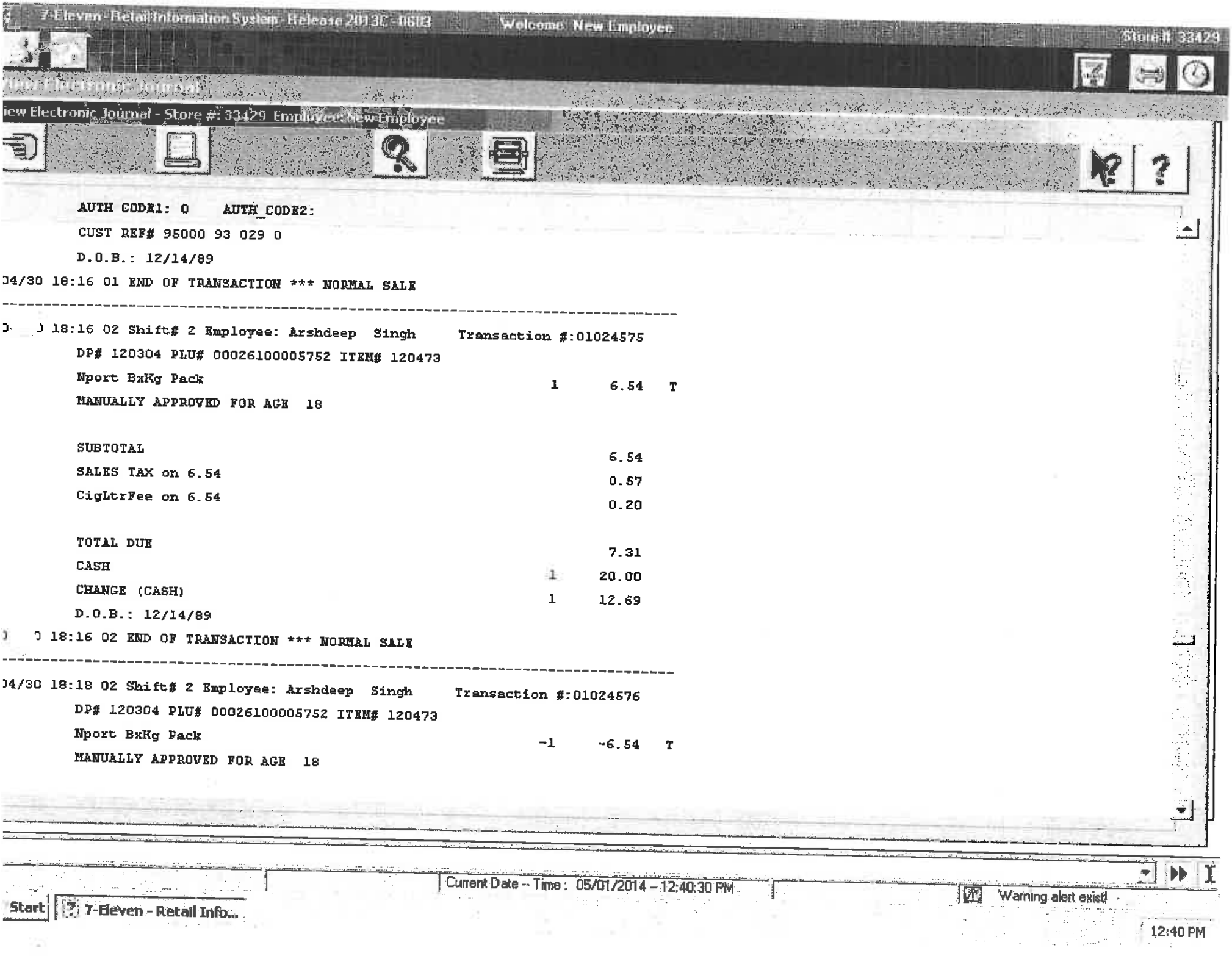
Has Successfully Completed

Come of Age 2005

Trainer

5/11/2013
Date

EXHIBIT 5


7-Eleven - Retail Information System - Release 2013C - 0613
Welcome: New Employee
Store #: 33429
New Electronic Journal - Store #: 33429 Employee: New Employee
AUTH CODE1: 0 AUTH_CODE2:
CUST REF# 95000 93 029 0
D.O.B.: 12/14/89
04/30 18:16 01 END OF TRANSACTION *** NORMAL SALE
18:16 02 Shift# 2 Employee: Arshdeep Singh Transaction #:01024575
DP# 120304 PLU# 00026100005752 ITEM# 120473
Nport BxKg Pack 1 6.54 T
MANUALLY APPROVED FOR AGE 18
SUBTOTAL 6.54
SALES TAX on 6.54 0.57
CigLtrFee on 6.54 0.20
TOTAL DUE 7.31
CASH 1 20.00
CHANGE (CASH) 1 12.69
D.O.B.: 12/14/89
18:16 02 END OF TRANSACTION *** NORMAL SALE
04/30 18:18 02 Shift# 2 Employee: Arshdeep Singh Transaction #:01024576
DP# 120304 PLU# 00026100005752 ITEM# 120473
Nport BxKg Pack -1 -6.54 T
MANUALLY APPROVED FOR AGE 18
Current Date -- Time : 05/01/2014 -- 12:40:30 PM
Warning alert exist!
Start
7-Eleven - Retail Info...
12:40 PM

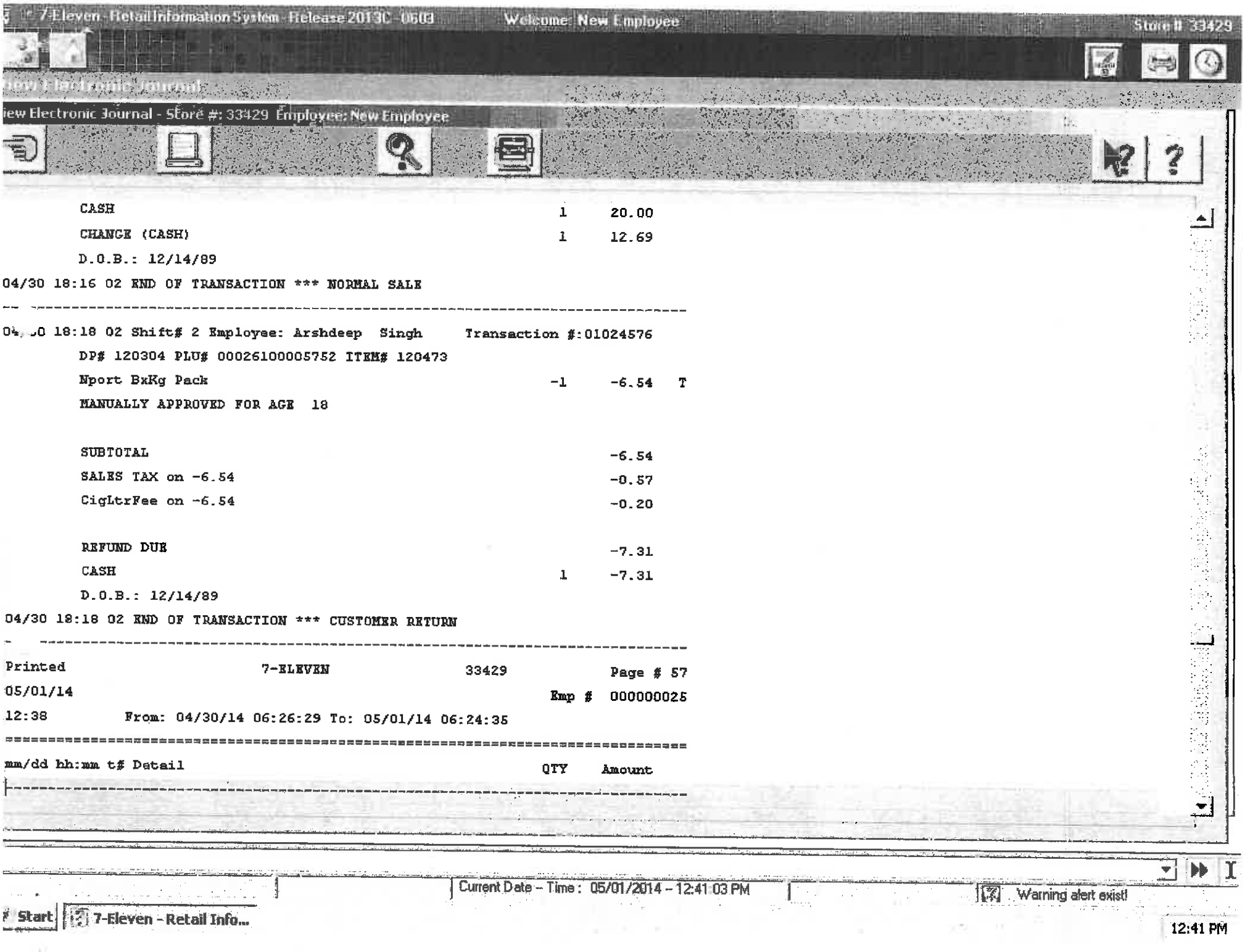

7-Eleven - Retail Information System - Release 2013C - 0503
Welcome: New Employee
Store # 33429
iew Electronic Journal - Store #: 33429 Employee: New Employee
CASH 1 20.00
CHANGE (CASH) 1 12.69
D.O.B.: 12/14/89
04/30 18:16 02 END OF TRANSACTION *** NORMAL SALE
04/30 18:18 02 Shift# 2 Employee: Arshdeep Singh Transaction #:01024576
DP# 120304 PLU# 00026100005752 ITEM# 120473
Nport BxKg Pack -1 -6.54 T
MANUALLY APPROVED FOR AGE 18
SUBTOTAL -6.54
SALES TAX on -6.54 -0.57
CigLtrFee on -6.54 -0.20
REFUND DUE -7.31
CASH 1 -7.31
D.O.B.: 12/14/89
04/30 18:18 02 END OF TRANSACTION *** CUSTOMER RETURN
Printed 7-ELEVEN 33429 Page # 57
05/01/14 Emp # 000000025
12:38 From: 04/30/14 06:26:29 To: 05/01/14 06:24:35
mm/dd hh:mm t# Detail QTY Amount
Current Date - Time : 05/01/2014 - 12:41:03 PM
Warning alert exist!
Start
7-Eleven - Retail Info...
12:41 PM

EXHIBIT 6

City and County of San Francisco
DEPARTMENT OF PUBLIC HEALTH
ENVIRONMENTAL HEALTH

Edwin M. Lee, Mayor
Barbara A. Garcia, MPA, Director of Health

Richard J. Lee, MPH, CIH, REHS
Acting Environmental Health Director

Date: 6/11/14

Hearing Date: 6/11/14
Director's Hearing Case # SMK1407
Re: 43 Drumm St.
DBA: 7 Eleven

Moneshpal Singh Josan & Namarta Josan.
7- Eleven
43 Drumm St
San Francisco, CA 94111

Dear Operator,

On the basis of the facts presented at the Department of Public Health Director's Hearing on 6/11/14, it was determined that you violated San Francisco Health Code Article 19H, Section 1009.61 and the California Penal Code, Section 308(a) for selling tobacco or tobacco products to minors as documented, and the following are ordered:

1. Pursuant to Section 1009.66 of the San Francisco Health Code, your permit to sell tobacco shall be suspended for **25 DAYS** beginning fifteen (15) days from the date of this letter commencing on 6/26/14.
2. **You shall not begin serving the suspension of your permit to sell tobacco until you are informed of the start and end date in writing by the Health Inspector.**
3. You may appeal the Director's order to suspend your permit through the Board of Appeals located at 1650 Mission Street, Room 304 (Tel.: 575-6880), San Francisco, as prescribed in Article 1 of the San Francisco Business and Tax Regulation Code.
4. If a notice to appeal the Director's orders is not filed within fifteen (15) days from the date of this notice with a copy sent to our office, the decision to suspend your permit shall be deemed final and the Inspector shall post the Notice of Suspension in your establishment.
5. Upon suspension, you shall remove all tobacco and e-cigarette products from sale shelves and discontinue selling tobacco/e-cigarettes in the establishment.
6. Failure to comply as ordered, or the removal of the posted sign, may result in the revocation of your permit to sell tobacco/e-cigarettes and referral to the City Attorney Code Enforcement Division with a recommendation to file an injunctive action against you.

The foregoing is a true copy of the orders issued in the name of the Director of Public Health in the City and County of San Francisco on the 11th day of June, 2014. If you have any questions, please call Senior Inspector Larry Kessler at (415) 252-3841.

Sincerely,

Tomas Aragon

Tomas Aragon, M.D., Dr. PH
Deputy Health Officer

SFDPH Environmental HEALTH
improving environments protecting health

RETAIL TOBACCO PROGRAM
1390 Market Street, Suite 210 San Francisco, CA 94102
Phone 415-252-3841 Fax 415-252-3894

EXHIBIT 7

7-Eleven

43, Drumm Street, San Francisco CA-94111

Phone: 415-837-0161, Fax: 415-837-0977

Email: moneshjosan@comcast.net.

June 23rd 2014

BOARD OF APPEALS
JUN 23 2014
APPEAL # 14-122

San Francisco Board Of Appeals
1650 Mission Street, Room # 304
San Francisco, CA

Ref: Department Of Public Health Case # SMK1407

I wish to file an appeal against the Deputy Health officer`s decision to suspend my license for the sale of tobacco products for 25 days. I wish to bring to the notice of the honorable Board members certain facts which may cause this decision to be waived. I will present my case in a formal written draft for the members and will also make a presentation at the Board hearing. I request that a hearing date be scheduled for this purpose. I have attached a Money order # 14-791900825, for $300 (Three Hundred Dollars) as the appeal filing fee.

Thank You

Monesh Josan

Franchise Owner

Mobile : 510-717-0646

EXHIBIT 8

City and County of San Francisco
Edwin M. Lee, Mayor

TOBACCO FREE PROJECT
Department of Public Health
Population Health and Prevention
Community Health Equity & Promotion Branch

5/1/2014

Moneshpal Singh Josan & Namarta Josan
7-Eleven
43 Drumm St.
San Francisco, CA 94111

Dear Moneshpal Singh Josan & Namarta Josan:

On April 30, 2014, a tobacco decoy program was conducted at your business. A youth (16 years or younger) entered your business and purchased a tobacco product from you or your employee. The seller then received a misdemeanor citation for Penal Code 308a (Furnishing Tobacco to a Minor) by members of the San Francisco Police Department. This ordinance requires tobacco retailers to obtain a tobacco permit from the Department of Public Health in order to sell tobacco products in San Francisco is that tobacco retailers comply with Penal Code 308a, which prohibits tobacco sales to minors under the age of 18 years. It is the holder of the tobacco permit that is responsible for assuring that there is compliance with Penal Code 308a. This citation has been referred to the Department of Public Health's Environmental Health Services, which enforces the San Francisco tobacco retailers' permit ordinance. An inspector from Environmental Health Services will contact you regarding your citation and inform you about the next Director of Public Health Hearing.

Should you have any questions, please contact the Tobacco Free Project at (415) 581-2448.

Sincerely,

Derek Smith, MSW, MPH
Tobacco Free Project Director
30 Van Ness Ave. #2300
San Francisco, CA 94102

EXHIBIT 9

NARRATIVE

On 2/11/2014, Lt. Ed Santos #2, Officer Wu #2063, (W1) Johnson and I conducted a Minor Decoy Operation regarding the Sale of Tobacco to Minors. Johnson was the minor and I was the close cover officer. At the beginning of the operation, I verified the age of Johnson by checking his California Identification Card. I provided Johnson with a (E2) marked Twenty Dollar Bill.

I observed Johnson walk into 43 Drumm St. (7-11 Convenience Store). I observed Johnson stand in line and approached the cashier at the checkout counter. I observed Johnson speak with the cashier, later identified as (C1) Gembreamlak. I observed Gembreamlak hand Johnson a box of (E1) Newport Cigarettes. I observed Johnson give Gembreamlak Marked City Funds that was provided to him at the onset of the operation. I observed Gembreamlak hand Johnson the change. I observed Johnson immediately walk out of the 7-11 Store. Johnson walked towards Officer Wu who was standing on the public sidewalk, where he gave the change and (E1) Newport Cigarettes. Johnson later told me that Gembreamlak did not ask him for his for ID or age. I observed the transaction from approximately 20 feet away.

Officer Wu and I entered the 7-11 Store. We both showed Gembreamlak our SFPD issued stars and identified ourselves as police officers. Officer WU informed Gembreamlak that she just sold cigarettes to a minor. I observed that there were signs posted advertising that no cigarettes would be sold to minors. I retrieved the (E3) Marked City Funds. Gembreamlak provide Lt Santos with the Tobacco permit and license (#H-31-001058), which displayed an expired date of March 31, 2014 .

With the approval of Lt. Santos, I cited and released Gembreamlak for selling tobacco products to a minor (308(a)(1) PC) on Citation # 016101536, which she signed. Lt Santos took interior photos of the 7-11 Store entrance and counter area, which displayed Selling to Minor the Tobacco Warning signs.

At the scene Johnson wrote a statement in the presence of Lt. Santos.

E1, E2 and E3 were booked into evidence.

San Francisco Police Department

Report Type: Initial **INCIDENT REPORT** 140358303

CITED 1

Code	Name (Last, First Middle)	Alias	Email
C	[redacted]		

Day Phone	Type	Home Address	City	State	Zip Code
[redacted]	CEL	[redacted]	SAN FRANCISCO	CA	[redacted]

Night Phone	Type	Work Address	City	State	Zip Code
		[redacted]	SAN FRANCISCO	CA	[redacted]

DOB Unknown ☐	Date of Birth	Age	or age between and	Race	Sex	Height	Weight	Hair Color	Eye Color
	[redacted]	23		[redacted]	[redacted]	5'7"	118	BLK	BRO

SFNO	J/D# (If Juv)	ID Type/Jurisdiction/Number	ID Type/Jurisdiction/Number	ID Type/Jurisdiction/Number
		FBI CA [redacted]		

Booking Charge(s)	Booking Location

Warrant #	Court#	Action#	Dept#	Enroute to

Warrant Violation(s)	Bail ($)

Citation#	Violation(s)	Appear Date/time	Location of Appearance
016101136	308(a)(1) PC	06/18/2014 08:00	850 BRYANT ST, [redacted]

☐ CA Form Booked Copy Attached	Mirandized: Star ☐	Date Time	CWB Check Star

Book/Cite Approval Star	Mass Arrest Code	M X-Rays ☐	School (If Juvenile)	Statement ☐
LT. SANTOS [redacted]				

Other Information: Citation/Warrant/Booking Charge(s)/Missing Person-Subject Description; Scars, Marks, Tattoos
LSW/ 5'7 / R-DK/GREEN UNIFORM

PROPERTY E1

Code/No	Item Description	Brand	Model
EVD 1	PACK OF CIGARETTES	NEWPORT	

Serial No.	Gun Make	Caliber	Color	Narcotics Lab No.	Quantity	Value
			BOLACK		1	$6.50 TAG#

Seized by (Star)	From Where
2287	43 DRUMM ST.

Additional Description/Identifying Numbers
E1 WAS SOLD TO (W1) JOHNSON BY (C1) CAMERAMAN; SEIZED (2X); BOOKED (P1) INTO EVIDENCE

PROPERTY E2

Code/No	Item Description	Brand	Model
EVD 2	WRITTEN STATEMENT	OFFD	3770

Serial No.	Gun Make	Caliber	Color	Narcotics Lab No.	Quantity	Value
					1	$0.00 TBD

Seized by (Star)	From Where
2287	(W1) JOHNSON

Additional Description/Identifying Numbers
WRITTEN AND SIGNED STATEMENT BY (W1) JOHNSON

PROPERTY E3

Code/No	Item Description	Brand	Model
EVD 3	COPY OF MARKED CITY FUNDS		

Serial No.	Gun Make	Caliber	Color	Narcotics Lab No.	Quantity	Value
[redacted]					1	$20.00 TBD

Seized by (Star)	From Where
2287	

Additional Description/Identifying Numbers

SAN FRANCISCO POLICE DEPARTMENT
CITY AND COUNTY OF SAN FRANCISCO

NOTICE TO APPEAR

☐ Traffic ☐ Infraction ☑ Misdemeanor
☑ Nontraffic ☐ Felony (Juvenile, PER 626(c) W&I) ☐ Pedestrian ☐ Bicyclist

DATE OF VIOLATION	TIME	DAY OF WEEK	INCIDENT NO.
04 / 30 / 14	1920	S M T (W) TH F S	[illegible]

NAME (First, Middle, Last) [illegible] ☐ OWNER'S RESPONSIBILITY (Veh. Code, § 40001)

MAILING ADDRESS [illegible] PHONE NO. ([illegible]) [illegible]

CITY San Francisco STATE CA ZIP CODE 941[illegible] JUVENILE (PHONE NO.) ( )

DRIVER LICENSE NO.	STATE	CLASS	COMMERCIAL	AGE	BIRTH DATE
[illegible]	CA		☐ YES ☐ NO	29	[illegible]

SEX	HAIR	EYES	HEIGHT	WEIGHT	RACE	S.F. NO. or X NO.
F	BLK	BRN	5'4	110	[illegible]	

VEH. LIC. NO./VIN.	STATE	REG MO / YR
		/

YR. of VEH.	MAKE	MODEL	BODY STYLE	COLOR

☐ COMMERCIAL VEHICLE (Veh. Code, § 15210(b))
☐ HAZARDOUS MATERIAL (Veh. Code, § 353)

EVIDENCE OF FINANCIAL RESPONSIBILITY

REGISTERED OWNER OR LESSEE ☐ SAME AS DRIVER

ADDRESS ☐ SAME AS DRIVER

CITY STATE ZIP CODE

CORRECTABLE VIOLATION (Veh. Code, § 40610) ☐ BOOKING REQUIRED (See Reverse) MISDEMEANOR OR INFRACTION (Circle)

YES	NO	CODE AND SECTION / DESCRIPTION	
☐	☑	308(a)(1) PC - Tobacco	(M) I
☐	☐	Product sales to minor	M I
☐	☐		M I

SPEED APPROX.	P.F./MAX SPEED	VEH. LMT.	RADAR	☐ CONTINUATION FORM ISSUED

LOCATION OF VIOLATION(S)
at 53 Drumm

M.A.C.				JUV. NO.	SCHOOL

☐ VIOLATION(S) NOT COMMITTED IN MY PRESENCE, DECLARED ON INFORMATION AND BELIEF.

I DECLARE UNDER THE PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF CALIFORNIA THAT THE FOREGOING IS TRUE AND CORRECT.

[signature] ARRESTING OR CITING OFFICER | ISSUING AGENCY IF NOT SFPD | STAR 2047 | ISSUING UNIT 3[illegible]

DATE | NAME OF ARRESTING OFFICER IF DIFFERENT FROM CITING OFFICER | STAR | ISSUING UNIT

WITHOUT ADMITTING GUILT, I PROMISE TO APPEAR AT THE TIME AND PLACE INDICATED BELOW.

X SIGNATURE [signature]

WHEN:
☐ ON OR BEFORE THIS DATE / /
☑ DAY: Thursday DATE: 06 / 19 / 14 TIME: 0900

WHAT TO DO: Follow the instructions on the reverse.

WHERE: www.sfsuperiorcourt.org

☐ Traffic/Nontraffic - Infraction Division - 850 Bryant St., Room 145, San Francisco, CA 94103 (415) 551-8550
☑ Criminal Division - SF Superior Court - 850 Bryant St., Room 476, San Francisco, CA 94103 (415) 551-0651
☐ Informal Juvenile & Traffic Court - 375 Woodside Avenue, Room 101, San Francisco, CA 94127 (415) 682-5100
☐ Youth Guidance Center - 375 Woodside Ave., Room 101, San Francisco, CA 94127 (415) 682-5100
☐ TO BE NOTIFIED ☐ YOU MAY ARRANGE WITH THE CLERK TO APPEAR AT A NIGHT SESSION OF THE COURT.

Notice To Appear Form approved by the Judicial Council of California.
Rev. 10/27/06 (Veh. Code §§ 40500(b), 40513(b), 40522, 40600; Penal Code § 853.9) SEE REVERSE TR-130

3800-10 (07/13)

016101535

NOTICE TO APPEAR
CITY AND COUNTY OF SAN FRANCISCO

DENNIS J. HERRERA, State Bar #139669
City Attorney
JULIE VAN NOSTERN, State Bar #103579
Lead Attorney, Health & Human Services Team
ALEETA M. VAN RUNKLE, State Bar #124563
Deputy City Attorney
Fox Plaza
1390 Market Street, 5th Floor
San Francisco, California 94102-5408
Telephone: (415) 554-4225
E-Mail: aleeta.van.runkle@sfgov.org

Attorneys for Respondent
SAN FRANCISCO DEPARTMENT OF PUBLIC HEALTH

BOARD OF APPEALS

CITY AND COUNTY OF SAN FRANCISCO

MONESH JOSAN dba 7-ELEVEN , Appellant, vs. DEPARTMENT OF PUBLIC HEALTH, Respondent.	Case No. 14-122 RESPONDENT SAN FRANCISCO DEPARTMENT OF PUBLIC HEALTH'S BRIEF Hearing Date: October 8, 2014 Time: 5:00 p.m. Place: City Hall, Room 416

INTRODUCTION

Appellant 7-Eleven store located at 43 Drumm Street in San Francisco ("Appellant") readily admits that his employee violated the law by selling cigarettes to a minor on April 30, 2014. But he claims that the San Francisco Police Department violated State law (Business & Professions Code section 22952) by using a 17- year old decoy and that Appellant owner should not be held accountable for his employee's conduct.

Appellant misunderstands the law. The City has not contracted with the State to conduct enforcement actions under the Stop Tobacco Access to Kids Enforcement Act (the STAKE Act) (Business & Professions Code section 22952). The STAKE Act and Penal Code section 308 provide localities with alternative methods of enforcing the various laws on the sale of tobacco products to

minors. Each municipality may choose which is the best use of resources in achieving the common goal of stopping cigarette sales to minors. San Francisco has chosen Penal Code 308 coupled with its extensive permitting scheme.

While the STAKE Act requires that the State develop guidelines providing that a minor decoy be 16 years of age or younger, counsel ignores that the FDA's federal regulations require Appellant to card anyone *appearing under 27 years of age* who attempts to purchase cigarettes. 21 C.F.R. section 1140.14. And both federal and state law prohibit the sale of cigarettes to anyone under 18 years of age.

Further, Appellant is accountable for his employee's actions regardless of the employee's motivations. Penal Code section 308 explicitly penalizes the owner, not the employee. Counsel urges the Board to interpret Penal Code Section 308 as allowing a defense to the crime where an employee neglects to card an individual, whether intentionally or unintentionally.

Yet Appellant's counsel is not a member of the Legislature and is unable to create a defense where none exists. Appellant is the permit-holder, not his employee. He is therefore held accountable for all sales to a minor that occur in his establishment.

BACKGROUND

The Department of Public Health requires retail tobacco vendors to obtain a tobacco sales permit for businesses that sell or distribute cigarettes or other tobacco products to adults. This requirement allows the City to ensure establishments comply with federal, state and local tobacco laws and take appropriate enforcement action related to violations of the law.

State law prohibits the sale or furnishing of cigarettes, tobacco products and smoking paraphernalia to minors, as well as the purchase, receipt or possession of tobacco products by minors. (California Penal Code Section 308). 5.6 million children alive today will ultimately die early from smoking absent more aggressive approaches to tobacco sales. More than 3,200 children younger than the age of 18 smoke their first cigarette every day. Nearly 9 out of 10 smokers start before the age of 18, and 98% start smoking by age 26. Every adult who dies early because of smoking is replaced by two new, young smokers; one of the two also will die early from smoking unless vigorous enforcement is embraced at all levels. *See* the Surgeon General's Report on Smoking and Health of 2014.

SF Health Code 19H requires all tobacco retailers to apply for a license and to conduct business in a legal and non-harmful way. The FDA requires stores to check photo ID of anyone appearing under age 27 who attempts to buy cigarettes. 21 C.F.R. section 1140.14.

Stores that break the law and sell to youth commit an unfair business practice by drawing in youth who purchase cigarettes as well as other goods. Young people seeking tobacco know exactly where to go – which stores are lenient and will break the law to supply this addictive product to young people. The 2010-2011 CA Healthy Kids Survey results from S.F. Unified students show 51% of 9th graders and 58% of 11th graders report it is easy to obtain cigarettes.

The Health Director is authorized, upon documented sales behavior that violates CA Penal Code Section 308 to suspend a tobacco sales permit.

EVIDENCE

Filed herewith is a declaration from Officer Robert M. Rueca of the San Francisco Police Department. Officer Rueca observed the illegal sale on April 30, 2014. Attached to his declaration as Exhibit A is Police Incident Report No. 140358303. The Police Incident Report clearly identifies the age of the decoy as being 17. The California ID card is attached as Exhibit A to the brief. Officer Rueca verified that the card was valid based on his training and experience.

LEGAL STANDARD

Section 1009.61 of the San Francisco Health Code provides that the Director may suspend a tobacco sales permit upon a decision that the Appellant or the Appellant's agent or employee has engaged in any conduct that violates California Penal Code Section 308. Penal Code Section 308(a) provides:

> Every person, firm, or corporation that knowingly or under circumstances in which it has knowledge, or should otherwise have grounds for knowledge, sells, gives, or in any way furnishes to another person who is under the age of 18 years any tobacco, cigarette, or cigarette papers, or any other preparation of tobacco, or any other instrument or paraphernalia that is designed for the smoking or ingestion of tobacco, products prepared from tobacco, or any controlled substance, is subject to either a criminal action for a misdemeanor or to a civil action brought by a city attorney, a county counsel, or a district attorney, punishable by a fine of two hundred dollars ($200) for the first offense, five hundred dollars ($500) for the second offense, and one thousand dollars ($1,000) for the third offense.

Under San Francisco Health Code Article 19H, Section 1009.66, the Director is authorized to suspend a permit for up to ninety days for a first offense.

ARGUMENT

A. The Owner Holds the Permit for his Establishment; Whether an Employee or the Owner of a Permitted Establishment Sold the Cigarettes to a Minor is Not a Factor in the Suspension of the Permit.

Appellant admits 7-Eleven violated the law by selling cigarettes to a minor. As a defense Appellant argues that despite being the owner of the 7-Eleven, his employee committed the criminal act. Therefore, she, and she alone is guilty of breaking the law. Virtually every store raises a variation of this argument. Owners generally do not operate the register without at a minimum, taking breaks. Yet, the owner is the permit holder, not the employee. He is responsible for his employee or agent's conduct. Appellant's argument does not warrant reduction or elimination of the suspension in this case.

The standard set forth in the Penal Code is clear. California Penal Code Sec. 308 states that

> "[e]very person, firm, or corporation that knowingly or under circumstances in which it has knowledge, or should have otherwise have grounds for knowledge, sells tobacco to a minor violates the law.

It is irrelevant whether the tobacco sale to a minor was intended or due to negligence.

B. Appellant Incorrectly Presumes that the City uses the State's STAKE Act to Enforce its Permitting Scheme. Rather, the City uses Penal Code Section 308 and Local Law Enforcement.

Appellant accuses the City of having violated State law by using a decoy 17 years of age. First, Appellant is incorrect as the City has not contracted with the State to have the State enforce Respondent's permitting scheme through the STAKE Act. Nor is it required that the City use the STAKE Act. Respondent has an extensive tobacco permitting scheme and the San Francisco Police Department cites violators of the law under Penal Code 308, not the California Business and Professions Code section that contains the STAKE Act.

Appellant's counsel refers to a letter from the Tobacco Free Project that does misstate the age of the minor as 16 years or younger. But the letter clearly provides that the enforcement action was taken pursuant to Penal Code Section 308. Further, federal regulations require establishments to card anyone appearing under 27 years of age. Appellant admits that his establishment violated the Penal Code. The Health Code does not provide for any defense or mitigating circumstance that would justify reduction of the suspension imposed by Respondent.

CONCLUSION

The Department of Public Health respectfully requests that the Board deny Appellant's appeal and uphold the suspension for twenty-five days.

Dated: October 2, 2014

Respectfully submitted,

DENNIS J. HERRERA
City Attorney

By: _____
ALEETA M. VAN RUNKLE

Deputy City Attorney
Attorneys for Respondent, Department of Public Health of the City and County of San Francisco

NEW PROVISIONAL AND UNDER 21 CARDS

NEW FORMAT
Driver license and Identification cards for persons under age 21 are vertical to aid retailers and law enforcement in identifying the age of the cardholder.

NAME FORMAT, ALL CARDS
There are two lines allotted for your name. Last name will be displayed on the first line. Second line will show the first and middle name. This change improves naming conventions and identification of the cardholder.

BOARD OF APPEALS

CITY AND COUNTY OF SAN FRANCISCO

MONESH JOSAN dba 7-ELEVEN v. SAN FRANCISCO DEPARTMENT OF PUBLIC HEALTH	APPEAL NO. 14-122 DECLARATION OF OFFICER ROBERT M. RUECA Hearing Date: October 8, 2014 Time: 5:00 p.m. Place: City Hall, Room 416

I, Robert M. Rueca, declare as follows:

1. I am an Officer with the San Francisco Police Department and I was detailed to the ABC Liason Unit (ALU). I have personal knowledge of the facts set forth herein. If called upon to testify, I could and would testify competently to these facts.

2. The San Francisco Police Department has not contracted with the State Department of Public Health to conduct enforcement activities in conjunction with the State under the "Stop Tobacco Access to Kids Enforcement Act" or "STAKE Act". The San Francisco Police Department conducts its enforcement activities pursuant to Penal Code Section 308.

3. I have participated in minor decoy operations at various establishments that sell tobacco products. Our decoys are required to produce a valid California identification card or driver's license and state their correct age if asked by a clerk.

4. Part of my training with the San Francisco Police Department included how to inspect and identify a valid I.D. card and how to detect any alterations, modifications, or changes in the text or photograph contained on the card.

5. I participated in the minor decoy operation on April 30, 2014 at the 7-Eleven, located at 43 Drumm Street, San Francisco. Attached hereto as Exhibit A is a true and correct copy of Police Incident Report No. 140358303.

6. I was the cover officer in this operation. As the cover officer, it was my duty to protect the minor decoy and to observe any sale of tobacco products to the minor.

7. The minor decoy who worked the operation with us on this date was 17 years old on April 30, 2014. He looks his age.

8. I examined the minor's identification used in the operation of April 30, 2014. Based on my training and experience, it is my opinion that the identification is an official identification card issued by the State of California. The card is clearly legible in all aspects and accurately depicts the appearance of the minor decoy when the operation took place.

9. The minor decoy entered the 7-Eleven with marked City funds. I observed his purchase a pack of Newport cigarettes with the marked City funds from Ms. Gembreamlak, clerk of the 7-Eleven store. Ms. Gembreamlak did not ask the minor for his ID but sold him the cigarettes anyway.

10. I approached Ms. Gembreamlak and identified myself as a police officer. I recovered the marked City funds from her and returned the change. I then cited her for selling tobacco to a minor. She was released at the scene.

11. The cigarettes, statement of the minor decoy, and a copy of the marked City funds were booked as evidence. A photo of the decoy was retained in the case file.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this document was executed on the 2nd of October 2014 in San Francisco, California.

ROBERT M. RUECA

San Francisco Police Department
INCIDENT REPORT

Report Type: Initial

140358303

INCIDENT

Incident Number	Occurrence From Date / Time	Occurrence To Date / Time	Reported Date / Time	CAD Number
140-358-303	04/30/2014 18:20	04/30/2014 18:20	04/30/2014 18:21	141202761

Type of Incident: TOBACCO PRODUCTS, SELLING OR FURNISHING TO MINOR 16031

Location of Occurrence:	At Intersection with/Premise Type	District
43 DRUMM ST	ALL OTHERS, EXPLAIN IN NARRATIVE	CENTRAL

Confidential Report?	Arrest Made?	Suspect Known?	Suspect Unknown?	Non-Suspect Incident?	Domestic Violence?	(Type of Weapon Used)	Reporting Unit
☐	☑	☐	☐	☐	☐		3X205

Location Sent / On View:	At Intersection with:	Reporting District
43 DRUMM ST		CENTRAL

How Cleared?	Reported to Bureau	Name	Star	Date/ Time	Elder Victim	Gang Related?	Juvenile Subject?	Prejudice Based?
7	ALU	Santos, Edward J	2	04/30/2014 18:22	☐	☐	☐	☐

OFFICER DECLARATION

I declare under penalty of perjury, this report of _3_ pages is true and correct, based on my personal knowledge, or is based on information and belief following an investigation of the events and parties involved.
PROP 115 CERTIFIED 5 Year/Post

	Star	Station	Watch	Date
Reporting Officer: RUECA, ROBERT M	2267	Ingleside Station	0700-1700	04/30/14 21:39
Reviewing Officer: SANTOS, EDWARD J	2	Alcoholic Beverage Control Liaison Unit	0700-1600	04/30/14 21:39
OIC: SANTOS, EDWARD J	2	Alcoholic Beverage Control Liaison Unit	0700-1600	04/30/14 21:39

Related Case	Related Case	Re-assigned to	Assigned to 5X150	Assigned by
--	--	Copies to 5X150 3*300	Add'l Copies DA, DPH, CO A	RR 2267

R/W 1

Code	Name (Last, First Middle)	Alias	Email
R/W 1	JOHNSON, CHARLES ROBERT		

Day Phone / Type	Home Address	City	State	Zip Code
(415) 553-1049 Work	850 BRYANT ST	SAN FRANCISCO	CA	94103-

Night Phone / Type	Work Address	City	State	Zip Code
Type				

DOB / Age	DOB Unk.	or age between and	Race	Sex	Height	Weight	Hair Color	Eye Color	ID Type	Jurisd.	ID No.
07/22/96 17	☐		W	M			BRO	BLU			

Confidential Person	Violent Crime Notification	293 PC Notification / Star	Follow-up Form	Statement	Relationship to Subject
☐	☐	☐	YES ☐	YES ☑	STRANGER/NONE

School (if Juvenile)	Injury/Treatment	Other Information/If Interpreter Needed Specify Language
	NONE/NONE	

REPORTEE 1

Code	Name (Last, First Middle)	Alias	Email
R 1	SFPD RUECA, #2267		

Day Phone / Type	Home Address	City	State	Zip Code
(000) 000-0000 Refused				

Night Phone / Type	Work Address	City	State	Zip Code
(415) 404-4000 Work	1 SGT JOHN V YOUNG ST	SAN FRANCISCO	CA	94112-

DOB / Age	DOB Unk.	or age between and	Race	Sex	Height	Weight	Hair Color	Eye Color	ID Type	Jurisd.	ID No.
	☑										

Confidential Person	Violent Crime Notification	293 PC Notification / Star	Follow-up Form	Statement	Relationship to Subject
☐	☐	☐	YES ☑	YES ☑	STRANGER/NONE

School (if Juvenile)	Injury/Treatment	Other Information/If Interpreter Needed Specify Language
	NONE/NONE	CITING OFFICER OF (C1) GEBREAMLAK

San Francisco Police Department
INCIDENT REPORT

Report Type: Initial

140358303

CITED 1

Code	Name (Last, First Middle)	Alias	Email
C1	GEBREAMLAK, BETHLELHEM PAULOS		

Day Phone	Type	Home Address	City	State	Zip Code
(415) 596-9680	Cell	361 TURK ST , APT# 206	SAN FRANCISCO	CA	94102-
Night Phone	**Type**	**Work Address**	**City**	**State**	**Zip Code**
		43 DRUMM ST	SAN FRANCISCO	CA	94111-

DOB	Date of Birth	Age	or age between and	Race	Sex	Height	Weight	Hair Color	Eye Color
Unknown ☐	12/14/85	28		B	F	5'7	118	BLK	BRO

SFNO	J/D# (If Juvi)	ID Type/Jurisdiction/Number	ID Type/Jurisdiction/Number	ID Type/Jurisdiction/Number
		PID CA F4956725		

Booking Charge(s)	Booking Location

Warrant #	Court#	Action#	Dept#	Enroute to

Warrant Violation(s)	Bail ($)

Citation#	Violation(s)	Appear Date/time	Location of Appearance
016101536	308(a)(1) pc	06/19/2014 08:00	850 BRYANT ST, RM 475

☐ CA Form Booked Copy Attached	Mirandized: Star ☐	Date Time	CWB Check Star

Book/Cite Approval	Star	Mass Arrest Code	M X-Rays	School (If Juvenile)	Statement
LT. SANTOS	2		☐		☐

Other Information: Citation/Warrant/Booking Charge(s)/Missing Person-Subject Description; Scars, Marks, Tattoos
LSW 7-11 RED/GREEN UNIFORM

PROPERTY E1

Code/No	Item Description	Brand	Model
EVD 1	PACK OF CIGAETTES	NEWPORT	

Serial No.	Gun Make	Caliber	Color	Narcotics Lab No.	Quantity	Value
			MUL/COL		1	$8.50 Total

Seized by (Star)	From Where
2267	43 DRUMM ST.

Additional Description/Identifying Numbers
E1 WAS SOLD TO (W1) JOHNSON BY (C1) GEBREAMLAK; I SIEZED (E1); BOOKED (E1) INTO EVIDENCE

PROPERTY E2

Code/No	Item Description	Brand	Model
EVD 2	WRITTEN STATEMENT	SFPD	377G

Serial No.	Gun Make	Caliber	Color	Narcotics Lab No.	Quantity	Value
					1	$0.00 TBD

Seized by (Star)	From Where
2267	(W1) JOHNSON

Additional Description/Identifying Numbers
WRITTEN AND SIGNED STATEMENT BY (W1) JOHNSON

PROPERTY E3

Code/No	Item Description	Brand	Model
EVD 3	COPY OF MARKED CITY FUNDS		

Serial No.	Gun Make	Caliber	Color	Narcotics Lab No.	Quantity	Value
JD760766108					1	$20.00 Total

Seized by (Star)	From Where
2267	

Additional Description/Identifying Numbers

NARRATIVE

On 2/11/2014, Lt. Ed Santos #2, Officer Wu #2063, (W1) Johnson and I conducted a Minor Decoy Operation regarding the Sale of Tobacco to Minors. Johnson was the minor and I was the close cover officer. At the beginning of the operation, I verified the age of Johnson by checking his California Identification Card. I provided Johnson with a (E2) marked Twenty Dollar Bill.

I observed Johnson walk into 43 Drumm St. (7-11 Convenience Store). I observed Johnson stand in line and approached the cashier at the checkout counter. I observed Johnson speak with the cashier, later identified as (C1) Gembreamlak. I observed Gembreamlak hand Johnson a box of (E1) Newport Cigarettes. I observed Johnson give Gembreamlak Marked City Funds that was provided to him at the onset of the operation. I observed Gembreamlak hand Johnson the change. I observed Johnson immediately walk out of the 7-11 Store. Johnson walked towards Officer Wu who was standing on the public sidewalk, where he gave the change and (E1) Newport Cigarettes. Johnson later told me that Gembreamlak did not ask him for his for ID or age. I observed the transaction from approximately 20 feet away.

Officer Wu and I entered the 7-11 Store. We both showed Gembreamlak our SFPD issued stars and identified ourselves as police officers. Officer WU informed Gembreamlak that she just sold cigarettes to a minor. I observed that there were signs posted advertising that no cigarettes would be sold to minors. I retrieved the (E3) Marked City Funds. Gembreamlak provide Lt. Santos with the Tobacco permit and license (#H-31-001058), which displayed an expired date of March 31, 2014 .

With the approval of Lt. Santos, I cited and released Gembreamlak for selling tobacco products to a minor (308(a)(1) PC) on Citation # 016101536, which she signed. Lt Santos took interior photos of the 7-11 Store entrance and counter area, which displayed Selling to Minor the Tobacco Warning signs.

At the scene Johnson wrote a statement in the presence of Lt. Santos.

E1, E2 and E3 were booked into evidence.

SAN FRANCISCO POLICE DEPARTMENT
CITY AND COUNTY OF SAN FRANCISCO

NOTICE TO APPEAR 016101536

☐ Traffic ☐ Infraction ☑ Misdemeanor
☑ Nontraffic ☐ Felony (Juvenile, PER 626(c) W&I) ☐ Pedestrian ☐ Bicyclist

DATE OF VIOLATION	TIME	DAY OF WEEK (S M T W TH F S)	INCIDENT NO.
04/30/14	1820	W	140358303

NAME (First, Middle, Last) ☐ OWNER'S RESPONSIBILITY (Veh. Code, § 40001)
BETHLEHEM PAULOS GEBREAMLAK

MAILING ADDRESS: 351 TURK ST. APT. 206 — PHONE NO.: (415) 576-9626

CITY: SAN FRANCISCO — STATE: CA — ZIP CODE: 94102 — JUVENILE (PHONE NO.): ( )

DRIVER LICENSE NO.	STATE	CLASS	COMMERCIAL ☐ YES ☐ NO	AGE	BIRTH DATE
F4956705	CA			29	12/14/85

SEX	HAIR	EYES	HEIGHT	WEIGHT	RACE	S.F. NO. or X NO.
M	BLK	BRN	5'7"	160	B	

VEH. LIC. NO./VIN. — STATE — REG MO/YR

YR. of VEH. | MAKE | MODEL | BODY STYLE | COLOR — ☐ COMMERCIAL VEHICLE (Veh. Code, § 15210(b)) ☐ HAZARDOUS MATERIAL (Veh. Code, § 353)

EVIDENCE OF FINANCIAL RESPONSIBILITY

REGISTERED OWNER OR LESSEE — ☐ SAME AS DRIVER

ADDRESS — ☐ SAME AS DRIVER

CITY — STATE — ZIP CODE

CORRECTABLE VIOLATION (Veh. Code, § 40610) YES	NO	CODE AND SECTION	DESCRIPTION (☐ BOOKING REQUIRED (See Reverse))	MISDEMEANOR OR INFRACTION (Circle)
☐	☑	308(a)(1) PC	TOBACCO PRODUCT SALES TO MINOR	M / I
☐	☐			M / I
☐	☐			M / I

SPEED APPROX.	P.F./MAX SPEED	VEH. LMT.	RADAR	☐ CONTINUATION FORM ISSUED
▸				

LOCATION OF VIOLATION(S): at 43 DRUMM

M.A.C.	JUV. NO.	SCHOOL

☐ VIOLATION(S) NOT COMMITTED IN MY PRESENCE, DECLARED ON INFORMATION AND BELIEF.

I DECLARE UNDER THE PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF CALIFORNIA THAT THE FOREGOING IS TRUE AND CORRECT.

ARRESTING OR CITING OFFICER — ISSUING AGENCY IF NOT SFPD — 2267 STAR — 3X205 ISSUING UNIT

DATE — NAME OF ARRESTING OFFICER IF DIFFERENT FROM CITING OFFICER — STAR — ISSUING UNIT

WITHOUT ADMITTING GUILT, I PROMISE TO APPEAR AT THE TIME AND PLACE INDICATED BELOW.

X SIGNATURE Bethlem

WHEN:

☐ ON OR BEFORE THIS DATE ___/___/___

☑ DAY: THURSDAY DATE: 06/19/14 TIME: 0800

WHAT TO DO: Follow the instructions on the reverse.

WHERE: www.sfsuperiorcourt.org

☐ Traffic/Nontraffic - Infraction Division - 850 Bryant St., Room 145, San Francisco, CA 94103 (415) 551-3550
☑ Criminal Division - SF Superior Court - 850 Bryant St., Room 475, San Francisco, CA 94103 (415) 551-0551
☐ Informal Juvenile & Traffic Court - 375 Woodside Avenue, Room 101, San Francisco, CA 94127 (415) 682-5100
☐ Youth Guidance Center - 375 Woodside Ave., Room 101, San Francisco, CA 94127 (415) 682-5100
☐ TO BE NOTIFIED ☐ YOU MAY ARRANGE WITH THE CLERK TO APPEAR AT A NIGHT SESSION OF THE COURT.

COURT COPY

3500-10 (07/13)
Notice To Appear Form approved by the Judicial Council of California.
Rev. 10/27/06 (Veh. Code §§ 40500(b), 40513(b), 40522, 40600; Penal Code § 853.9)

SEE REVERSE TR-130

016101536

NOTICE TO APPEAR
CITY AND COUNTY OF SAN FRANCISCO

PROOF OF SERVICE

RE: MONESH JOSAN dba 7-ELEVEN v. S.F. DEPARTMENT OF PUBLIC HEALTH APPEAL NO. 14-122

I, LILY KANG, declare as follows:

I am a citizen of the United States, over the age of eighteen years and not a party to the within entitled action. I am employed at the City Attorney's Office of San Francisco, Fox Plaza Building, 1390 Market Street, Fifth Floor, San Francisco, CA 94102. On October 2, 2014, I served the attached:

1. **RESPONDENT SAN FRANCISCO DEPARTMENT OF PUBLIC HEALTH'S BRIEF**
2. **DECLARATION OF OFFICER ROBERT M. RUECA**

on the interested parties in said action, by placing a true copy thereof in sealed envelope(s) addressed as follows:

Julia M. Jayne, Esq.
Jayne Law Group, P.C.
260 California Street – Suite 1001
San Francisco, CA 94111
Tel: (415) 623-3600
Fax: (415) 623-3605
Atty. for Appellant: Monesh Josan dba 7-Eleven

By Personal Service & By Facsimile

and served the named documents in the manner indicated below:

☐ BY MAIL: I caused true and correct copies of the above documents, by following ordinary business practices, to be placed and sealed in envelope(s) addressed to the addressee(s), at the City Attorney's Office of San Francisco, Fox Plaza Building, 1390 Market Street, City and County of San Francisco, California, 94102, for collection and mailing with the United States Postal Service, and in the ordinary course of business, correspondence placed for collection on a particular day is deposited with the United States Postal Service that same day.

☒ BY PERSONAL SERVICE: I caused true and correct copies of the above documents to be placed and sealed in envelope(s) addressed to the addressee(s) and I caused such envelope(s) to be delivered by hand via a Professional Messenger Service on the office(s) of the addressee(s).

☒ BY FACSIMILE: I caused a copy(ies) of such document(s) to be transmitted via facsimile machine. The fax number of the machine from which the document was transmitted was (415) 554-4248. The fax number(s) of the machine(s) to which the document(s) were transmitted are listed above. The fax transmission was reported as complete and without error. I caused the transmitting facsimile machine to print a transmission record of the transmission.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed October 2, 2014, at San Francisco, California.

LILY KANG