

**BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD  
OF THE STATE OF CALIFORNIA**

**AB-9660**

File: 20-567121 Reg: 16085122

7-ELEVEN, INC. and HADY NAWABI,  
dba 7-Eleven #36042B  
3225 McHenry Avenue,  
Modesto, CA 95350,  
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,  
Respondent

Administrative Law Judge at the Dept. Hearing: Alberto Roldan

Appeals Board Hearing: July 12, 2018  
South San Francisco, CA

**ISSUED AUGUST 2, 2018**

Appearances: *Appellants:* Donna Hooper, of Solomon Saltsman & Jamieson, as counsel for 7-Eleven, Inc. and Hady Nawabi, doing business as 7-Eleven #36042B.  
*Respondent:* Sean Klein as counsel for the Department of Alcoholic Beverage Control.

**OPINION**

7-Eleven, Inc. and Hady Nawabi, doing business as 7-Eleven #36042B (appellants), appeal from a decision of the Department of Alcoholic Beverage Control<sup>1</sup> suspending their license for 15 days because their clerk sold an alcoholic beverage to a Department minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

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1. The decision of the Department, dated July 14, 2017, is set forth in the appendix

## FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on April 13, 2016. On December 16, 2016, the Department filed an accusation charging that appellants' clerk, Fnu Babrak (the clerk), sold an alcoholic beverage to 17-year-old Angela Luong on July 29, 2016. Although not noted in the accusation, Luong was working as a minor decoy for the Department of Alcoholic Beverage Control at the time.

At the administrative hearing held on May 3, 2017, documentary evidence was received, and testimony concerning the sale was presented by Luong (the decoy) and by Agent Nate Lauer of the Department of Alcoholic Beverage Control. Appellants presented no witnesses.

Testimony established that on the date of the operation, the decoy entered the licensed premises, then looked for the cases with beer since she was unfamiliar with the premises. After finding them, she observed that they needed to be opened with a key. The decoy made contact with the clerk on duty. The clerk asked for her identification, which she produced. The clerk took the identification. He did not appear to look at it at this time. He gave the decoy the key and retained her identification while she returned to the case. The decoy selected a can of Coors Light beer. She then took her selection back to the clerk and waited behind the one customer who was before her. After the clerk was done with the customer before her, the decoy presented for purchase the can of Coors Light beer she had selected.

The clerk continued to hold the decoy's identification as he completed the transaction for the beer. The decoy's identification was the portrait type, with a red bar under the date of birth that specifically said she would not be 21 until 2019.

Despite the information on the decoy's identification, no questions were asked of the decoy about her age at any point during the transaction. The clerk rang up the beer, told the decoy the cost, then returned her identification. He completed the transaction for the beer after the decoy gave him cash to pay for the can of Coors Light beer. The decoy was given change by the clerk along with the beer purchase. She then exited the licensed premises with the can of Coors Light beer.

The decoy immediately went to the vehicle where Department agents were waiting and confirmed what had just occurred. The decoy immediately reentered with the Department agents. After allowing the clerk to complete transactions with customers who were in line, one of the agents informed the clerk of why they were there, and that he had sold alcohol to a minor. After this was done, one of the Department agents asked the decoy who sold her the beer. The decoy pointed at the clerk and said "He did." This occurred from a distance of approximately three feet. The clerk was looking at the decoy when she identified him.

After the hearing, the Department issued a decision determining the violation charged was proved and no defense was established.

Appellants then filed this appeal contending the decoy's mature demeanor violated rule 141(b)(2).

#### DISCUSSION

Appellants argue the decoy's appearance violated rule 141(b)(2). In particular, they contend the decoy's "physical appearance did not off-set the mature demeanor developed by her extensive experience as a decoy." (App.Br., at p. 6.) Appellants direct this Board to the decoy's testimony, in which she acknowledged having "participated in

20 to 30 operations," with each operation encompassing 10 to 15 licensed premises. (App.Br., at p. 3.) Additionally, the decoy had served as a police Explorer for two to three years. (*Ibid.*)

Appellants claim "[i]t is axiomatic that the amount of experience a person has practicing a task the more comfortable they will become at it and the more confident and self-assured they will appear in performing that task." (App.Br., at p. 6.) Moreover, appellants argue that "[a]n ALJ should consider all aspects of the decoy, which can include the past experience of the decoy and the observable effect that experience has on the decoy's appearance." (*Ibid.*, citing *7-Eleven, Inc.* (2001) AB-7631.) Appellants contend that an ordinary minor would not have handed over her identification in exchange for the key to the coolers, but that this decoy's experience and confidence "allowed her to approach the situation with the ease and maturity of an adult who had years of experience purchasing alcohol unimpeded." (App.Br., at p. 7.) Finally, appellants complain that "the ALJ did not note anything about [the decoy's] physical appearance that would off-set the impression set by her experienced demeanor." (*Ibid.*)

Rule 141 provides, in relevant part: "The decoy shall display the appearance which could generally be expected of a person under 21 years of age, under the actual circumstances presented to the seller of alcoholic beverages at the time of the alleged offense." (Code Regs., tit. 4, § 141(b)(2).) The rule provides an affirmative defense, and the burden of proof lies with the party asserting it. (*Chevron Stations, Inc.* (2015) AB-9445, at pp. 3-16; *7-Eleven, Inc./Lo* (2006) AB-8384, at pp. 8-11.)

This Board is bound by the factual findings in the Department's decision as long as those findings are supported by substantial evidence. The standard of review is as follows:

We cannot interpose our independent judgment on the evidence, and we must accept as conclusive the Department's findings of fact. [Citations.] We must indulge in all legitimate inferences in support of the Department's determination. Neither the Board nor [an appellate] court may reweigh the evidence or exercise independent judgment to overturn the Department's factual findings to reach a contrary, although perhaps equally reasonable, result. [Citations.] The function of an appellate board or Court of Appeal is not to supplant the trial court as the forum for consideration of the facts and assessing the credibility of witnesses or to substitute its discretion for that of the trial court. An appellate body reviews for error guided by applicable standards of review.

*(Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd. (Masani) (2004)*

118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826].)

The ALJ made the following relevant findings of fact:

[The decoy] appeared her chronological age at the time of the decoy operation. Based on her overall appearance, i.e., her physical appearance, clothing, poise, demeanor, maturity, and mannerisms shown at the hearing, and her appearance and conduct in front of the clerk at the Licensed Premises on July 29, 2016, [the decoy] displayed the appearance which could generally be expected of a person less than 21 years of age during her interactions with the clerk. The clerk did not testify in this matter to explain his age related impressions of [the decoy] or why he sold [the decoy] alcohol after being given a California Identification card that showed her to be 17 years of age at the time of the transaction.

(Findings of Fact, ¶ 15.) Based on these findings, the ALJ reached the following conclusions of law:

5. The Respondent[s] argued that the decoy operation at the Licensed Premises failed to comply with rule 141<sup>[fn.]</sup> and, therefore, the accusation should be dismissed pursuant to rule 141(c). Specifically, the Respondent argued that the appearance of [the decoy] failed to comply with rule 141(b)(2) because her appearance and demeanor appeared older because of her experience with operations and explorer training.

6. There is no credible evidence supporting the assertion by the Respondent that there was a failure to comply with the requirements of rule 141(b)(2). Neither the clerk nor any other witnesses for the Respondent testified regarding the impact of [the decoy]'s physical appearance, demeanor, or her apparent age. Given the totality of the evidence presented by the Department credibly establishing compliance with rule 141(b)(2), the Respondent's unsupported assertions that compliance did not occur is found not credible.

7. [The decoy] testified in this matter and her appearance matched the appearance she presented to the clerk on the date of the operation. Her appearance was consistent with a person under the age of 21. She presented identification to the clerk that clearly showed she was 17 years old. As previously noted, the clerk did not testify to establish whether there was anything in [the decoy]'s manner or appearance that led him to reasonably conclude that she was over 21.

(Conclusions of Law, ¶¶ 5-7.) The ALJ's conclusions are supported by the evidence, or rather, by the lack thereof. Appellant would have this Board reverse based merely on the unsupported generalization that a decoy with explorer experience necessarily looks over the age of 21 by virtue of her relative confidence. They provide no evidence, however, to show how experience or confidence affected *this particular decoy's* appearance. Appellants do argue that the decoy's confidence manifested in her audacity, that a typical minor would not have handed over her identification in order to obtain the keys to the cooler. (App.Br., at pp. 7-8.) However, this too is an unsupported generalization; anyone who has interacted with teenagers knows that audacity is not a trait limited to adults.

Finally, appellants attempt to shift the burden of proof when they argue that "the ALJ did not note anything about [the decoy's] appearance that would off-set" her confidence and experience. (App.Br., at p. 7.) Appellants, however, bore the burden of proof; in order to prevail on their affirmative defense, they needed to establish, with

evidence, that this particular decoy appeared over 21. They failed to do so. The Department was not required to rebut appellants' unsupported assertions.

The ALJ's factual findings were reasonable and supported by the evidence. We therefore offer no relief.

ORDER

The decision of the Department is affirmed.<sup>2</sup>

BAXTER RICE, CHAIRMAN  
PETER J. RODDY, MEMBER  
MEGAN MCGUINNESS, MEMBER  
ALCOHOLIC BEVERAGE CONTROL  
APPEALS BOARD

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2. This final order is filed in accordance with Business and Professions Code section 23088, and shall become effective 30 days following the date of the filing of this order as provided by section 23090.7 of said code.

Any party, before this final order becomes effective, may apply to the appropriate court of appeal, or the California Supreme Court, for a writ of review of this final order in accordance with Business and Professions Code section 23090 et seq.

# **APPENDIX**

**BEFORE THE  
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL  
OF THE STATE OF CALIFORNIA**

**IN THE MATTER OF THE ACCUSATION  
AGAINST:**

7-ELEVEN INC AND HADY NAWABI  
7-ELEVEN #36042B  
3225 MCHENRY AVENUE  
MODESTO, CA 95350

**OFF-SALE BEER AND WINE - LICENSE**

Respondent(s)/Licensee(s)  
Under the Alcoholic Beverage Control Act

STOCKTON DISTRICT OFFICE

*AB-9666*  
File: 20-567121

Reg: 16085122

**CERTIFICATE OF DECISION**

It is hereby certified that, having reviewed the findings of fact, determination of issues, and recommendation in the attached proposed decision, the Department of Alcoholic Beverage Control adopted said proposed decision as its decision in the case on June 20, 2017. Pursuant to Government Code section 11519, this decision shall become effective 30 days after it is delivered or mailed.

Any party may petition for reconsideration of this decision. Pursuant to Government Code section 11521(a), the Department's power to order reconsideration expires 30 days after the delivery or mailing of this decision, or if an earlier effective date is stated above, upon such earlier effective date of the decision.

Any appeal of this decision must be made in accordance with Business and Professions Code sections 23080-23089. For further information, call the Alcoholic Beverage Control Appeals Board at (916) 445-4005, or mail your written appeal to the Alcoholic Beverage Control Appeals Board, 300 Capitol Mall, Suite 1245, Sacramento, CA 95814.

On or after August 24, 2017, a representative of the Department will contact you to arrange to pick-up the license certificate.

Sacramento, California

Dated: July 14, 2017



Matthew D. Botting  
General Counsel

2017 OCT 16 AM 8:30  
RECEIVED  
ABC APPEALS BOARD

BEFORE THE  
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL  
OF THE STATE OF CALIFORNIA

IN THE MATTER OF THE ACCUSATION AGAINST:

7 ELEVEN INC, HADY NAWABI  
7 ELEVEN 36042B  
3225 MCHENRY AVE  
MODESTO, CA 95350

OFF-SALE BEER AND WINE - LICENSE

Respondent(s)/Licensee(s)  
under the Alcoholic Beverage Control Act.

STOCKTON DISTRICT OFFICE

File: 20-567121

Reg: 16085122

AB: 9660

CERTIFICATION

I, Dominique Williams, do hereby certify that I am a Senior Legal Analyst for the Department of Alcoholic Beverage Control of the State of California.

I do hereby further certify that annexed hereto is a true, correct and complete record (not including the Hearing Reporter's transcript) of the proceedings held under Chapter 5 of Part 1 of Division 3 of Title 2 of the Government Code concerning the petition, protest, or discipline of the above-listed license heretofore issued or applied for under the provisions of Division 9 of the Business and Professions Code.

IN WITNESS WHEREOF, I hereunto affix my signature on October 13, 2017, in the City of Sacramento, County of Sacramento, State of California.

/s/ Dominique Williams  
DOMINIQUE WILLIAMS, Senior Legal Analyst  
Office of Legal Services

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ABC APPEALS BOARD

**BEFORE THE  
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL  
OF THE STATE OF CALIFORNIA**

IN THE MATTER OF THE ACCUSATION AGAINST:

7-Eleven, Inc. and	}	File: 20-567121
Hady Nawabi,	}	
dba 7-Eleven #36042B	}	Reg.: 16085122
3225 McHenry Avenue	}	
Modesto, California 95350	}	License Type: 20
	}	
Respondent	}	Word Count: 12,421
	}	
	}	Reporter:
	}	Cheryl Laboa-CSR # 10039
	}	California Reporting
	}	
<u>Off-Sale Beer and Wine License</u>	}	<b><u>PROPOSED DECISION</u></b>

Administrative Law Judge Alberto Roldan, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter at Modesto, California, on May 3, 2017.

Sean Klein, Attorney, represented the Department of Alcoholic Beverage Control (Department).

Melissa Gelbart, Attorney, represented Respondent 7-Eleven, Inc. and Hady Nawabi.

The Department seeks to discipline the Respondent's license on the grounds that, on or about July 29, 2016 the Respondent, through their agent or employee, Fnu Babrak, sold, furnished, or gave alcoholic beverages to Angela Luong, an individual under the age of 21 in violation of Business and Professions Code section 25658(a).<sup>1</sup> (Exhibit D-1.)

Oral evidence, documentary evidence, and evidence by oral stipulation on the record was received at the hearing. The matter was argued and submitted for decision on May 3, 2017.

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<sup>1</sup> All statutory references are to the Business and Professions Code unless otherwise noted.

## FINDINGS OF FACT

1. The Department filed the accusation on December 16, 2016. Subsequent to the filing of the accusation, Respondent sought additional discovery from the Department pursuant to Government Code section 11507.6. The Department attempted to comply with discovery by providing copies of the investigation containing attached images, including an image that purported to be the California Identification Card utilized by the Decoy in the operation that led to the charge in the accusation.
2. Angela Luong (Luong) testified in this matter to having served as a Decoy on behalf of the Department. During her testimony, she was shown an image from the investigative report that was described by the author of the report to be an image of the identification she used on the date of the decoy operation. (Exhibit D-2) Luong testified that this image was not the identification that she carried and produced on the date of the operation. She recognized it as her previous California Identification Card because her hair was different even though the remaining information and appearance of the identification was the same. The image appeared to be from previous operations Luong had served as a decoy prior to receiving the new California Identification Card that Luong actually carried on the date of this operation.
3. Luong produced the identification she used on the date of the operation and an adjournment of approximately 15 minutes was taken for the Department to copy an image of the California Identification Card that Luong testified was actually displayed, redact Luong's personal information from the image, provide a copy to the Respondent, and mark the image as an exhibit. (Exhibit D-6) Luong was returned to the stand and her testimony was reopened. In sworn testimony, she confirmed that Exhibit D-6 was the identification that she utilized during the operation at issue in this accusation and that Exhibit D-2 was not the identification she carried on the date of this operation.
4. Respondent renewed their previous request for a continuance based on the Department's failure to provide an image of the actual identification used prior to the hearing. When asked what additional witnesses or information needed to be explored as a result of the discovery error, the Respondent was unable to articulate any need for additional time to prepare. After considering the Respondent's motion and the Department's opposition to the motion, it was denied based on the finding that the Department had come into compliance with its discovery obligation by providing Exhibit D-6, that Respondent had been given sufficient time to adjust to the new information and cross examine all Department witnesses on the new information, and that no good cause for a continuance had been presented by the Respondent.

5. On April 13, 2016 the Department issued a type 20, off-sale beer and wine license to the Respondent for the above-described location (the Licensed Premises).
6. There is no record of prior Department discipline against the Respondent's license.
7. Luong was born on October 2, 1998 and was 17 years old at the time of the investigation on July 29, 2016. On that date, Luong served as a minor decoy in an operation conducted by the Department at a series of locations.
8. Luong appeared and testified at the hearing. On July 29, 2016 her appearance was as depicted in a photograph that was taken during the operation (Exhibit D-3) where she was wearing a black and white striped t-shirt over a pair of blue jeans. She wore her hair down and straight with her face fully exposed. She had no visible tattoos. Her jewelry was limited to a wristwatch and a necklace. According to her license information, Luong is 5'3" and 123 pounds. (Exhibit D-6) Her appearance at the hearing was consistent with her license information and was also essentially the same as her appearance on the date of the decoy operation.
9. On July 29, 2016 at about 11:10 p.m. Luong entered the Licensed Premises in furtherance of the operation. (Exhibit D-5) She looked for the cases with beer since she was unfamiliar with the Licensed Premises. After finding them, she observed that they needed to be opened with a key. Luong made contact with the clerk on duty. The clerk asked for her identification which she produced. (Exhibit D-6) The clerk took this identification. He did not appear to look at it at this time. The clerk gave Luong the key and retained her identification while she returned to the case. She selected a can of Coors Light beer. She then took her selection back to the clerk and waited behind the one customer who was before her. After the clerk was done with the customer before her, Luong presented for purchase the can of Coors Light beer she had selected.
10. This clerk was the same person in the photo that was later taken of Luong standing next to the clerk that served her. (Exhibit D-5) The clerk continued to hold Luong's identification as he completed the transaction for the beer. Luong's identification was the California Identification portrait type that had the red bar under the date of birth that specifically said she would not be 21 until 2019.
11. Despite the information on the license, no questions were asked of Luong about her age at any point during the transaction. The clerk rang up the beer, told Luong the cost, then returned her identification. He completed the transaction for the beer after Luong gave him a cash to pay for the can of Coors Light beer. Luong was given change by the clerk along with the beer purchase. She then exited the Licensed Premises with the can of Coors Light beer.

12. Luong immediately went to the vehicle where the Department agents were waiting and confirmed what had just occurred. Luong immediately re-entered with the Department agents. After allowing the clerk to complete transactions with customers who were in line, one of the agents informed the clerk of why they were there and that he had sold alcohol to a minor. After this was done, one of the Department agents asked Luong about who sold her the beer. Luong pointed at the clerk who had sold the alcohol to her and said "He did". This occurred from a distance of approximately 3 feet between Luong and the clerk. (Exhibit D-5) The clerk was looking at Luong when she identified him.

13. Department Agent Nate Lauer (Lauer) subsequently identified the clerk as Fnu Babrak from his driver's license information during his contact with the clerk. After the identification by Luong, a picture was taken of Luong standing directly next to the clerk while holding the can of Coors Light she had purchased from him. (Exhibit D-5)

14. Luong became a decoy through the Heywood Recreational Center where she heard a presentation about the decoy program. She was also involved in the Oakland Police Department explorer program for 2-3 years. Luong had volunteered to be a decoy on 20-30 operations since she was 16 years old.

15. Luong appeared her chronological age at the time of the decoy operation. Based on her overall appearance, i.e., her physical appearance, clothing, poise, demeanor, maturity, and mannerisms shown at the hearing, and her appearance and conduct in front of the clerk at the Licensed Premises on July 29, 2016, Luong displayed the appearance which could generally be expected of a person less than 21 years of age during her interactions with the clerk. The clerk did not testify in this matter to explain his age related impressions of Luong or why he sold Luong alcohol after being given a California Identification Card that showed her to be 17 years of age at the time of the transaction.

16. Except as set forth in this decision, all other allegations in the accusation and all other contentions of the parties lack merit.

### CONCLUSIONS OF LAW

1. Article XX, section 22 of the California Constitution and section 24200(a) provide that a license to sell alcoholic beverages may be suspended or revoked if continuation of the license would be contrary to public welfare or morals.
2. Section 24200(b) provides that a licensee's violation, or causing or permitting of a violation, of any penal provision of California law prohibiting or regulating the sale of alcoholic beverages is also a basis for the suspension or revocation of the license.

3. Section 25658(a) provides that every person who sells, furnishes, gives, or causes to be sold, furnished, or given away, any alcoholic beverage to any person under the age of 21 years is guilty of a misdemeanor.
4. Cause for suspension or revocation of the Respondent's license exists under Article XX, section 22 of the California State Constitution and sections 24200(a) and (b) on the basis that on July 29, 2016 the Respondent's clerk, inside the Licensed Premises, sold an alcoholic beverage to Angela Luong, a person under the age of 21, in violation of Business and Professions Code section 25658(a). (Findings of Fact ¶¶ 5-15.)
5. The Respondent argued that the decoy operation at the Licensed Premises failed to comply with rule 141<sup>2</sup> and, therefore, the accusation should be dismissed pursuant to rule 141(c). Specifically, the Respondent argued that the appearance of Yuong failed to comply with rule 141(b)(2) because her appearance and demeanor appeared older because of her experience with operations and explorer training.
6. There is no credible evidence supporting the assertion by the Respondent that there was a failure to comply with the requirements of rule 141(b)(2). Neither the clerk nor any other witnesses for the Respondent testified regarding the impact of Yuong's physical appearance, demeanor, or her apparent age. Given the totality of the evidence presented by the Department credibly establishing compliance with rule 141(b)(2), the Respondent's unsupported assertions that compliance did not occur is found not credible.
7. Yuong testified in this matter and her appearance matched the appearance she presented to the clerk on the date of the operation. Her appearance was consistent with a person under the age of 21. She presented identification to the clerk that clearly showed she was 17 years old. As previously noted, the clerk did not testify to establish whether there was anything in Yuong's manner or appearance that led him to reasonably conclude that she was over 21.
8. The remaining matter is whether the Respondent was denied due process when their request for a continuance was denied. Respondent contends that the error on the part of the Department required a continuance to remedy the error. Clearly there was an error in compliance with timely discovery required by Government Code section 11507.6. This error was not shown to be anything more than the product of an oversight or error on the part of the Department. There is no evidence of intentional or reckless withholding of discovery. Government Code section 11507.7 gives the administrative law judge broad discretion in acting to remedy errors related to discovery. The error was sufficiently

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<sup>2</sup> All rules referred to herein are contained in title 4 of the California Code of Regulations unless otherwise noted.

7-Eleven, Inc. and Hady Nawabi  
dba 7-Eleven #36042B  
File #20-567121  
Reg. #16085122  
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remedied in this matter almost immediately after its discovery. No evidence was presented to establish a need for a continuance as a further remedy to the error. The remedy gave the Respondent the full ability to cross examine all Department witnesses on the issue. Credible sworn testimony established that Luong received an updated Identification Card subsequent to providing an image of her previous identification card to the Department. It is unclear what favorable information on behalf of the Respondent could have been developed as a result of the continuance. The request for continuance was properly denied because it was not supported by good cause.

### **PENALTY**

The Department recommended that the Respondent's license be suspended for a period of 15 days which is the standard penalty for a violation without mitigation or aggravation. No evidence of established and enforced policies to prevent sales of alcoholic beverages to underage individuals was presented by the Respondent. The period of discipline free operation is of insufficient duration to be an appropriate factor in mitigation.

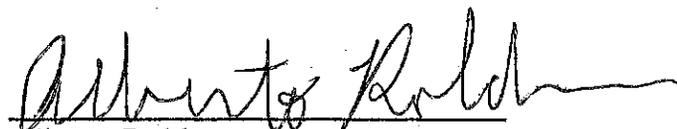
There appear to be no factors in aggravation or mitigation applicable to this violation. The penalty recommended herein complies with rule 144.

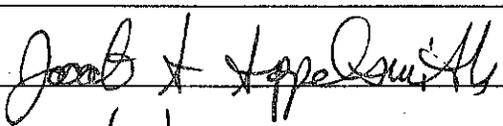
7-Eleven, Inc. and Hady Nawabi  
dba 7-Eleven #36042B  
File #20-567121  
Reg. #16085122  
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**ORDER**

The Respondents' off-sale general license is hereby suspended for a period of 15 days.

Dated: May 8, 2017

  
Alberto Roldan  
Administrative Law Judge

<input checked="" type="checkbox"/> Adopt
<input type="checkbox"/> Non-Adopt: _____
By: 
Date: <u>6/20/17</u>