

**Department of Health and Human Services**

**DEPARTMENTAL APPEALS BOARD**

**Civil Remedies Division**

Center for Tobacco Products,

Complainant,

v.

Vincennes Express Mart Inc.  
d/b/a BP One Stop,

Respondent.

Docket No. C-15-196  
FDA Docket No. FDA-2014-H-1717

Decision No. CR3541

Date: December 30, 2014

**INITIAL DECISION AND DEFAULT JUDGMENT**

The Center for Tobacco Products (CTP) filed an Administrative Complaint (Complaint) against Respondent, Vincennes Express Mart Inc., d/b/a BP One Stop that alleges facts and legal authority sufficient to justify the imposition of a civil money penalty of \$500. Respondent did not answer the Complaint, nor did Respondent request an extension of time within which to file an answer. Therefore, I enter a default judgment against Respondent and assess a civil money penalty of \$500.

CTP began this case by serving the Complaint on Respondent and filing a copy of the Complaint with the Food and Drug Administration's (FDA) Division of Dockets Management. The Complaint alleges that Respondent impermissibly sold cigarettes to minors and failed to verify that a cigarette purchaser was 18 years of age or older, thereby violating the Federal Food, Drug, and Cosmetic Act (Act), 21 U.S.C. § 301 *et seq.*, and its implementing regulations, Cigarettes and Smokeless Tobacco, 21 C.F.R. pt. 1140 (2013). CTP seeks a civil money penalty of \$500.

On October 30, 2014, CTP served the Complaint on Respondent by United Parcel Service, pursuant to 21 C.F.R. §§ 17.5 and 17.7. In the Complaint and accompanying cover letter, CTP explained that within 30 days, Respondent should pay the proposed penalty, file an answer, or request an extension of time within which to file an answer. CTP warned Respondent that if it failed to take one of these actions within 30 days, an Administrative Law Judge could, pursuant to 21 C.F.R. § 17.11, issue an initial decision ordering Respondent to pay the full amount of the proposed penalty.

Respondent has not filed an answer within the time provided by regulation, nor has it requested an extension. Pursuant to 21 C.F.R. § 17.11(a), I am required to “assume the facts alleged in the [C]omplaint to be true” and, if those facts establish liability under the Act, issue a default judgment and impose a civil money penalty. Accordingly, I must determine whether the allegations in the Complaint establish violations of the Act.

Specifically, CTP alleges the following facts in its Complaint:

- Respondent owns BP One Stop, an establishment that sells tobacco products and is located at 606 Shirlee Street, Vincennes, Indiana 47591. Complaint ¶ 3.
- During an inspection of Respondent’s establishment on November 9, 2013, at approximately 11:56 AM, an FDA-commissioned inspector observed that “a person younger than 18 years of age was able to purchase a package Grizzly Long Cut Premium Wintergreen smokeless tobacco.” The inspector also observed that “the minor’s identification was not verified before the sale . . . .” Complaint ¶ 10.
- On January 23, 2014, CTP issued a Warning Letter to Respondent regarding the inspector’s observation from November 9, 2013. The letter explained that the observation constituted violations of regulations found at 21 C.F.R. §§ 1140.14(a) and 1140.14(b) and that the named violations were not necessarily intended to be an exhaustive list of all violations at the establishment. The Warning Letter went on to state that if Respondent failed to correct the violations, regulatory action by the FDA or a civil money penalty action could occur and that Respondent is responsible for complying with the law. Complaint ¶ 10.
- In an undated letter received by CTP on February 19, 2014 an individual representing BP One Stop responded to the warning letter. The signature of the individual was illegible however; the letter “apologized for the violation and stated that Respondent took steps to prevent future violations.” On March 14, 2014, Wendy Sinclair who identified herself as the establishment’s manager responded by telephone.

“Ms. Sinclair stated that Respondent’s employees would verify the identification of individuals attempting to purchase tobacco products who appear to be under the age of 30, and would not sell tobacco to persons who are under the age of 18.” Complaint ¶ 11.

- During a subsequent inspection of Respondent’s establishment on April 26, 2014, at approximately 2:35 PM, FDA-commissioned inspectors documented that “a person younger than 18 years of age was able to purchase a package of Salem Box cigarettes ... [.]” The inspector also observed that “the minor’s identification was not verified before the sale . . . .” Complaint ¶ 1.

These facts establish that Respondent is liable under the Act. The Act prohibits misbranding of a tobacco product. 21 U.S.C. § 331(k). A tobacco product is misbranded if distributed or offered for sale in any state in violation of regulations issued under section 906(d) of the Act. 21 U.S.C. § 387c(a)(7)(B); 21 C.F.R. § 1140.1(b). The Secretary of the U.S. Department of Health and Human Services issued the regulations at 21 C.F.R. pt. 1140 under section 906(d) of the Act. 21 U.S.C. § 387a-1; *see* 21 U.S.C. § 387f(d)(1); 75 Fed. Reg. 13,225, 13,229 (Mar. 19, 2010). The regulations prohibit the sale of cigarettes to any person younger than 18 years of age. 21 C.F.R. § 1140.14(a). The regulations also require retailers to verify, by means of photo identification containing a purchaser’s date of birth, that no cigarette purchasers are younger than 18 years of age. 21 C.F.R. § 1140.14(b)(1).

Taking the above alleged facts as true, on November 9, 2013, and April 26, 2014, the Respondent violated the prohibition against selling tobacco products to persons younger than 18 years of age, 21 C.F.R. § 1140.14(a). Respondent also violated the requirement that retailers verify, by means of photo identification containing a purchaser’s date of birth, that no cigarette purchasers are younger than 18 years of age. 21 C.F.R. § 1140.14(b)(1). Therefore, Respondent’s actions constitute violations of law that merit a civil money penalty.

CTP has requested a fine of \$500, which is a permissible fine under the regulations. 21 C.F.R. § 17.2. Therefore, I find that a civil money penalty of \$500 is warranted and so order one imposed.

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/s/  
Steven T. Kessel  
Administrative Law Judge