

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Center for Tobacco Products,

Complainant

v.

Nancy Fitzgerald
d/b/a Chevron / Westmond Store,

Respondent.

Docket No. C-15-1118
FDA Docket No. FDA-2015-H-0299

Decision No. CR3751

Date: April 3, 2015

INITIAL DECISION AND DEFAULT JUDGMENT

The Center for Tobacco Products (CTP) filed an Administrative Complaint (Complaint) against Respondent, Nancy Fitzgerald d/b/a Chevron / Westmond Store, which alleges facts and legal authority sufficient to justify the imposition of a civil money penalty of \$250. 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 \$250.

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, 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 \$250.

On February 4, 2015, 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 Chevron / Westmond Store, an establishment that sells tobacco products and is located at 40 Westmond Road, Sagle, Idaho 83860. Complaint ¶ 3.
- During an inspection of Respondent’s establishment on March 9, 2014, at approximately 3:44 p.m. PST, an FDA-commissioned inspector observed that “a person younger than 18 years of age was able to purchase a package of Camel Crush Menthol Silver cigarettes . . . [.]” The inspector also observed that “the minor’s identification was not verified before the sale” Complaint ¶ 10.
- On May 15, 2014, CTP issued a Warning Letter to Respondent regarding the inspector’s observations from March 9, 2014. The letter explained that the observations constituted violations of regulations found at 21 C.F.R. § 1140.14(a) and (b)(1), 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.
- Nancy Fitzgerald responded to the Warning Letter in a July 16, 2013, letter. “Ms. Fitzgerald stated that the employee who sold the tobacco product to the minor no longer works at the establishment. Ms. Fitzgerald stated that Respondent retrained all employees on the importance of complying with the ‘Federal Law’ regarding the sale of tobacco products to minors. . . .” She further informed CTP “that she stresses this ‘importance through weekly reminders and literature. . . .” Complaint ¶ 11.

