

**Department of Health and Human Services**

**DEPARTMENTAL APPEALS BOARD**

**Civil Remedies Division**

Center for Tobacco Products,

Complainant

v.

Kroger Texas L.P.,  
d/b/a Kroger 570

Respondent.

Docket No. C-15-97  
FDA Docket No. FDA-2014-H-1594

Decision No. CR3525

Date: December 22, 2014

**INITIAL DECISION AND DEFAULT JUDGMENT**

The Center for Tobacco Products (CTP) filed an Administrative Complaint (Complaint) against Respondent, Kroger Texas L.P., d/b/a Kroger 570 that alleges facts and legal authority sufficient to justify the imposition of a civil money penalty of \$5,000. 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 \$5,000.

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 cigarette purchasers were 18 years of age or older, thereby violating the Federal Food, Drug, and Cosmetic Act (Act), 21 U.S.C. § 301 *et*

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 \$5,000.

On October 21, 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 Kroger 570, an establishment that sells tobacco products and is located at 5021 Teasley Lane, Denton, Texas 76210. Complaint ¶ 3.
- CTP previously initiated a civil money penalty action, CRD Docket Number C-13-1292, FDA Docket Number FDA-2013-H-1098, against Respondent for three violations of 21 C.F.R. pt. 1140 within a 24-month period. Specifically, those violations included violations on February 10, 2013, when Respondent sold tobacco products to a minor and failed to verify the age of the tobacco purchaser by means of a photographic identification, and an unspecified violation on March 17, 2012. Complaint ¶ 10.
- The previous civil money penalty action concluded when Rob Hamilton, Respondent’s authorized representative, settled the claims on Respondent’s behalf. On September 12, 2013, Mr. Hamilton signed an Acknowledgment Form “admitting that the violations described in the Complaint filed in FDA Docket Number FDA-2013-H-1098, CRD Docket Number C-13-1292 occurred, waiving his ability to contest the violations in the future, and stating that he understood that the violations may be counted in determining the total number of violations for purposes of future enforcement actions.” The Administrative Law Judge closed the case on October 11, 2013. Complaint ¶ 11.

