

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Center for Tobacco Products,
(FDA No. FDA-2014-H-0836)

Complainant

v.

Juan Antonio Guevara d/b/a Don Juan's 2,

Respondent.

Docket No. C-14-1341

Decision No. 3336

Date: August 19, 2014

INITIAL DECISION AND DEFAULT JUDGMENT

The Center for Tobacco Products (CTP) began this matter by serving an administrative complaint on Respondent, Juan Antonio Guevara d/b/a Don Juan's 2, at 7359 North Bentsen Palm Drive, Mission, Texas 78574, and by filing a copy of the complaint with the Food and Drug Administration's (FDA) Division of Dockets Management. The complaint alleges that Don Juan's 2 unlawfully sold cigarettes to minors and failed to verify the ages of tobacco purchasers by means of photographic identification containing the bearer's date of birth, thereby violating the Federal Food, Drug, and Cosmetic Act (Act), 21 U.S.C. § 301 *et seq.*, and its implementing regulations, 21 C.F.R. pt. 1140. CTP seeks to impose a \$500 civil money penalty against Respondent Don Juan's 2.

As provided for in 21 C.F.R. §§ 17.5 and 17.7, on June 25, 2014, CTP served the complaint on Respondent Don Juan's 2 by United Parcel Service. In the complaint and accompanying cover letter, CTP explained that, within 30 days, Respondent should pay the penalty, file an answer, or request an extension of time in which to file an answer. CTP warned Respondent that, if it failed to take one of these actions within 30 days, the Administrative Law Judge could, pursuant to 21 C.F.R. § 17.11, issue an initial decision ordering it to pay the full amount of the proposed penalty.

Respondent Don Juan's 2 has neither filed an answer within the time prescribed, nor requested an extension of time within which to file an answer. Pursuant to 21 C.F.R. § 17.11, I assume that the facts alleged in the complaint (but not its conclusory statements) are true. Specifically:

- At Respondent's business establishment, 7359 North Bentsen Palm Drive, Mission, Texas 78574, on February 24, 2013, at approximately 3:14 PM CT, an FDA-commissioned inspector observed Respondent's staff sell a package of Camel Crush Regular Fresh cigarettes to a person younger than 18 years of age. The inspector also noted that Respondent's staff failed to verify, by means of photo identification containing the bearer's date of birth, that the cigarette purchaser was 18 years of age or older;
- In a warning letter issued on March 14, 2013, CTP informed Respondent of the inspector's observations from February 24, 2013, and that such actions violate federal law, 21 C.F.R. § 1140.14(a) and (b)(1). The letter further warned that if Respondent failed to correct its violations, the FDA could impose a civil money penalty or take other regulatory action;
- At Respondent's business establishment, 7359 North Bentsen Palm Drive, Mission, Texas 78574, on January 11, 2014, at approximately 10:35 AM, FDA-commissioned inspectors documented Respondent's staff selling a package of Marlboro cigarettes to a person younger than 18 years of age. The inspectors also noted that Respondent's staff failed to verify, by means of photo identification containing the bearer's date of birth, that the cigarette purchaser was 18 years of age or older.

These facts establish Respondent's liability under the Act. The Act prohibits misbranding of a tobacco product. 21 U.S.C. § 331(k). A tobacco product is misbranded if sold or distributed in violation of regulations issued under section 906(d) of the Act. 21 U.S.C. § 387f(d); *see* 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). Under 21 C.F.R. § 1140.14(a), no retailer may sell cigarettes or smokeless tobacco to any person younger than 18 years of age. Under 21 C.F.R. § 1140.14(b)(1), retailers must verify, by means of photo identification containing the bearer's date of birth, that no cigarette or smokeless tobacco purchaser is younger than 18 years of age.

A \$500 civil money penalty is permissible under 21 C.F.R. § 17.2.

