

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Center for Tobacco Products,

Complainant

v.

MJ Mart LLC / Ravi Patel
d/b/a MJ Mart,

Respondent.

Docket No. C-15-891
FDA Docket No. FDA-2015-H-0090

Decision No. CR3701

Date: March 10, 2015

INITIAL DECISION AND DEFAULT JUDGMENT

The Center for Tobacco Products (CTP) filed an Administrative Complaint (Complaint) against MJ Mart LLC / Ravi Patel d/b/a MJ Mart (Respondent), which alleges facts and legal authority sufficient to justify imposing a \$500 civil money penalty. Respondent did not timely 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 initiated this case by serving a Complaint on Respondent and filing a copy of the Complaint with the Civil Remedies Division (CRD) and the Food and Drug Administration's (FDA) Division of Dockets Management. The Complaint alleges that Respondent utilized a self-service display of regulated tobacco products in a non-exempt facility,

sold a regulated tobacco product to a minor, and failed to verify that a purchaser of a tobacco product was of sufficient age, thereby violating the Federal Food, Drug, and Cosmetic Act (Act), codified at 21 U.S.C. §§ 301 – 399d, and its implementing regulations, found at 21 C.F.R. Part 1140.

In compliance with 21 C.F.R. §§ 17.5 and 17.7, CTP served Respondent with the Complaint on January 14, 2015, via United Parcel Service. The Complaint and accompanying cover letter stated that within 30 days, Respondent must take one of the following three actions: pay the penalty, file an answer, or request an extension of time within which to file an answer. CTP further explained that if Respondent did not comply with one of the actions within 30 days, an Administrative Law Judge could issue an initial decision ordering Respondent to pay the full amount of the proposed penalty. 21 C.F.R. § 17.11.

Respondent has neither filed an Answer within the time provided by regulation, nor timely requested an extension. Pursuant to 21 C.F.R. § 17.11(a), I am required to “assume the facts alleged in the complaint to be true, and, if such facts establish liability under [the Act],” issue an initial decision and impose a civil money penalty. Accordingly, I must determine whether the allegations in the Complaint establish violations of the Act.

Specifically, CTP alleges that:

- Respondent owns MJ Mart, an establishment that sells tobacco products and is located at 9775 Charlotte Highway, Fort Mill, South Carolina 29707. Complaint ¶ 3.
- On January 14, 2014, an FDA-commissioned inspector observed Respondent “using a self-service display in a non-exempt facility, in violation of 21 C.F.R. § 1140.16(c).” Specifically, the inspector observed, “Skoal brand smokeless tobacco located on a counter in an area of the establishment that is open to customers of all ages.” Complaint ¶ 10.
- On March 6, 2014, CTP issued a Warning Letter to Respondent regarding the inspector’s observation from January 14, 2014. The letter explained that the observation constituted a violation of a regulation found at 21 C.F.R. § 1140.16(c), and that the named violation was not necessarily intended to be an exhaustive list of all violations at the establishment. The Warning Letter also stated that if Respondent failed to correct the violation, 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.

- On May 5, 2014, Ravi Patel responded in writing to the Warning Letter on Respondent's behalf. "Mr. Patel stated that Respondent 'rectified its mistake' and that it would remove all regulated tobacco products from self-service displays." Complaint ¶ 11.
- During a subsequent inspection conducted on July 10, 2014, FDA-commissioned inspectors documented additional violations of 21 C.F.R. Part 1140 at Respondent's establishment. Specifically, "a person younger than 18 years of age was able to purchase a package of Grizzly Long Cut Premium Wintergreen smokeless tobacco on July 10, 2014, at approximately 10:27 AM[.]" The inspectors also documented that "the minor's identification was not verified before the sale . . . on July 10, 2014" Complaint ¶ 1.

I find that these facts, which I must assume are true, establish that Respondent is liable under the Act. *See* 21 C.F.R. § 17.11(a). 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, codified at 21 U.S.C. § 387f(d). *See* 21 U.S.C. § 387(a)(7)(B); 21 C.F.R. § 1140.1(b). The regulations prohibit the sale of cigarettes or smokeless tobacco to any person younger than 18 years of age. 21 C.F.R. § 1140.14(a). Retailers are required to verify, by means of photo identification containing the purchaser's date of birth, that no purchaser of cigarettes or smokeless tobacco is younger than 18 years of age. 21 C.F.R. § 1140.14(b)(1). Pursuant to 21 C.F.R. § 1140.16(c)(1), a retailer may sell cigarettes and smokeless tobacco only in a direct, face-to-face exchange between the retailer and the consumer. Self-service displays are a method of sale that is not permitted under the regulations, 21 C.F.R. § 1140.16(c)(1), except when located in facilities where the retailer ensures that no person younger than 18 years of age is present, or permitted to enter, at any time. 21 C.F.R. § 1140.16(c)(2)(ii).

In the present case, on January 14, 2014, Respondent utilized a self-service display in violation of 21 C.F.R. § 1140.16(c). On July 10, 2014, Respondent sold a regulated tobacco product to a person younger than 18 years of age, in violation of 21 C.F.R. § 1140.14(a), and failed to verify by means of photographic identification that the purchaser of the tobacco product was of sufficient age, in violation of 21 C.F.R. § 1140.14(b)(1). Respondent's actions and omissions at the same retail outlet constitute violations of law that warrant a civil money penalty.

The regulations require me to impose a civil money penalty that is either the maximum amount provided for by law, or the amount sought in the Complaint, whichever amount is smaller. 21 C.F.R. § 17.11(a)(1)-(2). The maximum penalty for these actions is \$500. *See* 21 C.F.R. § 17.2. In its Complaint, CTP seeks a civil money penalty in the amount of \$500. Accordingly, I find that a civil money penalty is permissible under 21 C.F.R. § 17.2.

/s/

Steven T. Kessel
Administrative Law Judge