

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Center for Tobacco Products,
(FDA No. FDA-2013-H-0268)

Complainant

v.

Zak Abs, Inc.
d/b/a Brother's Supermarket and Deli,

Respondent.

Docket No. C-13-505

Decision No. CR2764

Date: April 24, 2013

INITIAL DECISION AND DEFAULT JUDGMENT

The Center for Tobacco Products (CTP) began this matter by serving an administrative complaint on Respondent, Zak Abs, Inc. d/b/a Brother's Supermarket and Deli, at 525 Springfield Avenue, Newark, New Jersey 07103, and by filing a copy of the complaint with the Food and Drug Administration's (FDA) Division of Dockets Management. The complaint alleges that Brother's Supermarket and Deli impermissibly sold cigarettes or smokeless tobacco to a minor and failed to verify the purchaser's age by means of photo identification containing a date of birth, violating the Federal Food, Drug, and Cosmetic Act (Act), 21 U.S.C. § 301 *et seq.*, and its implementing regulations, 21 C.F.R. Part 1140. CTP seeks to impose a \$500 civil money penalty against Respondent Brother's Supermarket and Deli.

As provided for in 21 C.F.R. §§ 17.5 and 17.7, on March 13, 2013, CTP served the complaint on Respondent Brother's Supermarket and Deli 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 Brother's Supermarket and Deli 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, 525 Springfield Avenue, Newark, New Jersey 07103, on June 9, 2012, an FDA-commissioned inspector observed a sale of cigarettes or smokeless tobacco to a person younger than 18 years of age;
- At Respondent's business establishment, 525 Springfield Avenue, Newark, New Jersey 07103, on June 9, 2012, an FDA-commissioned inspector observed that staff failed to verify, by means of photo identification containing the bearer's date of birth, that no purchaser of cigarettes or smokeless tobacco is younger than 18 years of age;
- In a warning letter dated August 9, 2012, CTP informed Respondent of the inspector's June 9, 2012 observations, and that such actions violate federal law, 21 C.F.R. §§ 1140.14(a) and 1140.14(b)(1).¹ The letter further warned that Respondent's failure to correct its violations could result in a civil money penalty or other regulatory action;
- At approximately 1:39 p.m. on December 8, 2012, at Respondent's business establishment, 525 Springfield Avenue, Newark, New Jersey 07103, an FDA-commissioned inspector observed the sale of a package of Maverick Box 100s cigarettes to a person younger than 18 years of age; staff also failed to verify, by means of photo identification containing the bearer's date of birth, the purchaser's age.

These facts establish Respondent Brother's Supermarket and Deli'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

¹ In the warning letter, CTP alleges that these violations occurred at Brother's Market Deli. Although the Complaint does not state that Brother's Market Deli is also known as or is a prior name of Brother's Supermarket and Deli, I infer that the two names refer to the same retail outlet.

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 issued the regulations at 21 C.F.R. Part 1140 under section 906(d) of the Act. 21 U.S.C. 387(a); *see* 21 U.S.C. § 387f(d)(1); 75 Fed. Reg. 13,229 (Mar. 10, 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), a retailer must verify, by means of photo identification containing the bearer's date of birth, that no person purchasing cigarettes or smokeless tobacco is younger than 18 years of age.

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

Order

For these reasons, I enter default judgment in the amount of \$500 against Respondent Zak Abs, Inc. d/b/a Brother's Supermarket and Deli. Pursuant to 21 C.F.R. § 17.11 (b), this order becomes final and binding upon both parties within 30 days of the date of its issuance.

/s/

Carolyn Cozad Hughes
Administrative Law Judge