

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Center for Tobacco Products,

Complainant

v.

Quick Food Mart 1 Inc
d/b/a Quick Food Mart,

Respondent.

Docket No. C-13-568
FDA Docket No. FDA-2013-H-0346

Decision No. CR2786

Date: May 14, 2013

INITIAL DECISION AND DEFAULT JUDGMENT

The Center for Tobacco Products (CTP) filed an administrative complaint against Respondent, Quick Food Mart 1 Inc d/b/a Quick Food Mart, that alleges facts and legal authority sufficient to justify the imposition of a civil money penalty of \$500. 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 began this case by serving a 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 unlawfully sold tobacco products to minors and failed to verify the ages of purchasers of tobacco products 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. CTP seeks a civil monetary penalty of \$500 for these violations.

On April 2, 2013, 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 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, the Administrative Law Judge could issue an initial decision ordering Respondent to pay the full amount of the proposed penalty, pursuant to 21 C.F.R. § 17.11.

Respondent has not filed an answer within the time provided by regulation or 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 a default judgment and impose a civil monetary penalty. Accordingly, I must determine whether the allegations in the complaint establish violations of the Act.

Specifically, CTP alleges that:

- Respondent owns Quick Food Mart, an establishment that sells tobacco products and is located at 15380 Highway 15, Decatur, Mississippi 39327. Complaint ¶ 2.
- On August 16, 2011, an FDA-commissioned inspector observed violations of 21 C.F.R. § 1140.14(a) and (b)(1) at Quick Food Mart for “[s]elling tobacco products to a person younger than 18 years of age . . .” and “[f]ailing to verify the age of a person purchasing tobacco products by means of photographic identification containing the bearer’s date of birth . . .” Complaint ¶ 9.
- “[O]n November 10, 2011, CTP issued a Warning Letter to Quick Food Mart 1 Inc.” Complaint ¶ 9. The letter noted the violations the FDA-commissioned inspector had observed on August 16, 2011, and explained that the failure to correct violations could result in the imposition of a civil money penalty or other regulatory action. Complaint ¶ 9. Moreover, CTP explained that the warning letter was not intended to provide an exhaustive list of violations and that Respondent maintained the responsibility to ensure that it complied with the law. Complaint ¶ 9.
- Respondent received the warning letter on November 14, 2011, via UPS. Complaint ¶ 10. “Ali” signed for the UPS delivery. Complaint ¶ 10. CTP, however, did not receive a response. Complaint ¶ 10.

- Pursuant to a two-part inspection conducted on November 20, and December 3, 2012, FDA-commissioned inspectors documented that “a person younger than 18 years of age was able to purchase a package of Marlboro Gold Pack cigarettes on November 20, 2012, at approximately 10:20 AM CT; and . . . the minor’s identification was not verified before the sale” Complaint ¶ 1.

Taking these facts as true, I must find pursuant to 21 C.F.R. § 17.11(a) that Respondent is liable 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, codified at 21 U.S.C. § 387f(d). 21 U.S.C. § 387c(a)(7)(B); 21 C.F.R. § 1140.1(b). Those 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). Those regulations also require a retailer to “verify by means of photographic identification containing the bearer’s date of birth that no person purchasing the product is younger than 18 years of age[.]” 21 C.F.R. § 1140.14(b)(1), though “[n]o such verification is required for any person over the age of 26[.]” 21 C.F.R. § 1140.14(b)(2).

Here, Respondent disobeyed the law on August 16, 2011, and November 20, 2012, when it sold cigarettes to minors without verifying the purchasers’ ages with photographic identification. These actions and omissions on two separate occasions violated 21 C.F.R. § 1140.14(a) and (b), respectively. Therefore, a civil money penalty is merited.

The regulations require the imposition of a civil money penalty in the amount that is either the maximum provided for by law or the amount sought in the complaint, whichever is smaller. 21 C.F.R. § 17.11(a). CTP, through its Complaint, requested a civil money penalty in the amount of \$500, which is the maximum penalty for the third violation committed within a 24-month period. 21 C.F.R. § 17.2. Therefore, I impose a civil money penalty in the amount of \$500.

/s/
Steven T. Kessel
Administrative Law Judge