

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Center for Tobacco Products,

Complainant

v.

Yazeed Barakat
d/b/a Smoker's Corner,

Respondent.

Docket No. C-14-293
FDA Docket No. FDA-2013-H-1495

Decision No. CR3114

Date: February 11, 2014

INITIAL DECISION AND DEFAULT JUDGMENT

The Center for Tobacco Products (CTP) filed an Administrative Complaint (Complaint) against Respondent, Yazeed Barakat d/b/a Smoker's Corner, alleging facts and legal authority sufficient to justify the imposition of a civil money penalty of \$250. 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 order that Respondent pay a civil money penalty in the amount of \$250.

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's staff unlawfully sold cigarettes to minors on two occasions and, prior to one of those transactions, Respondent's staff failed to verify that a cigarette purchaser was of sufficient age, thereby violating the Federal Food, Drug, and Cosmetic Act (Act) and its

implementing regulations, found at 21 C.F.R. Part 1140. CTP seeks a civil money penalty of \$250.

On December 16, 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 an Administrative Law Judge could, pursuant to 21 C.F.R. § 17.11, issue an initial decision by default 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. Therefore, pursuant to 21 C.F.R. § 17.11(a), I am required to issue an initial decision by default if the Complaint is sufficient to justify a penalty. Accordingly, I must determine whether the allegations in the Complaint establish violations of the Act.

For purposes of this decision, I assume the facts alleged in the Complaint are true. 21 C.F.R. § 17.11(a). Specifically, CTP alleges the following facts in its Complaint:

- Respondent owns Smoker's Corner, an establishment that sells tobacco products and is located at 1801 Green Mountain Drive #5, Little Rock, Arkansas 72212. Complaint ¶ 3.
- On March 11, 2013, an FDA-commissioned inspector observed that "a person younger than 18 years of age was able to purchase a package of Marlboro cigarettes . . . at approximately 4:25 PM CT[] and . . . the minor's identification was not verified before the sale . . ." Complaint ¶ 10.
- On March 28, 2013, CTP issued a Warning Letter to Smoker's Corner explaining that the inspector's March 11, 2013 observations constituted violations of regulations found at 21 C.F.R. § 1140.14(a) and (b)(1). In addition to describing the violations, the letter advised Respondent that the FDA may initiate a civil money penalty action or take other regulatory action against Respondent if it failed to correct the violations. The letter also stated that it was Respondent's responsibility to comply with the law. Complaint ¶ 10.
- On April 10, 2013, Yazeed Barakat, Respondent's owner, responded by electronic mail to the Warning Letter on Respondent's behalf. "Mr.

Baraket stated that he discussed the importance of the establishment's policies and the legal restrictions on the sale of tobacco products with his employees, and that he would place a sign that instructs tobacco purchasers to have their identification ready." Complaint ¶ 11.

- On June 19, 2013, during another inspection of Respondent's establishment, FDA-commissioned inspectors documented that "a person younger than 18 years of age was able to purchase a package of Newport Box cigarettes . . . at approximately 2:23 PM." Complaint ¶ 1.

These facts establish 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. 21 U.S.C. § 387c(a)(7)(B); 21 C.F.R. § 1140.1(b). Under 21 C.F.R. § 1140.14(a), no retailer may sell cigarettes 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 cigarette purchasers are younger than 18 years of age.

Here, Respondent violated 21 C.F.R. § 1140.14(a) on March 11, 2013, and June 19, 2013, when its staff sold cigarettes to minors. Respondent also violated 21 C.F.R. § 1140.14(b)(1) on March 11, 2013, when its staff did not verify, by checking a cigarette purchaser's photographic identification, that a cigarette purchaser was 18 years of age or older. Respondent's actions and omissions on two separate occasions at the same retail outlet constitute violations of law that warrant a civil money penalty. Accordingly, I find that a civil money penalty of \$250 is permissible under 21 C.F.R. § 17.2.

/s/

Steven T. Kessel
Administrative Law Judge