

**Department of Health and Human Services**

**DEPARTMENTAL APPEALS BOARD**

**Civil Remedies Division**

Center for Tobacco Products,  
(FDA No. FDA-2014-H-1154)

Complainant

v.

Race Supermarket Inc.,

Respondent.

Docket No. C-14-1663

Decision No. CR3411

Date: October 9, 2014

**INITIAL DECISION AND DEFAULT JUDGMENT**

The Center for Tobacco Products (CTP) began this matter by serving an administrative complaint on Respondent, Race Supermarket Inc., at 156 North 52nd Street, Philadelphia, Pennsylvania 19139, and by filing a copy of the complaint with the Food and Drug Administration's (FDA) Division of Dockets Management. The complaint alleges that Race Supermarket Inc. impermissibly sold cigarettes to a minor 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. The complaint likewise alleges that Respondent Race Supermarket Inc. previously paid a \$500 civil money penalty for violations of regulations found at 21 C.F.R. pt. 1140. CTP now seeks to impose another \$500 civil money penalty against Respondent Race Supermarket Inc.

As provided for in 21 C.F.R. §§ 17.5 and 17.7, on August 13, 2014, CTP served the complaint on Respondent Race Supermarket Inc. 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 Race Supermarket Inc. 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:

- CTP previously issued a warning letter to Respondent Race Supermarket Inc. on September 15, 2011, citing violations of 21 C.F.R. pt. 1140 on June 24, 2011, at Respondent's business establishment, 156 North 52nd Street, Philadelphia, Pennsylvania 19139;
- On June 7, 2012, CTP initiated a previous civil money penalty action, CRD Docket Number C-12-788, FDA Docket Number FDA-2012-H-0561, against Respondent for three violations of 21 C.F.R. pt. 1140 within a twenty-four month period. CTP alleged those violations to have occurred on June 24, 2011 and February 10, 2012. Two of the violations were charged for selling tobacco products to a minor, and failing to verify age by means of photographic identification bearing date of birth, on February 10, 2012;
- The previous action concluded when Race Supermarket Inc. paid the civil money penalty. The Administrative Law Judge closed the case on July 27, 2012;
- At approximately 11:30 AM on October 14, 2013, at Respondent's business establishment, 156 North 52nd Street, Philadelphia, Pennsylvania 19139, FDA-commissioned inspectors documented Respondent's staff selling a package of Newport Menthol Gold Box cigarettes to a person younger than 18 years of age.

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 to any person younger than 18 years of age.

Under 21 C.F.R. § 17.2, a \$500 civil money penalty is permissible for three violations of the regulations found at 21 C.F.R. pt. 1140.

**Order**

For these reasons, I enter default judgment in the amount of \$500 against Respondent Race Supermarket Inc. Pursuant to 21 C.F.R. § 17.11(b), this order becomes final and binding upon both parties after 30 days of the date of its issuance.

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/s/  
Catherine Ravinski  
Administrative Law Judge