Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Center for Tobacco Products,

Complainant

v.

IFERU, Inc. d/b/a Broadview Citgo

Respondent.

Docket No. C-13-530 FDA Docket No. FDA-2013-H-0293

Decision No. CR2789

Date: May 17, 2013

INITIAL DECISION AND DEFAULT JUDGMENT

The Center for Tobacco Products (CTP) filed an Administrative Complaint (Complaint) against Respondent, IFERU, Inc. d/b/a Broadview Citgo, alleging 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 order that Respondent pay a civil money penalty in the amount 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 impermissibly sold tobacco products to a minor and failed to verify appropriately the age of a person purchasing tobacco products, 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 \$500.

On March 19, 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, pursuant to 21 C.F.R. § 17.11, issue an initial decision ordering Respondent to pay the full amount of the proposed penalty. Respondent did not take any of the required actions within the time provided by regulation.

I am required to issue a default judgment if the Complaint is sufficient to justify a penalty, and the Respondent fails to answer timely or to request an extension. 21 C.F.R. § 17.11(a). For that reason, I must decide whether a default judgment is appropriate here, and I conclude that it is merited based on the allegations of the Complaint and Respondent's failure to answer them.

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 Broadview Citgo, a business that sells tobacco products and is located at 2319 West Roosevelt Road, Broadview, Illinois 60155.
- On March 15, 2012, an FDA-commissioned inspector observed violations while inspecting Respondent's establishment. Specifically, a minor was able to purchase "Newport Box" cigarettes at 5:00 p.m. Additionally, Respondent's staff did not verify the minor's identification before this sale.
- On April 19, 2012, CTP issued a Warning Letter to Broadview Citgo detailing the inspector's observations from March 15, 2012. In addition to describing the violations, the letter also advised Respondent that if it failed to correct the violations, the FDA may initiate a civil money penalty action or take other regulatory action.
- On June 5, 2012, Mr. Lucky Khan responded, in writing, to the Warning Letter and on behalf of Respondent.

- On August 14, 2012, CTP acknowledged, in writing, receipt of the establishment's response and reminded Respondent of its continuing obligation to comply with the law.
- On September 27, 2012, FDA-commissioned inspectors documented additional violations during a subsequent inspection of the establishment. At approximately 4:55 p.m., a person younger than 18 years of age was able to purchase a package of "Newport Box" cigarettes. Additionally, Respondent's staff did not verify the minor's identification, by means of photographic identification containing the bearer's date of birth, before this sale.

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 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.

Here, Respondent sold cigarettes or smokeless tobacco to a minor in violation of the foregoing regulations on two separate occasions, March 15, 2012, and September 27, 2012. In addition, Respondent did not appropriately check the photographic identification of the tobacco purchasers prior to these transactions. Respondent's actions and omissions on two separate occasions at the same retail outlet constitute violations of law for which a civil money penalty is merited. Accordingly, I find that a civil money penalty of \$500 is permissible under 21 C.F.R. § 17.2.

/s/

Steven T. Kessel Administrative Law Judge