Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Center for Tobacco Products,

Complainant

v.

Energy Marketing 245, LLC d/b/a Energy Express/Phillips 66,

Respondent.

Docket No. C-13-1401 FDA Docket No. FDA-2013-H-1196

Decision No. CR3026

Date: December 12, 2013

INITIAL DECISION AND DEFAULT JUDGMENT

The Center for Tobacco Products (CTP) filed an Administrative Complaint (Complaint) against Respondent, Energy Marketing 245, LLC d/b/a Energy Express/Phillips 66, that alleges facts and legal authority sufficient to justify the imposition of a civil money penalty of \$2,000. Respondent did not 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 \$2,000.

CTP began this case by serving the 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 and repeatedly sold cigarettes to minors and failed to verify that a cigarette purchaser was 18 years of age or older, thereby violating the Federal Food, Drug, and Cosmetic Act (Act), 21 U.S.C. § 301 *et seq.*, and its implementing regulations,

Cigarettes and Smokeless Tobacco, 21 C.F.R. Part 1140 (2012). CTP seeks a civil money penalty of \$2,000.

On October 22, 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 proposed 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 ordering Respondent to pay the full amount of the proposed penalty.

Additionally, on October 30, 2013, I issued an Initial Order Establishing Procedures to both Respondent and CTP. In that Order, I instructed the parties that Respondent's answer was due no later than November 21, 2013. I informed Respondent that if it failed to answer the Complaint, I would decide this matter without a hearing. On November 14, 2013, the United States Postal Service (USPS) returned to my office a copy of the Initial Order Establishing Procedures that staff had sent to Respondent. USPS had marked the returned copy as "Refused." The copy my office received was one of two copies mailed to the Respondent, the other of which USPS did not return.

Respondent has not filed an answer within the time provided by regulation, nor has it requested an extension. Pursuant to 21 C.F.R. § 17.11(a), I am required to "assume the facts alleged in the [C]omplaint to be true" and, if those facts establish liability under the Act, issue a default judgment and impose a civil money penalty. Accordingly, I must determine whether the allegations in the Complaint establish violations of the Act.

Specifically, CTP alleges the following facts in its Complaint:

- Respondent owns Energy Express/Phillips 66, an establishment that sells tobacco products and is located at 733 South Vandeventer, Saint Louis, Missouri 63110. Complaint ¶ 3.
- On March 6, 2012, an FDA-commissioned inspector observed a violation of 21 C.F.R. Part 1140 at Respondent's establishment. The inspector observed a violation of 21 C.F.R. § 1140.14(a) when "a person younger than 18 years of age was able to purchase a package of Newport cigarettes . . . at approximately 7:30 PM CT." Complaint ¶ 12.
- On April 19, 2012, CTP issued a Warning Letter to Respondent regarding the inspector's observations from March 6, 2012. The letter explained that

the observations constituted a violation of a regulation found at 21 C.F.R. § 1140.14(a), and that the named violation was not necessarily intended to be an exhaustive list of all violations at the establishment. The Warning Letter went on to state that if Respondent failed to correct the violation, regulatory action by the FDA or a civil money penalty action could occur and that Respondent is responsible for complying with the law. Complaint ¶ 12.

- Clay Bawne, Respondent's District Manager, replied to the Warning Letter in a May 7, 2012 telephone call. "Mr. Bawne stated that all employees were retrained to card customers who appear to be under the age of 40 and to not sell tobacco products to anyone under the age of 18." Complaint ¶ 13.
- On June 19, 2012, FDA-commissioned inspectors documented an additional violation of 21 C.F.R. Part 1140 at Respondent's establishment. The inspectors documented a violation of 21 C.F.R. § 1140.14(a) when "a person younger than 18 years of age was able to purchase a package of Newport cigarettes . . . at approximately 3:11 PM." Complaint ¶ 10.
- CTP initiated a civil money penalty action, CRD Docket number C-13-372, against Respondent on February 8, 2013, as a result of the violations. An Administrative Law Judge closed the matter on March 12, 2013, after Respondent paid the penalty. Complaint ¶ 10-11.
- On April 25, 2013, FDA-commissioned inspectors documented additional violations of 21 C.F.R. Part 1140 at Respondent's establishment. The inspectors documented a violation of 21 C.F.R. § 1140.14(a) when "a person younger than 18 years of age was able to purchase a package of Newport Box cigarettes . . . at approximately 7:57 PM[.]" The inspectors also documented a violation of 21 C.F.R. § 1140.14(b)(1) when "the minor's identification was not verified before the sale" 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 distributed or offered for sale in any state 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). 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); 21 U.S.C. § 387f(d)(1); 75 Fed. Reg. 13,229 (Mar. 10, 2010). The regulations prohibit the sale of cigarettes to any person younger than 18 years of age. 21 C.F.R. § 1140.14(a). The regulations also require retailers to verify, by means of photo identification containing a

purchaser's date of birth, that no cigarette purchasers are younger than 18 years of age. 21 C.F.R. § 1140.14(b)(1).

Taking the above alleged facts as true, Respondent had four violations of regulations contained in 21 C.F.R. Part 1140 within a fourteen-month period. Specifically, Respondent had a violation on March 6, 2012, a violation on June 19. 2012, and two violations on April 25, 2013. Respondent's actions on each occasion violated the prohibition against selling cigarettes to persons younger than 18 years of age. 21 C.F.R. § 1140.14(a). Respondent's actions on April 25, 2013, also violated the requirement that retailers verify, by means of photo identification containing a purchaser's date of birth, that no cigarette purchaser is younger than 18 years of age. 21 C.F.R. § 1140.14(b)(1). Therefore, Respondent's actions constitute violations of law that merit a civil money penalty.

The regulations require me to impose a civil money penalty in an 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)(1)-(2). The regulations currently allow a maximum penalty of \$2,000 for a fourth violation within a fourteen-month period, 21 C.F.R. § 17.2, and CTP has requested a fine in that amount. Therefore, I find that a civil money penalty of \$2,000 is warranted and so order one imposed.

/s/ Steven T. Kessel Administrative Law Judge