

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Center for Tobacco Products,
(FDA No. FDA-2015-H-1935)

Complainant

v.

Brothers Groceries, LLC
d/b/a Brothers Grocery,

Respondent.

Docket No. C-15-2758

Decision No. CR4481

Date: December 4, 2015

INITIAL DECISION AND DEFAULT JUDGMENT

The Center for Tobacco Products (CTP) began this matter by serving an administrative complaint on Respondent, Brothers Groceries, LLC d/b/a Brothers Grocery, located at 4685 Park Heights Avenue, Baltimore, Maryland 21215, and by filing a copy of the complaint with the Food and Drug Administration's (FDA) Division of Dockets Management. The complaint alleges that Brothers Grocery impermissibly sold cigarettes to minors and failed to verify, by means of photo identification containing a date of birth, that the purchasers were 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, 21 C.F.R. pt. 1140. CTP seeks to impose a \$2,000 civil money penalty against Respondent Brothers Grocery. During the hearing process, Respondent has failed to comply with a judicial direction regarding CTP's discovery request. I therefore strike Respondent's answer and issue this decision of default judgment.

I. Procedural History

CTP began this matter by serving an administrative complaint seeking a \$2,000 civil money penalty on Respondent Brothers Grocery, at 4685 Park Heights Avenue, Baltimore, Maryland 21215. Respondent filed an answer to CTP's complaint on July 14, 2015. I issued an Acknowledgement and Prehearing Order (APHO) on July 21, 2015, that set deadlines for parties' submissions, including the August 19, 2015 deadline to request that the opposing party provide copies of documents relevant to this case. Additionally, the APHO stated that a party receiving such a request must provide the requested documents no later than 30 days after the request. CTP served Respondent with its request for documents on August 19, 2015.

On September 25, 2015, CTP filed a Motion to Compel Discovery indicating that Respondent did not respond to its request within the time limit. *See* 21 C.F.R. § 17.23(a). On the same date, CTP also filed a motion requesting that all pre-hearing exchange deadlines be extended. In a letter issued by my direction, Respondent was given until October 15, 2015, to object to CTP's motion. Respondent did not file an objection to CTP's motion.

On October 22, 2015, I issued an order granting CTP's Motion to Compel Discovery and extending the pre-hearing exchange deadlines. The Order allowed Respondent until November 6, 2015 to comply with CTP's discovery request. In granting CTP's Motion to Compel Discovery I also explained that failure to comply with CTP's discovery request may result in Sanctions, including the issuance of an Initial Decision and Default Judgment, finding Respondent liable for the violations listed in the complaint and imposing a civil money penalty. CTP subsequently filed a Motion to Impose Sanctions on November 12, 2015, indicating that Respondent did not comply with the Order Granting CTP's Motion to Compel. I do note that Respondent mailed a \$250 check to the Departmental Appeal Board on October 30, 2015. On November 12, 2015, Respondent's check was returned with detailed instructions on how to provide payment to CTP. On December 1, 2015, CTP filed an Updated Status Report indicating that the parties had not reached a settlement.

II. Pending Motions

On November 12, 2015, CTP filed a Motion to Impose Sanctions. In its November 12, 2015 Motion for Sanctions, CTP stated that "Respondent has neither produced any of the requested documents, nor contacted Complainant or Counsel for Complainant regarding this matter."

Due to noncompliance with my Order granting CTP's Motion to Compel, I am striking Respondent's Answer, issuing this default decision, and assuming the facts alleged in CTP's complaint to be true. *See* 21 C.F.R. § 17.35(c) (3), 17.11(a). The harshness of the

sanctions I impose upon either party must relate to the nature and severity of the misconduct or failure to comply, and I find the failure to comply here sufficiently egregious to warrant striking the answer and issuing a decision without further proceedings. *See* 21 C.F.R. § 17.35(b).

III. Default Decision

Striking Respondent's Answer leaves the Complaint unanswered. Therefore, I am required to issue an initial decision by default if the complaint is sufficient to justify a penalty. 21 C.F.R. § 17.11(a). 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 and conclude the default judgment is merited based on the allegations of the Complaint and the sanctions imposed on Respondent for failure to comply with the orders. 21 C.F.R. § 17.11. Specifically:

- CTP previously issued a warning letter to Respondent Brothers Grocery on February 20, 2014, citing violations of 21 C.F.R. pt. 1140 on December 5, 2013, at Respondent's business establishment, 4685 Park Heights Avenue, Baltimore, Maryland 21215;
- On October 7, 2014, CTP initiated a previous civil money penalty action, CRD Docket Number C-15-6, FDA Docket Number FDA-2014-H-1494¹, against Respondent for two violations of 21 C.F.R. pt. 1140 within a twelve month period. CTP alleged those violations to have occurred on December 5, 2013², and March 26, 2014;
- The previous action concluded when an Initial Decision and Default Judgment was entered by an Administrative Law Judge on December 3, 2014, that "found Respondent liable under the Act for the violations as alleged" The Initial Decision and Default Judgment became final and binding on the parties on

¹ In the previous action, Respondent was Ali Ahmed d/b/a Brothers Grocery.

² In the complaint, CTP describes the action or actions that took place at Respondent Brothers Grocery's business establishment on December 5, 2013, as both "a violation" and as "violations." Complaint ¶ 10. In a previous administrative complaint issued on October 1, 2014, CTP described two discrete violations at Respondent Brothers Grocery's business establishment on December 5, 2013: a violation of 21 C.F.R. § 1140.14(a) and a violation of 21 C.F.R. § 1140.14(b)(1). Therefore, I will infer that CTP's description in the present complaint of "a violation" occurring on December 5, 2013, was a typographical error.

January 2, 2015;

- At approximately 4:00 p.m. on February 4, 2015, at Respondent's business establishment, 4685 Park Heights Avenue, Baltimore, Maryland 21215, FDA-commissioned inspectors documented Respondent's staff selling a package of Newport Box cigarettes to a person younger than 18 years of age. The inspector also observed that staff failed to verify, by means of photographic identification containing a date of birth, that the purchaser was 18 years of age or older.

These facts establish Respondent Brothers Grocery'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. § 1140.14(b)(1), retailers must verify, by means of photographic identification containing a purchaser's date of birth, that no cigarette purchasers are younger than 18 years of age.

A \$2,000 civil money penalty is permissible under 21 C.F.R. § 17.2.

Order

For these reasons, I enter default judgment in the amount of \$2,000 against Respondent Brothers Groceries, LLC d/b/a Brothers Grocery. 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.

/s/
Catherine Ravinski
Administrative Law Judge