

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Center for Tobacco Products,

Complainant

v.

Evergreen Gas and Food Mart LLC
d/b/a Sunoco / Food Mart,

Respondent.

Docket No. C-15-2851
FDA No. FDA-2015-H-2020

Decision No. CR4475

Date: December 1, 2015

INITIAL DECISION AND DEFAULT JUDGMENT

The Center for Tobacco Products (CTP) initiated a \$250 civil money penalty (CMP) action against Respondent for unlawfully selling cigarettes to minors, and failing to verify, by means of photo identification containing a date of birth, that the purchasers were 18 years of age or older, in violation of 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. During the hearing process, Respondent 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 \$250 civil money penalty on Respondent Sunoco / Food Mart, at 14490 North Cleveland Avenue, North Fort Myers, Florida 33903, on June 26, 2015. Respondent filed an answer to CTP's complaint on July 23, 2015. I issued an Acknowledgement and Pre-Hearing Order

(APHO) on July 31, 2015, that set deadlines for parties' submissions, including the August 31, 2015 deadline to request that the opposing party provide copies of documents relevant to the 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 28, 2015.

On October 7, 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. Pursuant to my direction, an October 9, 2015 letter was sent to Respondent allowing until October 19, 2015 to file an objection to CTP's motion to compel discovery. Respondent did not file an objection to CTP's motion to compel discovery. On October 28, 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 12, 2015 to comply with CTP's discovery request. CTP subsequently filed a motion to impose sanctions on November 18, 2015, indicating that Respondent did not comply with the Order granting CTP's motion to compel.

II. Pending Motions

CTP filed a motion to impose sanctions on November 18, 2015. In its November 18, 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 this noncompliance, 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:

- Respondent owns Sunoco / Food Mart, an establishment that sells tobacco products and is located at 14490 North Cleveland Avenue, North Fort Myers, Florida 33903. Complaint ¶ 3.
- During an inspection of Respondent’s establishment on October 8, 2014, at approximately 7:36 PM, an FDA-commissioned inspector observed that “a person younger than 18 years of age was able to purchase a package of Camel Crush Menthol Silver cigarettes . . . [.]” The inspector also observed that “the minor’s identification was not verified before the sale” Complaint ¶ 10.
- On October 23, 2014, CTP issued a Warning Letter to Respondent regarding the inspector’s observations from October 8, 2014. The letter explained that the observations constituted violations of regulations found at 21 C.F.R. § 1140.14(a) and (b)(1), and that the named violations were 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 violations, regulatory action by the FDA or a civil money penalty action could occur and that Respondent is responsible for complying with the law. Complaint ¶ 10.
- Hamza Rashid responded to the Warning Letter in an undated letter, received by CTP on October 27, 2014. “Mr. Rashid stated that he issued a warning to the employee who sold the tobacco products to the minor, and explained to the employee the requirement to check identification prior to tobacco sales.” Complaint ¶ 11.
- During a subsequent inspection of Respondent’s establishment on February 11, 2015, at approximately 11:55 AM, FDA-commissioned inspectors documented that “a person younger than 18 years of age was able to purchase a package of Marlboro Gold Pack cigarettes . . . [.]” 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 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). 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 violated the prohibition against selling cigarettes to persons younger than 18 years of age, 21 C.F.R. § 1140.14(a), on October 8, 2014, and February 11, 2015. On October 8, 2014, Respondent also violated the requirement that retailers 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). Therefore, Respondent's actions constitute violations of law that merit a civil money penalty.

CTP has requested a fine of \$250, which is a permissible fine under the regulations. 21 C.F.R. § 17.2. Therefore, I find that a civil money penalty of \$250 is warranted and so order one imposed.

/s/
Steven T. Kessel
Administrative Law Judge