

**Department of Health and Human Services**

**DEPARTMENTAL APPEALS BOARD**

**Civil Remedies Division**

Center for Tobacco Products,  
(FDA No. FDA-2015-H-2140)

Complainant

v.

Massood Ali  
d/b/a 7-Eleven Store 10317A,

Respondent.

Docket No. C-15-3001

Decision No. CR4502

Date: January 12, 2016

**INITIAL DECISION AND DEFAULT JUDGMENT**

The Center for Tobacco Products (CTP) began this matter by serving an administrative complaint on Respondent, Massood Ali d/b/a 7-Eleven Store 10317A, located at 4833 Coronado Parkway, Cape Coral, Florida 33904, and by filing a copy of the complaint with the Food and Drug Administration's (FDA) Division of Dockets Management. The complaint alleges that 7-Eleven Store 10317A impermissibly sold cigarettes to minors, 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 \$250 civil money penalty against Respondent 7-Eleven Store 10317A. 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 \$250 civil money penalty on Respondent Massood Ali d/b/a 7-Eleven Store 10317A, located at 4833 Coronado Parkway, Cape Coral, Florida 33904. Respondent filed an answer to CTP's complaint on August 3, 2015. I issued an Acknowledgement and Prehearing Order (APHO) on August 21, 2015, that set deadlines for parties' submissions, including the September 21, 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 September 21, 2015.

On October 27, 2015, CTP filed a Motion to Compel Discovery indicating that CTP had not received a response to its request for production of documents. *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 an October 28, 2015 letter issued by my direction, Respondent was given until November 12, 2015, to object to CTP's motion. Respondent did not file an objection to CTP's motion.

On November 24, 2015, I issued an order granting CTP's Motion to Compel Discovery and extending the pre-hearing exchange deadlines. The Order allowed Respondent until December 8, 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 December 11, 2015, indicating that Respondent did not comply with the November 24, 2015 Order Granting CTP's Motion to Compel.

## **II. Pending Motions**

On December 11, 2015, CTP filed a Motion to Impose Sanctions. In its December 11, 2015 memorandum supporting its Motion for Sanctions, CTP stated that "Respondent still has not produced any documents in response to CTP's Request for Production that was served on it more than eleven weeks ago."

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:

- At approximately 6:48 p.m. on November 20, 2014, at Respondent's business establishment, 4833 Coronado Parkway, Cape Coral, Florida 33904, an FDA-commissioned inspector observed Respondent's staff selling a package of Marlboro cigarettes to a person younger than 18 years of age;
- In a warning letter dated December 18, 2014, CTP informed Respondent of the inspector's November 20, 2014 observation, and that such action violates federal law, 21 C.F.R. § 1140.14(a). The letter further warned that Respondent's failure to correct its violation could result in a civil money penalty or other regulatory action;
- At approximately 9:02 p.m. on February 27, 2015, at Respondent's business establishment, 4833 Coronado Parkway, Cape Coral, Florida 33904, an FDA-commissioned inspector documented Respondent's staff selling a package of Marlboro Gold Pack cigarettes to a person younger than 18 years of age.

These facts establish Respondent 7-Eleven Store 10317A's liability under the Act. Under 21 C.F.R. § 1140.14(a), no retailer may sell cigarettes to any person younger than 18 years of age.

A \$250 civil money penalty is permissible under 21 C.F.R. § 17.2.

