

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Center for Tobacco Products,
(FDA No. FDA-2018-H-2030)

Complainant,

v.

Red Brick Liquors Corp.
d/b/a Red Brick Liquors,

Respondent.

Docket No. T-18-2335

Decision No. TB3571

Date: March 4, 2019

INITIAL DECISION AND DEFAULT JUDGMENT

The Center for Tobacco Products (CTP) filed an Administrative Complaint (Complaint) against Respondent, Red Brick Liquors Corp. d/b/a Red Brick Liquors, that alleges that Respondent impermissibly sold cigarettes to a minor and failed to verify, by means of photographic identification containing a date of birth, that the 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, 21 C.F.R. pt. 1140. The Complaint also alleges that Respondent previously sold cigarettes or smokeless tobacco 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. The complaint further alleges that a final default judgment was previously entered against Respondent Red Brick Liquors for five violations of the regulations found at 21 C.F.R. pt. 1140 and, therefore, CTP seeks to impose an \$11,182 civil money penalty against Respondent Red Brick Liquors. Respondent filed an Answer to the Complaint, but has failed to comply with multiple judicial orders and directives during the hearing process. I therefore strike Respondent's Answer and issue this decision of default judgment.

I. Procedural History

On May 30, 2018, CTP began this matter by serving a Complaint on Respondent, seeking an \$11,182 civil money penalty. On June 27, 2018, Respondent timely filed its answer to CTP's Complaint in the DAB E-File system.

On July 10, 2018, I issued an Acknowledgment and Pre-Hearing Order (APHO). The APHO generally explained to the parties what they must do to present evidence and arguments in this case. Specifically, it explained that the parties may request copies of documents relevant to this case and that the requesting party must serve the request for documents no later than August 16, 2018. As indicated in the APHO, a party who received such a request was required to provide the requested documents no later than 30 days after the request had been made.

On August 29, 2018, pursuant to 21 C.F.R. § 17.23(a), CTP filed a Motion to Compel Discovery. In that motion, CTP stated that it served a Request for Production of Documents (RFP) on Respondent on July 18, 2018, and indicated it had not received a response to its request. On August 29, 2018, CTP also filed a Motion to Extend Deadlines. On August 30, 2018, a letter was issued by my direction, which provided Respondent with a deadline of September 14, 2018, to file a response to CTP's motion to compel discovery. On August 30, 2018, I also issued an Order that extended the parties' pre-hearing exchange deadlines.

On September 13, 2018, Respondent filed the following: 1) Response to Request for Production of Documents; 2) Documentation regarding the proceedings in CRD Docket Number T-17-343; and 3) Supporting pictures and documents. Based on Respondent's submission, a letter was issued at my direction dated October 11, 2018, directing CTP to advise of its intent to pursue the Motion to Compel. On October 18, 2018, CTP withdrew the Motion to Compel.

On November 29, 2018, I issued an Order scheduling a pre-hearing telephone conference (PHC) for December 10, 2018 at 11:00 AM Eastern Time. On the scheduled date and time for the PHC, Respondent did not appear to participate in the conference call. In an Order dated December 10, 2018, I directed Respondent to show cause not later than December 26, 2018, for its failure to appear at the PHC. The Order warned Respondent that "[f]ailure to [show cause] may result in sanctions, including the issuance of an Initial Decision and Default Judgment"

On December 11, 2018, Respondent submitted a letter of explanation, as well as two sets of "Documents Supporting Innocence." In the letter of explanation, Respondent advised that its failure to participate in the PHC was due to "working in Panama City, Florida,

helping with the Hurricane Relief Effort¹ for close to two months” Respondent stated that he was unaware of the missed conference call until he returned home and had access to his computer. CTP did not file a reply to Respondent’s response.

On January 4, 2019, an Order rescheduling the PHC for January 24, 2019, at 11:00 AM Eastern Time was issued by DAB E-File. Respondent did not appear at the rescheduled PHC on January 24, 2019.

On February 19, 2019, Respondent submitted a two paragraph letter. In the letter, Respondent stated:

I filed an answer/appeal back in 12/10/18 and was awaiting written response, but I fell ill due to a complication of a Surgery back in May and did not follow up until I received a call earlier this month as to whether I had settled with the CTP.

I do not know if I have been ordered to do so and I am supposed to reach a settlement as I was told I HAD to do within the next 15 days

On February 20, 2019, by email transmission, CTP was directed to advise this office by February 21, 2019 of the status of this case; specifically, whether the parties had reached a settlement, as suggested in Respondent’s filing. CTP submitted a Status Report on February 21, 2019, noting that “CTP has not settled this matter with Respondent. Moreover, CTP has not contacted or attempted to contact Respondent to negotiate a settlement at any time after the second pre-hearing conference on January 24, 2019.”

To date, Respondent has not complied with multiple orders and directions, including orders scheduling two pre-hearing telephone conferences.

II. Striking Respondent’s Answer

Pursuant to 21 C.F.R. § 17.35, I am striking Respondent’s Answer for failing to comply with multiple judicial orders and directions. Specifically, Respondent has not complied with: 1) the deadline set forth in the Acknowledgment and Pre-Hearing Order for submission of pre-hearing exchange documents; and 2) the orders scheduling and rescheduling pre-hearing conferences issued on November 29, 2018, and January 4, 2019. Therefore, sanctions are appropriate in this case. The issue is whether CTP’s proposed sanction – striking Respondent’s answer and issuing a default judgment is appropriate. The harshness of the sanctions I impose upon either party must relate to the nature and severity of the misconduct or failure to comply. I find here that Respondent's

¹ I take judicial notice that Hurricane Michael, a Category 4 storm, caused significant damage in the Florida panhandle in October 2018.

repeated failure to comply is 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:

- On October 26, 2016, CTP initiated a previous civil money penalty action, CRD Docket Number T-17-343, FDA Docket Number FDA-2016-H-3455, against Respondent for five² violations of 21 C.F.R. pt. 1140. CTP alleged those violations to have occurred at Respondent's business establishment, 4351 Northwest 7th Street, Miami, Florida 33126, on March 18, 2015, September 23, 2015, and April 12, 2016. Complaint ¶ 9.
- The previous action was closed when an Initial Decision and Default Judgment was entered by an Administrative Law Judge, "finding that all of the violations alleged in the Complaint occurred." Complaint ¶ 10.
- At approximately 11:21 AM on January 14, 2018, at Respondent's business establishment, 4351 Northwest 7th Street, Miami, Florida 33126, an FDA-commissioned inspector documented Respondent's staff selling a package of Newport Box cigarettes to a person younger than 18 years of age. The inspector also documented 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. Complaint ¶ 7.

These facts establish Respondent Red Brick Liquor'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).

² Two violations were documented on March 18, 2015, two on September 23, 2015, and two on April 12, 2016. In accordance with customary practice, CTP counted the violations at the initial inspection as a single violation, and all subsequent violations as separate individual violations.

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); 81 Fed. Reg. 28,974, 28,975-76 (May 10, 2016). Under 21 C.F.R. § 1140.14(a)(1), no retailer may sell cigarettes or smokeless tobacco to any person younger than 18 years of age. Under 21 C.F.R. § 1140.14(a)(2)(i), retailers must verify, by means of a photographic identification containing a purchaser's date of birth, that no cigarette or smokeless tobacco purchasers are younger than 18 years of age.

Under 21 C.F.R. § 17.2, an \$11,182 civil money penalty is permissible for seven violations of the regulations found at 21 C.F.R. pt. 1140.

ORDER

For these reasons, I enter default judgment in the amount of \$11,182 against Respondent Red Brick Liquors Corp. d/b/a Red Brick Liquors. 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