

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Center for Tobacco Products,

Complainant,

v.

Gui Qing Liu
d/b/a QQ Chinese Restaurant,

Respondent.

Docket No. T-19-543
FDA No. FDA-2018-H-4357

Decision No. TB3747

Date: April 19, 2019

INITIAL DECISION AND DEFAULT JUDGMENT

I hereby impose a civil money penalty (CMP) in the amount of \$559, against Respondent, Gui Qing Liu d/b/a QQ Chinese Restaurant (Respondent), for three violations of federal tobacco regulations over a period of 24-months.

I. Background

The Center for Tobacco Products (Complainant or CTP) seeks to impose a CMP in the amount of \$559, against Respondent, located at 723 East Chelton Avenue, Philadelphia, Pennsylvania 19144, for three violations of the Federal Food, Drug, and Cosmetic Act (the Act), 21 U.S.C. § 301 *et seq.*, and its implementing regulations, 21 C.F.R. pt. 1140, within a 24-month period. The complaint alleges that Respondent impermissibly sold covered tobacco products 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 Act, and its implementing regulations at 21 C.F.R. pt. 1140. Therefore, CTP seeks a \$559 civil money penalty against Respondent QQ Chinese Restaurant for three violations within a 24-month period.

As provided in 21 C.F.R. §§ 17.5 and 17.7, on November 20, 2018, Complainant served the complaint on Respondent QQ Chinese Restaurant by United Parcel Service. Respondent timely filed its answer on November 21, 2018, via the DAB E-Filing System. Respondent requested a hearing to contest the allegations. Respondent contends that it never sold tobacco to a minor without asking for identification.¹ Answer at 1. On November 27, 2018, I issued an Acknowledgment and Pre-hearing Order (APHO) acknowledging receipt of Respondent's answer and setting forth case procedures and deadlines. The APHO contained a provision that set out instructions regarding a party's request for production of documents. That provision states, in part, that a party had until December 28, 2018, to request the opposing party provide copies of documents relevant to this case. The order also stated that a party receiving such a request must provide the requested documents no later than 30 days after the request has been made, pursuant to 21 C.F.R. § 17.23(a). The parties were warned that failure to comply with any order including the APHO may result in sanctions.

On January 25, 2019, Complainant filed a Motion to Compel Discovery stating that it sent its Request for Production of Documents to Respondent on December 19, 2018. Complainant also stated that it had not received a response from Respondent to its Request for Production of Documents and requested that I issue an order requiring Respondent to comply with Complainant's Request for Production of Documents. In a February 1, 2019 letter issued by my direction, Respondent was given until February 18, 2019, to file a response to Complainant's Motion to Compel Discovery.

Respondent failed to file a response to Complainant's Motion to Compel Discovery or the February 1, 2019 letter. Accordingly, in an order dated February 22, 2019, I granted Complainant's Motion to Compel Discovery and ordered Respondent to comply with Complainant's Request for Production of Documents by March 8, 2019. Respondent was warned that failure to do so 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 penalty.

On March 13, 2019, Complainant filed a Status Report and Motion to Impose Sanctions indicating that Respondent had not complied with my February 22, 2019 order. Complainant requested I strike Respondent's answer and issue an initial decision and default judgment imposing a money penalty against Respondent. In a March 14, 2019 letter issued by my direction, Respondent was given until March 28, 2019, to file a response to Complainant's Motion to Impose Sanctions. To date, Respondent has not responded to Complainant's Motion to Impose Sanctions or the March 14, 2019 letter.

¹ On December 3, 2018, our office received a mailed version of Respondent's answer, which entailed the same information as the answer Respondent filed via the DAB E-Filing system.

I may sanction a party for failing to comply with an order, subpoena, rule, or procedure governing the proceeding; failing to prosecute or defend an action; or engaging in other misconduct that interferes with the speedy, orderly, or fair conduct of the hearing. 21 C.F.R. § 17.35(a). Here, Respondent failed to comply with the deadline set forth in the APHO for responding to a discovery request, and the order granting Complainant's Motion to Compel Discovery issued on February 22, 2019. Respondent also did not respond to Complainant's Motion to Impose Sanctions or the letter sent by my direction on March 14, 2019. The harshness of the sanctions I impose must relate to the nature and severity of the misconduct or failure to comply. 21 C.F.R. § 17.35(b). This repeated conduct is sufficiently egregious to warrant striking Respondent's answer and issuing an initial decision by default. Therefore, pursuant to 21 C.F.R. § 17.35, I am granting Complainant's Motion to Impose Sanctions, and striking Respondent's answer for failing to comply with multiple judicial orders and directives.

II. Default Decision

Striking Respondent's answer leaves the complaint unanswered. Pursuant to 21 C.F.R. § 17.11, I assume that the facts alleged in the complaint (but not its conclusory statements) are true. Specifically:

- At approximately 7:20 PM on March 16, 2017, at Respondent's business establishment, 723 East Chelton Avenue, Philadelphia, Pennsylvania 19144, an FDA-commissioned inspector documented Respondent's staff selling a package of two Garcia y Vega Game Green cigars 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;
- In a warning letter dated March 23, 2017, CTP informed Respondent of the inspector's March 16, 2017 documented violations, and that such actions violate federal law. The letter further warned that Respondent's failure to correct its violations could result in a civil money penalty or other regulatory action;
- During a subsequent inspection, at approximately 5:42 PM on August 30, 2018, at Respondent's business establishment, 723 East Chelton Avenue, Philadelphia, Pennsylvania 19144, an FDA-commissioned inspector documented Respondent's staff selling a package of two Garcia y Vega Game Pineapple cigars 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.

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

A \$559 civil money penalty is permissible under 21 C.F.R. § 17.2.

Order

For these reasons, I enter default judgment in the amount of \$559 against Respondent Gui Qing Liu d/b/a QQ Chinese Restaurant. 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/
Wallace Hubbard
Administrative Law Judge