

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Center for Tobacco Products,

Complainant,

v.

Motown Mini Mart Inc.
d/b/a Motown Mini Mart / BP,

Respondent.

Docket No. T-18-3283
FDA Docket No. FDA-2018-H-3200

Decision No. TB3666

Date: April 1, 2019

INITIAL DECISION AND DEFAULT JUDGMENT

The Center for Tobacco Products (CTP) began this matter by serving an administrative complaint on Respondent, Motown Mini Mart Inc. d/b/a Motown Mini Mart / BP, at 801 South Martin Luther King Jr. Boulevard, Lansing, Michigan 48915, and by filing a copy of the complaint with the Food and Drug Administration's (FDA) Division of Dockets Management. CTP seeks to impose a \$559 civil money penalty against Respondent Motown Mini Mart / BP for three violations within a 24-month period. Specifically, the complaint alleges that Motown Mini Mart / BP impermissibly sold regulated 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 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 course of these administrative proceedings, Respondent failed to comply with orders and procedures governing this proceeding and failed to defend its actions, which

interfered with the speedy, orderly, or fair conduct of this proceeding. 21 C.F.R. § 17.35(a). Accordingly, pursuant to 21 C.F.R. § 17.35(c)(3), I strike Respondent's Answer and issue this decision of default judgment.

I. Procedural History

On August 21, 2018, CTP served the complaint on Respondent by United Parcel Service, pursuant to 21 C.F.R. §§ 17.5 and 17.7. Respondent timely answered CTP's complaint. On September 19, 2018, I issued an Acknowledgement and Pre-Hearing Order (APHO) that set deadlines for the parties' filings and exchanges, including a schedule for discovery. I directed that a party receiving a discovery request must provide the requested documents within 30 days of the request. APHO ¶ 12; *see* 21 C.F.R. § 17.23(a). I warned:

I may impose sanctions including, but not limited to, dismissal of the complaint or answer, if a party fails to comply with any order (including this order), fails to prosecute or defend its case, or engages in misconduct that interferes with the speedy, orderly, or fair conduct of the hearing. 21 C.F.R. § 17.35.

APHO ¶ 16.

In accordance with the deadlines set forth in the APHO, CTP served Respondent with its Request for Production of Documents on October 19, 2018. On December 4, 2018, CTP filed a Motion to Compel Discovery asserting that Respondent had not responded to its discovery request. By letter issued at my direction, Respondent was informed that it had until December 14, 2018, to file a response to CTP's Motion to Compel Discovery. *See* 21 C.F.R. § 17.32(c); APHO ¶ 19. Respondent did not respond.

On January 7, 2019, I issued an Order to Compel Discovery in which I granted CTP's motion and ordered Respondent to produce responsive documents to CTP's Request for Production of Documents by January 28, 2019. I stated:

I warn Respondent that failure to comply may **result in sanctions** which may include striking its filings and issuing an Initial Decision and Default Judgment finding Respondent liable for the violations listed in the Complaint and imposing a civil money penalty. 21 C.F.R. § 17.35.

January 7, 2019, Order to Compel Discovery (emphasis in original).

On February 15, 2019, CTP filed a Status Report and Motion to Impose Sanctions. CTP advised that Respondent had not complied with my January 7, 2019 Order to Compel

Discovery requiring Respondent to produce documents responsive to CTP's Request for Production of Documents by January 28, 2019. CTP argued that sanctions against Respondent for its repeated non-compliance are an appropriate remedy. Specifically, CTP asked that I strike Respondent's Answer as a sanction and issue an Initial Decision and Default Judgment finding Respondent liable for the violations listed in the complaint and imposing a civil money penalty.

By Order of February 20, 2019, I informed Respondent that it had until March 4, 2019, to file a response to CTP's Motion to Impose Sanctions. I warned: "If Respondent fails to file a response, **I may grant CTP's Motion to Impose Sanctions in its entirety.**" February 20, 2019, Order (emphasis in original). Respondent did not timely respond.¹

II. Striking Respondent's Answer

I may sanction a party for:

- (1) Failing to comply with an order, subpoena, rule, or procedure governing the proceeding;
- (2) Failing to prosecute or defend an action; or
- (3) Engaging in other misconduct that interferes with the speedy, orderly, or fair conduct of the hearing.

21 C.F.R. § 17.35(a).

Respondent failed to comply with the following orders and procedures governing this proceeding:

- Respondent failed to comply with 21 C.F.R. § 17.23(a) and paragraph 12 of my APHO, when Respondent failed to respond to CTP's Request for Production of Documents within 30 days; and
- Respondent failed to comply with my January 7, 2019, Order to Compel Discovery, when it failed to submit the documents responsive to CTP's Request for Production of Documents by January 28, 2019.

Respondent failed to defend its action despite the following opportunities:

- By letter issued at my direction, Respondent was informed that it had until December 14, 2018, to file a response to CTP's Motion to Compel Discovery. Respondent did not defend its action; and

¹ I note that on March 26, 2019, Respondent sent an untimely response by email, which did not address the basis of CTP's Motion to Impose Sanctions.

- By Order of February 20, 2019, I informed Respondent that it had until March 4, 2019, to file a response to CTP's Motion to Impose Sanctions. Respondent did not defend its action.

I find that Respondent failed to comply with orders and procedures governing this proceeding, failed to defend its case, and, as a result, interfered with the speedy, orderly, and fair conduct of this proceeding. I conclude that Respondent's conduct establishes a basis for sanctions pursuant to 21 C.F.R. § 17.35, and that sanctions are warranted.

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). Here, Respondent failed to comply with two of my orders, despite my explicit and repeated warnings that its failure could result in sanctions. I specified that those sanctions may include striking its Answer and "issuing an Initial Decision and Default Judgment finding Respondent liable for the violations listed in the Complaint and imposing a civil money penalty." January 7, 2019, Order to Compel Discovery. Respondent also failed to defend its actions, despite my express reminders of the opportunity. Respondent's repeated misconduct interfered with the speedy, orderly, or fair conduct of this proceeding. I find that Respondent's actions are sufficient to warrant striking its Answer and issuing a decision by default, without further proceedings. 21 C.F.R. § 17.35(b), (c)(3). Accordingly, I strike Respondent's Answer. 21 C.F.R. § 17.35(c)(3).

II. Default Decision

Striking Respondent's Answer leaves the complaint unanswered. Therefore, I am required to issue an initial decision by default, provided the complaint is sufficient to justify a penalty. 21 C.F.R. § 17.11(a). Pursuant to 21 C.F.R. § 17.11(a), I am required to "assume the facts alleged in the complaint to be true" and, if those facts establish liability under the Act, issue a default judgment and impose a civil money penalty. Accordingly, I must determine whether the allegations in the complaint establish violations of the Act.

Specifically, CTP alleges the following facts in its complaint:

- At approximately 3:54 PM on November 16, 2017, at Respondent's business establishment, 801 South Martin Luther King Jr. Boulevard, Lansing, Michigan 48915, an FDA-commissioned inspector documented Respondent's staff selling a VUSE Berry e-liquid product 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 November 30, 2017, CTP informed Respondent of the inspector's November 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;
- At approximately 2:33 PM on June 13, 2018, at Respondent's business establishment, 801 South Martin Luther King Jr. Boulevard, Lansing, Michigan 48915, an FDA-commissioned inspector documented Respondent's staff selling a VUSE Nectar e-liquid product 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 Respondent Motown Mini Mart / BP'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); 81 Fed. Reg. 28,974, 28,975-76 (May 10, 2016). Under 21 C.F.R. § 1140.14(b)(1), no retailer may sell regulated tobacco products to any person younger than 18 years of age. Under 21 C.F.R. § 1140.14(b)(2)(i), retailers must verify, by means of photographic identification containing a purchaser's date of birth, that no regulated tobacco product purchasers are younger than 18 years of age.

A \$559 civil money penalty is permissible under 21 C.F.R. § 17.2 for three violations of the regulations found at 21 C.F.R. pt. 1140 within a 24-month period.

Order

For these reasons, I enter default judgment in the amount of \$559 against Respondent Motown Mini Mart Inc. d/b/a Motown Mini Mart / BP. 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