

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Center for Tobacco Products,

Complainant

v.

GQ Food Mart LLC
d/b/a GQ Food Mart,

Respondent.

Docket No. C-15-705
FDA Docket No. FDA-2014-H-2233

Decision No. CR3993

Date: June 29, 2015

INITIAL DECISION AND DEFAULT JUDGMENT

The Center for Tobacco Products (CTP) filed an Administrative Complaint (Complaint) against Respondent, GQ Food Mart LLC d/b/a GQ Food Mart that alleges facts and legal authority sufficient to justify the imposition of a civil money penalty of \$5,000. During the hearing process, Respondent has failed to comply with a judicial direction regarding CTP's discovery request. Therefore, I strike Respondent's answer and issue a default judgment against Respondent and assess a civil money penalty of \$5,000.

CTP began this case by serving a Complaint on Respondent and filing a copy of the Complaint with the Food and Drug Administration's (FDA) Division of Dockets Management. The Complaint alleges that Respondent's staff unlawfully sold individual cigarettes, sold cigarettes to minors, and failed to verify that cigarette purchasers were of sufficient age, thereby violating the Federal Food, Drug, and Cosmetic Act (Act) and its implementing regulations, found at 21 C.F.R. pt. 1140. CTP seeks a civil money penalty of \$5,000.

On December 23, 2014¹, CTP served the Complaint on Respondent by United Parcel Service, pursuant to 21 C.F.R. §§ 17.5 and 17.7. In the Complaint and accompanying cover letter, CTP explained that within 30 days Respondent should pay the penalty, file an answer, or request an extension of time within which to file an answer. CTP warned Respondent that if it failed to take one of these actions within 30 days an Administrative Law Judge could issue an initial decision by default ordering Respondent to pay the full amount of the proposed penalty. 21 C.F.R. § 17.11.

On January 21, 2015, Respondent timely answered CTP's Complaint denying the allegations and asserting that the civil money penalty was too high. I issued an Acknowledgement and Prehearing Order (APHO) that set deadlines for the parties' submissions, including the March 2, 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 February 25, 2015.

On April 15, 2015, CTP filed a Motion to Compel Discovery indicating that Respondent did not respond to its February 25, 2015 request within the time limit. *See* C.F.R. § 17.23(a). CTP also filed a Motion to Hold Deadlines in Abeyance on April 15, 2015. On April 29, 2015, I issued a By Direction Letter advising the parties that "Respondent ha[d] until May 11, 2015 to either comply, with CTP's Motion to Compel Discovery or file a Motion for Protective Order. 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 civil money penalty." (emphasis removed). In response to CTP's Motion to Hold Deadlines in Abeyance, the By Direction Letter also extended the pre-hearing exchange deadlines for both parties, allowing CTP until May 26, 2015 to file its pre-hearing exchange, and allowing Respondent until June 15, 2015 to file its pre-hearing exchange.

On June 16, 2015, CTP filed an updated status report requesting that sanctions be imposed against Respondent for failure to comply with my April 29, 2015 By Direction Letter, which gave Respondent until June 15, 2015 to comply with CTP's Motion to Compel Discovery.

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 sufficient to warrant striking the answer and issuing a decision without further

¹ On March 12, 2015, CTP filed a Motion for Leave to Amend its Complaint to change the name of Respondent from GQ Food Mart LLC / Mohamed Masikh d/b/a Food Mart to GQ Food Mart LLC d/b/a GQ Food Mart. On April 29, 2015, I granted the Motion to Amend the Complaint.

proceedings. *See* 21 C.F.R. § 17.35(b). Respondent did not comply with the order nor did it provide any adequate justification for not doing so. Therefore, 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).

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. 21 C.F.R. § 17.11(a). Specifically, CTP alleges the following facts in its Complaint:

- Respondent owns GQ Food Mart, an establishment that sells tobacco products and is located at 3 Hill Street, Ansonia, Connecticut 06401. Complaint ¶ 3.
- CTP previously initiated a civil money penalty action, CRD Docket Number C-13-1388, FDA Docket Number FDA-2013-H-1191, against Respondent for three violations of 21 C.F.R. pt. 1140 within a 24-month period. Specifically, those violations included selling individual cigarettes, selling tobacco products to a minor, and failing to verify, by means of photographic identification, that the tobacco purchaser was 18 years of age or older² on May 16, 2012, and two violations on April 12, 2013, when Respondent sold tobacco products to a minor and failed to verify, by means of photographic identification, that the tobacco purchaser was 18 years of age or older. Complaint ¶ 10.
- The previous civil money penalty action concluded when Mohamed Masikh, Respondent's authorized representative, settled the action with CTP on Respondent's behalf. On October 11, 2013, Mr. Masikh signed an Acknowledgment Form in which he "admitt[ed] that the violations . . . occurred, waiv[ed][Respondent's] ability to contest the violations in the future, and stat[ed] that he understood that the violations may be counted in determining the total number of violations for purposes of future enforcement actions." The Administrative Law Judge closed the case on December 13, 2013. Complaint ¶ 11.
- During a subsequent inspection of Respondent's establishment conducted on June 25, 2014, FDA-commissioned inspectors documented that "a person younger than 18 years of age was able to purchase a package of Newport Box cigarettes . . . at

² CTP's March 12, 2015 Complaint lists the May 16, 2012 violations as unspecified, but the October 7, 2013 Complaint lists the actual violations.

