

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Center for Tobacco Products,

Complainant,

v.

132 Third, LLC
d/b/a Third Avenue Store,

Respondent.

Docket No. C-15-3886
FDA No. FDA-2015-H-3080

Decision No. CR4579

Date: April 8, 2016

INITIAL DECISION AND DEFAULT JUDGMENT

The Center for Tobacco Products (CTP) initiated a \$5,000 civil money penalty (CMP) action against Respondent for unlawfully selling cigarettes to minors, on three separate occasions, and failing to verify, by means of photo identification containing a date of birth, that the purchasers were 18 years of age or older, on two separate occasions, in violation of 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 hearing process, Respondent 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

Respondent timely answered CTP's complaint. Administrative Law Judge Diane Townsend-Anderson issued an Acknowledgement and Prehearing Order (APHO) that set deadlines for parties' submissions, including the November 25, 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 November 24, 2015. On January 5, 2016, 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 January 5, 2016, CTP also filed a motion to extend the deadlines. On January 11, 2016, Judge Townsend-Anderson issued an Order that extended the parties' pre-hearing exchange deadlines.

On January 27, 2016, this case was reassigned from Judge Townsend-Anderson to me. Pursuant to my direction, a February 12, 2016 letter allowed Respondent until February 29, 2016 to file a response to CTP's motion to compel discovery. On February 12, 2016, CTP filed a motion to further extend the deadlines. On February 16, 2016, I issued an Order that further extended the parties' pre-hearing exchange deadlines.

On March 8, 2016, CTP filed an updated status report requesting that I grant its motion to compel and extend CTP's deadlines. The status report stated that Respondent had not filed an objection to the motion to compel and that Respondent had not produced any documents in response to CTP's request for production of documents.

On March 9, 2016, I issued an Order that granted CTP's motion to compel discovery. In that Order, I stated that Respondent shall comply with CTP's request for production of documents by March 29, 2016. I further stated 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 civil money penalty. Within five (5) days of Respondent's deadline to comply with discovery, CTP must file a status report notifying me whether Respondent has complied with discovery.

The March 9, 2016 Order also further extended the parties' pre-hearing exchange deadlines.

On April 1, 2016, CTP filed a motion to extend deadlines. On April 1, 2016, CTP also filed a status report and a motion to impose sanctions advising me that Respondent had not complied with my March 9, 2016 Order and asking me to strike the Respondent's answer and issue a default judgment in this case.

II. Striking Respondent's Answer

Respondent failed to file a response to CTP's motion to compel discovery, and to comply with the March 9, 2016 Order compelling discovery responses to be provided by March 29, 2016. Respondent has not made any contact with this Court since October 7, 2015, the date Respondent timely filed its answer. Respondent's failure to effectively prosecute and defend actions taken over the course of the proceedings have interfered with the orderly and speedy processing of this case, further warranting imposition of sanctions. *See* 21 C.F.R. § 17.35(a) (1)(2) and (3).

Due to Respondent's noncompliance with the March 9, 2016 Order, I am striking Respondent's Answer, issuing this default decision, and assuming the facts alleged in CTP's complaint to be true.¹ *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). Respondent failed to comply with the March 9, 2016 Order, and did not provide any adequate justification for not doing so.

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 that default judgment is merited based on the allegations of the Complaint and the sanctions imposed on Respondent for failure to comply with my orders. 21 C.F.R. § 17.11. Specifically:

- Respondent owns Third Avenue Store, an establishment that sells tobacco products and is located at 132 Third Avenue, Halethorpe, Maryland 21227. Complaint ¶ 3.
- CTP previously initiated a civil money penalty action, CRD Docket Number C-15-879, FDA Docket Number FDA-2015-H-0078, against Respondent for three violations of 21 C.F.R. pt. 1140 within a 24-month period.² Specifically, those violations included one violation on February 7, 2014, when Respondent sold

¹ As I am issuing a default decision, it is unnecessary to rule on CTP's April 1, 2016 motion to extend deadlines.

² In the prior complaint, Respondent's name was "132 Third, LLC / Gitaben Patel d/b/a Third Ave Grocery / 132 Third Avenue."

cigarettes to a minor; and two violations on June 29, 2014, when Respondent sold cigarettes 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; January 8, 2015 Complaint ¶ 10.

- The previous civil money penalty action concluded when an Initial Decision and Default Judgment was entered on March 6, 2015 that found Respondent liable for the alleged violations. The Initial Decision and Default Judgment became binding on both parties on April 6, 2015. Complaint ¶ 11.
- During a subsequent inspection of Respondent’s establishment conducted on May 14, 2015, at approximately 4:53 PM, FDA-commissioned inspectors documented that “a person younger than 18 years of age was able to purchase a package of Newport Box 100s cigarettes” Complaint ¶ 1. The inspectors also documented that “the minor’s identification was not verified before the sale . . . [.]” Complaint ¶ 1.

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 distributed or offered for sale in any state 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). The regulations prohibit the sale of cigarettes to any person younger than 18 years of age. 21 C.F.R. § 1140.14(a). The regulations also require retailers to verify, by means of photo identification containing a purchaser’s date of birth, that no cigarette purchasers are younger than 18 years of age. 21 C.F.R. § 1140.14(b)(1).

Taking the above alleged facts as true, Respondent violated the prohibition against selling tobacco to persons younger than 18 years of age, 21 C.F.R. § 1140.14(a), on February 7, 2014, June 29, 2014, and May 14, 2015. On June 29, 2014 and May 14, 2015, Respondent also violated the requirement that retailers verify, by means of photo identification containing a purchaser’s date of birth, that no tobacco purchasers are younger than 18 years of age. 21 C.F.R. § 1140.14(b)(1). Therefore, Respondent’s actions constitute violations of law that merit a civil money penalty.

CTP has requested a fine of \$5,000, which is a permissible fine under the regulations. 21 C.F.R. § 17.2. Therefore, I find that a civil money penalty of \$5,000 is warranted and so order one imposed.

/s/
Steven T. Kessel
Administrative Law Judge