

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Center for Tobacco Products,
(FDA No. FDA-2016-H-2355)

Complainant

v.

Ali Alteard
d/b/a Downtown Smoke Shop,

Respondent.

Docket No. T-16-1566

Decision No. TB1038

Date: March 31, 2017

INITIAL DECISION AND DEFAULT JUDGMENT

The Center for Tobacco Products (CTP) began this matter by serving an administrative complaint on Respondent, Ali Alteard d/b/a Downtown Smoke Shop, located at 141 East Kern Avenue, Tulare, California 93274, and by filing a copy of the complaint with the Food and Drug Administration's (FDA) Division of Dockets Management. The complaint alleges that Downtown Smoke Shop impermissibly sold cigarettes 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. CTP seeks to impose a \$550 civil money penalty against Respondent Downtown Smoke Shop. During the hearing process, Respondent has failed to comply with two separate judicial directions regarding CTP's discovery request. I therefore strike Respondent's answer and issue this decision of default judgment.

I. Procedural History

CTP began this matter by serving an administrative complaint, seeking a \$550 civil money penalty, on Respondent Ali Alteard d/b/a Downtown Smoke Shop, at 141 East Kern Avenue, Tulare, California 93274. Respondent filed an answer to CTP's complaint on October 5, 2016. I issued an Acknowledgment and Prehearing Order (APHO) on October 18, 2016, that set deadlines for parties' submissions, including the November 17, 2016 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 17, 2016.

On December 27, 2016, CTP filed a Motion to Compel Discovery indicating that Respondent did not respond to its request within the time limit. *See* 21 C.F.R. § 17.23(a). On the same date, CTP also filed a Motion to Extend Deadlines requesting that all pre-hearing exchange deadlines be extended for 30 days. In a letter issued by my direction, Respondent was given until January 19, 2017, to object to CTP's Motion to Compel Discovery. Respondent did not file an objection to CTP's motion.

In a January 25, 2017 Order, I granted CTP's Motion to Compel Discovery and extended the pre-hearing exchange deadlines. The Order allowed Respondent until February 10, 2017 to comply with CTP's discovery request. In granting CTP's Motion to Compel Discovery, I explained that failure to comply with CTP's discovery request could 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. CTP subsequently filed an Updated Status Report and Motion to Impose Sanctions on February 22, 2017, indicating that Respondent did not comply with the Order Granting CTP's Motion to Compel Discovery. In a February 23, 2017 letter issued by my direction, Respondent was given until March 10, 2017, to object to CTP's motion. To date, Respondent has not filed an objection to CTP's Motion to Impose Sanctions.

II. Pending Motions

On February 22, 2017, CTP filed a Motion to Impose Sanctions. In its Motion for Sanctions, CTP stated that "Respondent has neither produced any of the requested documents, nor contacted Complainant or Counsel for Complainant regarding this matter."

Due to noncompliance with my Acknowledgment and Pre-Hearing Order (APHO) and my Order granting CTP's Motion to Compel Discovery, 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(a)(1), 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).

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:

- At approximately 4:58 p.m. on September 2, 2015, at Respondent's business establishment, 141 East Kern Avenue, Tulare, California 93274, an FDA-commissioned inspector observed Respondent's staff selling a package of Newport Box 100s 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;
- In a warning letter dated September 17, 2015, CTP informed Respondent of the inspector's September 2, 2015 observations, and that such actions violate federal law, 21 C.F.R. § 1140.14(a) and (b)(1). 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 4:39 p.m. on February 3, 2016, at Respondent's business establishment, 141 East Kern Avenue, Tulare, California 93274, an FDA-commissioned inspector documented Respondent's staff selling a package of Camel Blue 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.

These facts establish Respondent Downtown Smoke Shop'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).

