

**Department of Health and Human Services**

**DEPARTMENTAL APPEALS BOARD**

**Civil Remedies Division**

Center for Tobacco Products,  
(FDA No. FDA-2018-H-4385)

Complainant,

v.

Last Call Liquor and Cellular, LLC  
d/b/a Last Call / Lackland Quick Shop,

Respondent.

Docket No. T-19-566

Decision No. TB3964

Date: June 13, 2019

**INITIAL DECISION AND DEFAULT JUDGMENT**

The Center for Tobacco Products (CTP) began this matter by serving an administrative complaint on Respondent, Last Call Liquor and Cellular, LLC d/b/a Last Call / Lackland Quick Shop, located at 10649 Lackland Road, Saint Louis, Missouri 63114, and by filing a copy of the complaint with the Food and Drug Administration's (FDA) Division of Dockets Management. The complaint alleges that Last Call / Lackland Quick Shop 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 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 \$559 civil money penalty against Respondent Last Call / Lackland Quick Shop for three violations within a 24-month period.

During the course of this administrative proceeding, Respondent has failed to comply with two separate judicial orders and failed to prosecute its case. *See* 21 C.F.R.

§ 17.35(a). Accordingly, pursuant to 21 C.F.R. §§ 17.35(a)(1), (2), I 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 \$559 civil money penalty, on Respondent Last Call Liquor and Cellular, LLC d/b/a Last Call / Lackland Quick Shop on November 20, 2018. Respondent filed an Answer to CTP's complaint on December 14, 2018. I issued an Acknowledgment and Prehearing Order (APHO) on December 27, 2018, that set deadlines for parties' submissions, including the January 28, 2019 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. On January 28, 2019, CTP served Respondent with its Request for Production of Documents.

On March 6, 2019, CTP filed a Motion to Compel Discovery, indicating that Respondent did not respond to its request for documents 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 its pre-hearing exchange deadline be extended for 30 days. In a March 7, 2019 letter issued by my direction, Respondent was given until March 22, 2019, to file a response to CTP's Motion to Compel Discovery. Additionally, on March 7, 2019, I issued an Order extending all pre-hearing exchange deadlines. Respondent did not file an objection to CTP's Motion to Compel Discovery.

On March 26, 2019, I granted CTP's Motion to Compel Discovery and extended the pre-hearing exchange deadlines. The Order Granting CTP's Motion to Compel Discovery allowed Respondent until April 10, 2019 to comply with CTP's discovery request. CTP subsequently filed a Status Report and Motion to Impose Sanctions, on April 17, 2019, indicating that Respondent had not responded to its Request for Production of Documents. On the same date, CTP also filed a Motion to Extend Deadlines, requesting that any deadlines be extended by 30 days. In an April 17, 2019 letter issued by my direction, Respondent was allowed until May 3, 2019 to respond to CTP's Motion to Impose Sanctions. Additionally, in the April 17, 2019 letter, I granted CTP's Motion to Extend Deadlines. To date, Respondent has not filed a response to CTP's Motion to Impose Sanctions.

## **II. Striking Respondent's Answer**

Pursuant to 21 C.F.R. § 17.35(a), 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.

Here, Respondent failed to:

- Comply with my December 27, 2018 Acknowledgment and Pre-Hearing Order that set deadlines for parties' submissions, including the January 28, 2019 deadline to request that the opposing party provide copies of documents relevant to this case;
- Comply with my March 26, 2019 Order Granting CTP's Motion to Compel Discovery; and
- Prosecute or defend its case.

I find that Respondent failed to comply with two judicial orders and failed to defend its actions, which has interfered with the speedy, orderly, or fair conduct of this proceeding. 21 C.F.R. § 17.35(a). 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 orders, despite having been warned in both the APHO and the Order Granting CTP's Motion to Compel Discovery that failure to comply could result in sanctions including issuance of an Initial Decision and Default Judgment.

Additionally, Respondent has not communicated with the Court since December 14, 2018. I note that Respondent did not take the opportunity to respond to two separate letters issued by my direction on March 7, 2019, and April 17, 2019. I find that Respondent's failure to comply is 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, and issue this Initial Decision and Default Judgment, assuming the facts alleged in CTP's complaint to be true. 21 C.F.R. §§ 17.35(c)(3), 17.11(a).

### **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 2:39 p.m. on November 21, 2017, at Respondent's business establishment, 10649 Lackland Road, Saint Louis, Missouri 63114, an FDA-commissioned inspector documented Respondent's staff selling a package of two Swisher Sweets 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 December 14, 2017, CTP informed Respondent of the inspector's November 21, 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 10:07 a.m. on August 26, 2018, at Respondent's business establishment, 10649 Lackland Road, Saint Louis, Missouri 63114, an FDA-commissioned inspector documented Respondent's staff selling a package of two Swisher Sweets 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 Respondent Last Call / Lackland Quick 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). 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). 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(b)(2)(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.

### **Order**

For these reasons, I enter default judgment in the amount of \$559 against Respondent Last Call Liquor and Cellular, LLC d/b/a Last Call / Lackland Quick Shop. Pursuant to

