

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Center for Tobacco Products,
(FDA No. FDA-2017-H-2745)

Complainant

v.

JMGM Enterprises, Inc.
d/b/a Brightmoor Liquor,

Respondent.

Docket No. T-17-3937

Decision No. TB2351

Date: January 8, 2018

INITIAL DECISION AND DEFAULT JUDGMENT

The Center for Tobacco Products (CTP) began this matter by serving an administrative complaint on Respondent, JMGM Enterprises, Inc. d/b/a Brightmoor Liquor, at 22002 Lyndon Street, Detroit, Michigan 48223, and by filing a copy of the complaint with the Food and Drug Administration's (FDA) Division of Dockets Management. The complaint alleges that Brightmoor Liquor 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. The complaint likewise alleges that a final default judgment was previously entered against Respondent Brightmoor Liquor for five violations of regulations found at 21 C.F.R. pt. 1140 and, therefore, CTP seeks to impose an \$11,182 civil money penalty against Respondent Brightmoor Liquor.

I. Background and Procedural History

As provided for in 21 C.F.R. §§ 17.5 and 17.7, on May 9, 2017, CTP served the complaint on Respondent Brightmoor Liquor by United Parcel Service. On June 8, 2017, through counsel, Respondent timely filed an answer. On June 27, 2017, I issued an Acknowledgment and Pre-Hearing Order (APHO) acknowledging receipt of Respondent's answer and establishing procedural deadlines for this case.

On August 28, 2017, counsel for Respondent filed a Motion to Withdraw as Counsel for Respondent and Extend Deadlines. I granted the motion and extended all the deadlines in this case including the deadline for parties to serve requests for documents. On August 30, 2017, CTP served its Request for Production of Documents on Respondent. On November 6, 2017, CTP filed a Motion to Compel Discovery stating it has not received a response to its Request for Production of Documents and requesting "an order be entered to require Respondent to comply with the Request for Production in its entirety."

In a November 7, 2017 letter issued by my direction, Respondent was given until November 21, 2017, to file a response to CTP's Motion to Compel Discovery. Respondent failed to file any response to CTP's Motion to Compel Discovery or otherwise respond to the November 7, 2017 letter. Therefore, in a November 29, 2017 order, I granted CTP's motion and ordered Respondent to comply with CTP's Request for Production of Documents by December 11, 2017. Respondent was warned that a failure to comply 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.

On December 12, 2017, CTP filed a Status Report and Motion to Impose Sanctions stating "Respondent has neither produced any of the requested documents, nor contacted Complainant or Counsel for Complainant regarding this matter." CTP requested I strike Respondent's answer and issue a default judgment imposing a civil money penalty in the amount of \$11,182 against Respondent. In a December 14, 2017 letter issued by my direction, Respondent was given until December 27, 2017, to file a response to CTP's Motion to Impose Sanctions. To date, Respondent has failed to file any response to CTP's Motion to Impose Sanctions.

Therefore, pursuant to 21 C.F.R. § 17.35, I grant CTP's Motion to Impose Sanctions, and strike Respondent's answer for failing to comply with two judicial directions. Specifically, Respondent failed to comply with my July 27, 2017 APHO and Respondent failed to comply with my November 29, 2017 order to comply with CTP's Request for Production of Documents. This conduct is sufficiently egregious to warrant striking Respondent's answer and issuing an initial decision by default.

II. Default Decision

Striking Respondent's answer leaves the complaint unanswered. Pursuant to 21 C.F.R. § 17.11, I assume that the facts alleged in the complaint (but not its conclusory statements) are true. Specifically:

- On June 16, 2016, CTP initiated a previous civil money penalty action, CRD Docket Number T-16-765, FDA Docket Number FDA-2016-H-1403, against Respondent for five¹ violations of 21 C.F.R. pt. 1140 within a thirty-six month period. CTP alleged those violations to have occurred at Respondent's business establishment, 22002 Lyndon Street, Detroit, Michigan 48223, on November 24, 2014, April 8, 2015, and December 6, 2015;
- The previous action concluded when an Initial Decision and Default Judgment was entered by an Administrative Law Judge, "finding that all of the violations alleged in the Complaint occurred";
- At approximately 5:30 p.m. on December 5, 2016, at Respondent's business establishment, 22002 Lyndon Street, Detroit, Michigan 48223, an FDA-commissioned inspector documented 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.

These facts establish Respondent Brightmoor Liquor'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(a)(1),² no retailer may sell cigarettes to any person younger than 18 years of age. Under 21 C.F.R. § 1140.14(a)(2)(i), retailers must verify, by means of photographic identification containing a purchaser's date of birth, that no cigarette purchasers are younger than 18

¹ Two violations were documented on November 24, 2014, two on April 8, 2015, and two on December 6, 2015. In accordance with customary practice, CTP counted the violations at the initial inspection as a single violation, and all subsequent violations as separate individual violations.

² On August 8, 2016, the citations to certain tobacco violations changed. For more information see: <https://federalregister.gov/a/2016-10685>.

