

**Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Civil Remedies Division**

Center for Tobacco Products,
(FDA No. FDA-2017-H-3572)

Complainant

v.

Action Convenience Service Inc.
d/b/a Marathon 113,

Respondent.

Docket No. T-17-4701

Decision No. TB2472

Date: March 1, 2018

INITIAL DECISION AND DEFAULT JUDGMENT

The Center for Tobacco Products (CTP) seeks to impose a civil money penalty against Respondent, Action Convenience Service Inc. d/b/a Marathon 113, located at 1930 Opa Locka Boulevard, Opa Locka, Florida 33054, for five violations 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, within a 36-month period. Specifically, CTP alleges that Marathon 113 violated the Act by impermissibly selling cigarettes and/or smokeless tobacco to minors, and failing to verify, by means of photographic identification containing a date of birth, that the purchasers were 18 years of age or older. CTP seeks to impose a \$5,591 civil money penalty against Respondent Marathon 113. During the hearing process, Respondent failed to comply with judicial directions and failed to appear for a pre-hearing conference. I, therefore, strike Respondent's filings and issue this decision of default judgment.

Procedural History

CTP began this matter on June 15, 2017, by serving an administrative complaint, seeking a \$5,591 civil money penalty, on Respondent Action Convenience Service Inc. d/b/a

Marathon 113, at 1930 Opa Locka Boulevard, Opa Locka, Florida 33054, and by filing a copy of the Complaint with the Food and Drug Administration's (FDA) Division of Dockets Management. After being properly served with CTP's Complaint in this matter, Respondent filed a timely Answer on June 27, 2017. I issued an Acknowledgment and Prehearing Order (APHO) on July 3, 2017, that set deadlines for the parties' submissions including the discovery deadlines.

On September 18, 2017, CTP filed a Motion to Extend Deadlines. In its Motion, CTP indicated that Respondent is located in Opa Locka, Florida, an area affected by Hurricane Irma. CTP's Motion also stated that it sent Respondent a Request for Production of Documents on July 28, 2017 but, due to the hurricane, had been unable to contact Respondent regarding its request.¹

Before I ruled on the Motion, CTP filed its pre-hearing exchange on September 19, 2017. On September 20, 2017, I issued an Order granting the Motion and extending the parties' pre-hearing deadlines. Respondent did not file a pre-hearing exchange.

On December 5, 2017, I issued an Order scheduling a pre-hearing telephone conference. The pre-hearing conference was scheduled for December 12, 2017, at 10:00 AM Eastern Time. The parties were provided with a call in telephone number and passcode. However, Respondent did not appear at the pre-hearing conference call or otherwise provide any response to the Order that scheduled the pre-hearing conference.

On December 20, 2017, I issued an Order giving Respondent until January 4, 2018 to show cause for its failure to appear at the pre-hearing conference. Respondent was informed that failure to respond to the Order could result in sanctions including the issuance of a default judgment. As of the date of this Decision, a response to my December 20, 2017 Order has not been received.

Striking Respondent's Filings

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.

¹ Respondent filed a single page Store Issues and Appeal Issues document on August 10, 2017 in response to CTP's Request for Production of Documents.

Here, Respondent failed to appear at the December 12, 2017 pre-hearing conference call and did not comply with my December 20, 2017 Order. Respondent has not participated in the hearing process since it filed its August 10, 2017 Store Training and Appeal Issues document. Respondent has failed to comply with orders and procedures governing this proceeding, and failed to defend the action. 21 C.F.R. § 17.35(a). Respondent's misconduct has interfered with the speedy, orderly, and fair conduct of this proceeding. *Id.* Therefore, I find that sanctions are appropriate under 21 C.F.R. § 17.35.

The harshness of the sanctions I impose upon either party must relate to the nature and severity of the misconduct or failure. 21 C.F.R. § 17.35(b). I find and conclude that Respondent's misconduct is sufficiently egregious to warrant striking its June 27, 2017 Answer and its Store Issues and Appeal Issues document, and issuing a decision without further proceeding. 21 C.F.R. §§ 17.35(a), 17.11(a).

Default Decision

Striking Respondent's Answer and Store Issues and Appeals document 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:

- On January 26, 2017, CTP initiated a previous civil money penalty action, CRD Docket Number T-17-1673, FDA Docket Number FDA-2017-H-0244, against Respondent for three² violations of 21 C.F.R. pt. 1140. CTP alleged those violations to have occurred at Respondent's business establishment, 1930 Opa Locka Boulevard, Opa Locka, Florida 33054, on January 13, 2016, and July 6, 2016;
- The previous action concluded when Respondent admitted the allegations contained in the Complaint issued by CTP, and paid the agreed upon monetary penalty in settlement of that claim. Further, "Respondent expressly waived its right to contest such violations in subsequent actions";

² Two violations were documented on January 13, 2016, and two on July 6, 2016. 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.

- At approximately 8:45 PM on April 10, 2017, at Respondent's business establishment, 1930 Opa Locka Boulevard, Opa Locka, Florida 33054, an FDA-commissioned inspector documented Respondent's staff selling a package of Newport Box 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.³

These facts establish Respondent Marathon 113'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),⁴ no retailer may sell cigarettes or smokeless tobacco 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 or smokeless tobacco purchasers are younger than 18 years of age.

A \$5,591 civil money penalty is permissible under 21 C.F.R. § 17.2.

Order

For these reasons, I enter default judgment in the amount of \$5,591 against Respondent Action Convenience Service Inc. d/b/a Marathon 113. Pursuant to 21 C.F.R. § 17.11(b), this order becomes final and binding upon both parties after 30 days of the date of its issuance.

/s/
Catherine Ravinski
Administrative Law Judge

³ These conclusions are supported by an un rebutted written declaration of the inspector. CTP Ex. 4. The inspector testified that he maintained an unobstructed view of the sales counter while seated in his car. *Id.* at 3. The inspector also testified that he observed the minor purchase a package of cigarettes and did not present any identification to the employee at the establishment. *Id.* Further, the inspector testified that the employee did not provide the minor with a receipt. *Id.*

⁴ On August 8, 2016, the citations to certain tobacco violations changed. For more information see: <https://federalregister.gov/a/2016-10685>.