

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Center for Tobacco Products,
(FDA No. FDA-2018-H-2109)

Complainant

v.

First Choice Grocery Inc.
d/b/a First Choice Food and Deli 2,

Respondent.

Docket No. T-18-2404

Decision No. TB3348

Date: December 19, 2018

**ORDER DENYING RESPONDENT'S MOTION FOR EXTENSION AND
INITIAL DECISION AND DEFAULT JUDGMENT**

The Center for Tobacco Products (CTP) began this matter by serving an administrative complaint on Respondent, First Choice Grocery Inc. d/b/a First Choice Food and Deli 2, located at 1714 Country Road 1, Dunedin, Florida 34698, and by filing a copy of the complaint with the Food and Drug Administration's (FDA) Division of Dockets Management. The complaint alleges that First Choice Food and Deli impermissibly sold cigarettes or smokeless tobacco 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 an \$11,182 civil money penalty against Respondent First Choice Food and Deli 2. During the hearing process, Respondent has failed to comply with multiple judicial directions. 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 an \$11,182 civil money penalty, on Respondent First Choice Grocery Inc. d/b/a First Choice Food and Deli 2, at 1714 Country Road 1, Dunedin, Florida 34698. Respondent filed an answer to CTP's complaint on July 3, 2018. I issued an Acknowledgement and Prehearing Order (APHO) on July 11, 2018 that set deadlines for the parties' submissions including an August 13, 2018 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 July 18, 2018.

On September 4, 2018, 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). In an Order issued on September 12, 2018, Respondent was given until September 19, 2018 to respond to CTP's motion. Respondent did not file a response.

In a September 28, 2018 Order, I granted CTP's Motion to Compel Discovery and extended the pre-hearing exchange deadlines. The Order allowed Respondent until October 15, 2018 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 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. CTP subsequently filed a Motion to Impose Sanctions on October 22, 2018, indicating that Respondent did not comply with the Order Granting CTP's Motion to Compel. In an October 25, 2018 letter issued by my direction, Respondent was given until November 6, 2018 to object to CTP's motion.

On or around October 25, 2018, Respondent sent a letter to CTP in response to the motion to compel explaining that his employees do not remember selling tobacco products to anyone underage. The letter did not otherwise respond to CTP's request for documents. A letter was issued by my direction on November 2, 2018, requesting that CTP let the court know if it was continuing to pursue sanctions by November 16, 2018. On November 16, 2018, CTP renewed its Motion for Sanctions and indicated that it had not received a response to its request for documents. A letter was issued under my direction on that same date giving Respondent until December 3, 2018 to file a response to CTP's renewed Motion for Sanctions. The letter warned Respondent again that failure to comply may result in sanctions including the issuance of an Initial Decision and Default Judgment.

On or around November 29, 2018, Respondent filed a letter requesting additional time to provide the requested documents to CTP.

II. Respondent's Request for an Extension of Time is Denied and Respondent's Answer is Struck

Respondent's request for an extension of time to produce documents in response to CTP's discovery request is unsupported. The letter does not provide any reasoning for the request. Respondent was served with CTP's request for documents on July 18, 2018. That was approximately 5 months ago. The standard time for production is 30 days. Respondent did not request a protective order and no argument has been made that complying with the request would be unduly burdensome or otherwise prohibited. As a result, I find that Respondent has had more than ample time to gather any responsive documents for production. Therefore, the request for extension is denied.

Due to noncompliance with my Acknowledgement and Pre-Hearing Order (APHO), my Order granting CTP's Motion to Compel, and my by direction letters ordering a response to CTP's motions for sanctions, 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:

- On September 26, 2016, CTP initiated a previous civil money penalty action, CRD Docket Number T-16-2131, FDA Docket Number FDA-2016-H-2953, 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

¹ Two violations were documented on October 27, 2014, two violations were documented on March 20, 2015, and two on March 12, 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.

establishment, 1714 Country Road 1, Dunedin, Florida 34698, on October 27, 2014, March 20, 2015, and March 12, 2016;

- 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 5:28 p.m. on January 29, 2018, at Respondent’s business establishment, 1714 Country Road 1, Dunedin, Florida 34698, an FDA-commissioned inspector documented Respondent’s staff selling a package of Marlboro Gold Pack cigarettes to a person younger than 18 years of age.

These facts establish Respondent First Choice Food and Deli 2’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, 28975-76 (May 10, 2016). Under 21 C.F.R. § 1140.14(a)(1), 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.

An \$11,182 civil money penalty is permissible under 21 C.F.R. § 17.2.

Order

For these reasons, I enter default judgment in the amount of \$11,182 against First Choice Grocery Inc. d/b/a First Choice Food and Deli 2. 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/
Wallace Hubbard
Administrative Law Judge