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SUPERIOR COURT OF N.J.
MERCER COUNTY
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SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION
MERCER COUNTY

Docket No. C 132-08

ANNE MILGRAM,
Attorney General of New Jersey,
David Szuchman,
Director of the New Jersey
Division of Consumer Affairs,
and Cheryl Fulmer Acting Director
of the New Jersey Division of Taxation,

Civil Action

Plaintiffs

MOTION DECISION

v.

RED JACKET TOBACCO,
LESLEY A. HOAG, individually,
and as principal and
owner of RED JACKET TOBACCO

Defendants

MARIA M. SYPEK, P.J. Ch.

October 2, 2009

ON THE BRIEFS: Cathy A. Melitski, DAG
Office of the Attorney General on behalf of Plaintiffs

No Submission by Defendants

This matter comes before the Court on Plaintiff's Motion for Final

Judgment by Default filed by the Office of the Attorney General, Anne Milgram, and the Court not receiving any opposition to said motions and having reviewed all documents submitted and for good cause shown the Court makes the following findings:

This matter arises from a complaint filed on October 10, 2008 by Anne Milgram, Attorney General of New Jersey, David Szuchman, Director of the New Jersey Division of Consumer Affairs and Cheryl Fulmer, acting Director of the New Jersey Division of Taxation, ("Plaintiffs") against Red Jacket Tobacco ("Red Jacket") and Lesley A. Hoag ("Ms. Hoag") individually and as principal and owner of Red Jacket (collectively "Defendants") and others for violations of the Cigarette Tax Act, N.J.S.A. 54:40A-1 et. seq.; the Tobacco Product Manufacturers' Responsibility Act ("Responsibility Act"), N.J.S.A. 52:4D et. seq.; the Cigarette Sales Tax Act, N.J.S.A. 54:40A-46A et. seq.; and the New Jersey Consumer Fraud Act ("CFA"), N.J.S.A. 56:8-1 et. seq., as well as its Advertising Regulations, N.J.A.C. 13:45A-9.1 et seq.

On October 14, 2008, the Deputy Attorney General ("DAG"), Cathy A Melitski, served the Summons and Complaint to Defendants by both

certified and regular mail.¹ See Cert. of Cathy A. Melitski, Exh. B. On November 3, 2008, the certified mail packages were returned and marked "Refused".² See id., Exh. B. On November 12, 2008, the DAG filed a Certification of Service with the Court. See id., ¶ 5. Pursuant to R. 4:4-4(b)(1)(C), service to Defendants was effectuated, because the Summons and Complaint were mailed simultaneously by certified mail and by ordinary mail to both Defendants. See id., Exh. B.

Plaintiffs filed its First Amended Complaint against Defendants in this Court on February 20, 2009 containing the same allegations and correcting the spelling of Ms. Hoag's first name from "Leslie" to "Lesley". See Cert. of Cathy A. Melitski, ¶ 6 & Exh. C. On March 3, 2009, the DAG served the First Amended Complaint to Defendants by both certified and regular mail.³ See id., Exh. D. On March 16, 2009, the certified mail packages were returned and marked "Refused".⁴ See id., Exh. A. On March 19, 2009, the DAG filed a Certification of Service of the First Amended Complaint with the Court. See id., ¶ 7 & Exh. D. Pursuant to R. 1:5-4(b), if an addressee refuses to accept delivery of certified mail, service to

¹ There were four packages mailed to Defendants and addressed as follows: (1) Leslie Hoag, P.O. Box 572, Salamanca, NY 14779-1479, (2) Leslie Hoag, 264 River Street, Salamanca NY 14779-1479, (3) Leslie Hoag, Principal of Red Jacket Tobacco, P.O. Box 572, Salamanca, NY 14779-1479, and (4) Leslie Hoag, Principal of Red Jacket Tobacco, 264 River Street, Salamanca NY 14779-1479.

² Plaintiffs failed to include copies of these returned and marked "Refused" packages.

³ There were two packages mailed to Defendants and addressed as follows: (1) Lesley A. Hoag, P.O. Box 572, Salamanca, NY 14779-1479, and (2) Lesley A. Hoag, 264 River Street, Salamanca NY 14779-1479.

⁴ Plaintiffs have included copies of these returned and marked "Refused" packages.

Defendants is deemed complete on mailing of ordinary mail, March 3, 2009.

See id., Exh. D.

On April 3, 2009, Default was entered against Defendants because Defendants failed to answer or otherwise move as to the complaint. See id., Exh. F. Entry of Default is governed by R. 4:43-1. The first requirement for entry of Default is that the defendants must have been served with process so that the court will have personal jurisdiction over those defendants. R. 4:4-4. Additionally, the plaintiff must provide the court with an affidavit reciting the date of service and the time within which the defendants may provide their answer. R. 4:43-1. Last, notice of the motion for Default must be served on the defendants. Id.

The Deputy Attorney General ("DAG"), Cathy A. Melitski, certifies that she caused to be mailed via certified and regular mail to Defendants, Red Jacket Tobacco and Lesley A. Hoag, a copy of the filed entry of default on April 3, 2009. See Cert. of Cathy A. Melitski, ¶ 10. Copies of the April 3, 2009 letters addressed to Defendants are attached to the Certification of Cathy A. Melitski. See id., Exh. F. Based on the above rule the Court is satisfied that default was properly entered.

By way of the present motion Plaintiffs request the entry of Final Judgment by Default seeking permanent injunctive relief, civil penalties,

attorneys' fees, and investigative costs. The Court will now consider the claims asserted by the State of New Jersey.

LIABILITY

The Plaintiffs assert that the Final Judgment by Default should find that Defendants violated the Cigarette Tax Act, N.J.S.A. 54:40A-3. See Cert. of Aziza Salikhov, ¶¶ 1-3. The Cigarette Tax Act requires a person selling cigarettes in New Jersey to obtain the appropriate license. N.J.S.A. 54:40A-3. Plaintiffs assert that Defendants operate an out-of-state mail order cigarette sales business and sold cigarettes to an Investigator posing as a New Jersey consumer on at least two occasions without a license.⁵

In support of the assertion that Defendants operate a mail order cigarette sales business, Plaintiffs state that Defendants sold cigarettes to the Investigator on at least two occasions. The first occasion occurred on June 26, 2008 when the Investigator ordered five (5) cartons of cigarettes (50 packs of 20 cigarettes or 1,000 cigarettes total) from Defendants by calling the number listed on Defendants Money Mailer Advertisement.⁶ See Cert. of Aziza Salikhov, ¶ 29. On or about July 14, 2008, the Investigator

⁵ The New Jersey consumer referred to is an Investigator, Aziza Salikhov, employed by the New Jersey Department of Law and Public Safety, Division of Consumer Affairs ("Division"). The Division began an investigation into Defendants mail order cigarette business after the Attorney General received a money mailer advertisement for Red Jacket Tobacco. See Cert. of Aziza Salikhov, ¶¶ 1-3. Ms. Salikhov is in charge of the investigation.

⁶ Red Jacket Tobacco contracted with Money Mailer to send advertisements to New Jersey consumers through the mail soliciting "TAX FREE CIGARETTES DELIVERED TO YOUR DOOR." See Cert. of Aziza Salikhov, Exh. D.

received the cigarettes she ordered from Defendants. See id., ¶ 39. The second occasion occurred on October 6, 2008 when the Investigator ordered two (2) cartons of cigarettes (20 packs of 20 cigarettes or 400 cigarettes total) from Defendants by calling the same number. See id., ¶¶ 49, 51, & 55 & Exh. K. On October 16, 2008, the Investigator received the cigarettes she ordered from Defendants. See id., ¶ 56. This evidence supports Plaintiffs' assertion that Defendants were operating a mail order cigarette sales business.

Further, Plaintiffs argue that Defendants were operating this mail order cigarette sales business out-of-state and without a license. In support of this, Plaintiffs assert that on or about June 10, 2008, the Investigator searched for different variations of the name "Red Jacket Tobacco" in the New Jersey State Business Gateway Service, Corporate and Business Information Reporting Database of the New Jersey Department of the Treasury by a general business entity name; by associated name; by a UCC debtor name and location; by trade name; and trade name location. See id., ¶ 5. The Investigator's search returned nothing, but the Investigator continued her search to determine whether the Defendants were out-of-state cigarette sellers.

Specifically, on August 20, 2008, the Investigator called the post office in the city and state located on Defendants Money Mailer Advertisement to determine the identity of the PO Box holder.⁷ From this call, the Investigator learned that Lesley A. Hoag of Oxspring Enterprises rented the PO Box. See id., ¶¶ 9-12. Eventually, the Investigator located Lesley Hoag on manta.com. See id., ¶ 13. This website listed “Lesley Hoag” as a principal” of Red Jacket Tobacco, a tobacco company, and also listed “Leslie Hoag” as a contact person on the company profile page. See id., Exh. C. The Investigator began a search using variations of the name “Lesley Hoag”, in the New Jersey State Business Gateway Service, Corporate and Business Information Reporting Database of the New Jersey Department of the Treasury, to see if she was registered as an officer or registered agent of a corporation or a sole proprietor. But, the search returned nothing. See id., ¶ 14. As a result, the Investigator concluded that Defendants were out-of-state cigarette sellers.

Out-of-state cigarette sellers must be a licensed wholesale dealer or licensed distributor to sell cigarettes into New Jersey.⁸ See Cert. of Chief Edward Vrancik, ¶¶ 5-9. The Cigarette Tax Act requires a person selling

⁷ The money mailer lists PO Box 572, Salamonca, NY as the address.

⁸ Chief Edward Vrancik is employed by the New Jersey Department of Treasury, Division of Taxation (“Taxation”) and Chief of the Miscellaneous Tax Branch/Office of Criminal Investigations (“Miscellaneous Tax”) within Taxation. He has been the Chief since August 2008. See id., ¶ 1. As part of his job he oversees the financial audit process on cigarette and tobacco products, retailers, wholesale dealers, and distributors. id. Part of the audit process includes checking whether a business is properly licensed.

cigarettes in New Jersey to obtain the appropriate license. N.J.S.A. 54:40A-3. However, Plaintiffs assert that Defendants sale of these cigarettes was made without the appropriate license. In support of this assertion, Plaintiffs refer the Court to Miscellaneous Tax's records. See id., ¶16. These records demonstrate that Defendants have never applied for a distributor or wholesale dealer license and have never been issued a distributor or wholesale dealer license. See id., ¶¶ 6-13. Yet, Defendants have transacted business in the State of New Jersey on at least two occasions. See Cert. of Aziza Salikhov ¶¶ 35-40, 55-57. Since the Miscellaneous Tax records indicate that Defendants have never applied for and have never been issued a distributor or wholesale dealer license, the Court finds that Defendants sale of these cigarettes was made without a license. Moreover, based on the Certification of Chief Edward Vrancik and the Certification of Investigator Aziza Salikhov, the court finds that Defendants were out-of-state cigarette sellers that sold cigarettes into New Jersey on at least two occasions without a license. Based on the above facts and evidence, it is clear that Defendants made cigarette sales into New Jersey without a license in violation of the Cigarette Tax Act, N.J.S.A. 54:40A-3.

In addition to the Cigarette Tax Act, N.J.S.A. 54:40A-3 Plaintiffs next assert that the Final Judgment by Default should find that Defendants

violated the Responsibility Act, N.J.S.A. 52:4D-8.b. The Responsibility Act, N.J.S.A. 52:4D-1 et seq., requires tobacco product manufacturers to annually certify the cigarette brands they want to sell in New Jersey and all cigarette brands that the Attorney General approves for sale in New Jersey are posted on the New Jersey Attorney General Tobacco Product Manufacturer's Directory ("Directory") on the Internet at http://www.nj.gov/oag/oag_tobacco.html. Moreover, pursuant to N.J.S.A. 52:4D-8.b., it is unlawful for any person to "sell, offer or possess for sale in this State, cigarettes of a tobacco products manufacturer or brand family not included in the directory established pursuant to the Act [the Attorney General Tobacco Manufacturer Directory] (hereinafter, "Directory")."

Plaintiffs state that the Investigators June 26, 2008 and October 6, 2008 orders included cigarettes not listed on the Directory. In support of this assertion, Plaintiffs state that on June 26, 2008, three (3) of the five (5) cartons (30 packs of 20 cigarettes or 600 cigarettes) were for 305's brand cigarettes manufactured by The Dosal Tobacco Corporation and, on October 6, 2008, two (2) cartons (20 packs of 20 cigarettes or 400 cigarettes) were for 305's brand cigarettes manufactured by The Dosal Tobacco Corporation. See Cert. of Aziza Salikhov ¶ 33 & Exh. F. Dosal Tobacco Corporation, the manufacturer of 305's cigarettes, was not listed on the Directory on June

26, 2008, or October 6, 2008. See id. The 305's brand of cigarettes was not listed on the Directory either. Thus, the Court finds that Defendants sold cigarettes not listed on the Directory and, as a result, violated the Responsibility Act, N.J.S.A. 52:4D-8.b.

In addition to the Responsibility Act, N.J.S.A. 52:4D-8.b., and the Cigarette Tax Act, N.J.S.A. 54:40A-3, Plaintiffs next assert that the Final Judgment by Default should find that Defendants violated the Cigarette Sales Act, N.J.S.A. 54:40A-46 et seq. Pursuant to the Cigarette Sales Act, N.J.S.A. 54:40A-46 et seq., a person shall not sell cigarettes into New Jersey unless the sale is a "face-to-face sale", except that a non "face-to-face sale" of cigarettes may occur if the following conditions are met:⁹ the seller (1) has fully complied with all requirements of the Jenkins Act, 15 U.S.C. §375 et seq., (2) verified, collected or paid all applicable State taxes, and (3) verified that the purchaser is at least 19 years old. Defendants' sold cigarettes through the mail on June 26, 2008 and October 6, 2008. See Cert. of Aziza Salikhov ¶¶ 35, 40, 48-50, 57 & Exhs. G & L. Since Defendants' sale of cigarettes to Investigator was a non face-to-face sale, Defendants

⁹ Pursuant to N.J.S.A. 54:40A-48: A 'face to face sale' means a sale in which the purchaser is in the physical presence of the seller or the seller's employee or agent at the time of the sale. A 'face to face sale' does not include any transaction conducted by mail order, the Internet, telephone, or any other anonymous transaction method in which the buyer is not in the seller's physical presence or the physical presence of the seller's employee or agent at the time of the sale.

must comply with the requirements of the Cigarette Sales Act, N.J.S.A.
54:40A-49.

Specifically, Defendants must meet three requirements of the Cigarette
Sales Act, N.J.S.A. 54:40A-49. First, The Cigarette Sales Act, N.J.S.A.
54:40A-49a, requires Defendants to comply with the Jenkins Act, 15 U.S.C.
§376.

The Jenkins Act, 15 U.S.C. §376 states in pertinent part:

Any person who sells or transfers for profit cigarettes in interstate commerce, whereby such cigarettes are shipped into a state taxing the sale or use of cigarettes to other than a State distributor by or located in such State, or who advertises or offers cigarettes for such sale or transfer and shipment, shall—

- (1) first file with the tobacco tax administrator of the State into which such shipment is made or in which such advertisement or offer is disseminated a statement setting forth his name and trade name, and the address of his principal place of business and any other place of business; and
- (2) not later than the 10th of each day of each calendar month, file with the tobacco tax administrator of the State into which such shipment is made, a memorandum or copy of the invoice covering each and every shipment of cigarettes made during the previous calendar month into such state; memorandum or invoice in each case to include the name and address of the person to whom shipment was made, the brand, and the quantity thereof.

Basically, the Jenkins Act, 15 U.S.C. §376, requires anyone selling cigarettes from one State to another to report the sale to the State tobacco tax administrator. In New Jersey, the State tobacco tax administrator is the Department of Treasury, Division of Taxation. See Cert. of Chief Edward Vrancik, ¶ 17. The Miscellaneous Tax/OCI Branch receives the cigarette sales reports filed in connection with the Jenkins Act (Jenkins Act Reports"). See id., ¶¶ 17 & 18. Plaintiffs offer evidence that The Miscellaneous Tax/OCI Branch has not received any Jenkins Act reports from Defendants. See id., ¶¶ 19 & 20. Thus, the Court finds that Defendants have failed to report the sale to the Department of Treasury, Division of Taxation, which is New Jersey's State tobacco tax administrator. As a result, Defendants have failed to comply with the Jenkins Act, 15 U.S.C. §376, and are in violation of Cigarette Sales Act, N.J.S.A. 54:40A-49a.

Third, The Cigarette Sales Act, N.J.S.A. 54:40A-40c, requires Defendants to verify that the purchaser is at least 19 years old.

Second, Plaintiffs assert that Defendants violated the Cigarette Sales Act, N.J.S.A. 54:40A-49b, when Defendants did not charge the Investigator the New Jersey Cigarette tax or New Jersey Sales tax on the June 26, 2008 purchase or the October 6, 2008 purchase. The Cigarette Sales Act, N.J.S.A. 54:40A-49b., requires the seller of cigarettes in a non "face-to-face sale" to

verify, collect or pay all applicable State taxes. Miscellaneous Tax's records indicate that Defendants have not verified or paid applicable taxes pursuant to the Cigarette Sales Act, N.J.S.A. 54:40A-49. See Cert. of Edward Vrancik, 21. See Cert. of Chief Edward Vrancik, ¶¶ 21 & 22. Thus, Defendants have failed to comply with the requirement of the Cigarette Sales Act to verify or pay all applicable State taxes due on cigarettes sold into New Jersey and are in violation of N.J.S.A. 54:40A-49b.

Third, Plaintiffs assert that Defendants violated The Cigarette Sales Act, N.J.S.A. 54:40A-40c, by failing to verify that the purchaser, Investigator, was at least 19 years old. The Cigarette Sales Act, N.J.S.A. 54:40A-40c, requires the seller of cigarettes in a non face-to-face sale to verify that the purchaser is at least 19 years old. In support of this, Plaintiffs state that on June 26, 2008, Defendants did not ask the Investigator her age, or ask the Investigator to verify her address, her date of birth, nor did Defendants request the Investigator to provide a statement under penalty of perjury that Investigator, as the purchaser of cigarettes, was at least 19 years old. See Cert. of Aziza Salikhov, ¶¶ 37 & 38. The Defendants did not ask her to provide a copy of her valid driver's license or other government

issued identification.¹⁰ id. The Plaintiffs also state that on October 6, the Defendants did not ask the Investigator to verify that she was at least 19 years old. See id., ¶¶ 52 & 53. Therefore, the Court finds that on at least two occasions Defendants have failed to comply with the requirement of the Cigarette Sales Act, N.J.S.A. 54:40A-49c, to verify that a purchaser of cigarettes is at least 19 years old.

Overall Defendants made at least two non face-to-face sales of cigarettes but failed to comply with all three conditions of a non face-to-face sale under the Cigarette Sales Act, N.J.S.A. 54:40A-49. Namely, the Defendants violated The Cigarette Sales Act, N.J.S.A. 54:40A-49a, by failing to comply with all requirements of the Jenkins Act, 15 U.S.C. §376, The Cigarette Sales Act, N.J.S.A. 54:40A-49b, by failing to verify, collect or pay all applicable State taxes, and The Cigarette Sales Act, N.J.S.A. 54:40A-40c, by failing to verify that the purchaser is at least 19 years old. As a result, the Court finds that Defendants violated the Cigarette Sales Act, N.J.S.A. 54:40A-46 et seq.

In addition to the Cigarette Sales Act, N.J.S.A. 54:40A-46 et seq.,

¹⁰ The Defendants catalogue provides the following statement "we are required by law to have your ID on file. Please send a legible copy of a Driver's license, I.D. Card, Birth Certificate or Passport showing your name, signature, and date of birth... This I.D. can be mailed to us or you can Fax to 716-945-3291. See Cert. of Aziza Salikhov ¶ 30 & Exh. E.

the Responsibility Act, N.J.S.A. 52:4D-8.b, and Cigarette Tax Act, N.J.S.A. 54:40A-3, Plaintiffs assert that the Final Judgment by Default should find that Defendants violated the New Jersey Consumer Fraud Act ("CFA") N.J.S.A. 56:8-1 et. seq. and its regulations including those dealing with General advertising, N.J.A.C. 13:45A-9.1 et seq. by advertising and selling cigarettes in New Jersey through unconscionable commercial practices, misrepresentations and knowing omissions. The CFA, N.J.S.A. 56:8-2 prohibits:

The act, use or employment by any person of any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing, concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise

Plaintiffs assert that the Money Mailer advertisement violated the CFA and its Advertising Regulations by misrepresenting that Defendants sold "tax free" cigarettes when taxes are due on cigarettes sold in the State pursuant to N.J.S.A. 54:40A-8; and by misrepresenting that "if we don't have it, we can order it" when, in fact, only cigarettes on the Directory may be sold in New Jersey. See Cert of Salikhov ¶17, Exh. D.

In support of these assertions, Plaintiffs have submitted copies of the Money Mailer Advertisements sent to New Jersey Consumers. The Money

Mailer advertisements solicit "TAX FREE CIGARETTES DELIVERED TO YOUR DOOR." See Cert. of Investigator Aziza Salikhov, Exh. D. Also, the advertisement states "IF WE DON'T HAVE IT, WE CAN ORDER IT." See id., Exh. D. As a result, the Court finds that Defendants made the above misrepresentations and are in violation of the CFA, N.J.S.A. 56:8-2 and its Advertising Regulations.

In addition to the above misrepresentations, Plaintiffs next allege that Defendants committed at least eight (8) further CFA violations through unconscionable commercial practices. Again, the CFA, N.J.S.A. 56:8-2 prohibits:

The act, use or employment by any person of any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing, concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise

Plaintiffs state that on June 26, 2008, and again on October 6, 2008, the investigator purchased cigarettes from Defendants, and each time an additional four CFA violations for unconscionable commercial practices were committed. See Cert. of Aziza Salikhov, ¶¶ 46, 62. Specifically, Defendants (1) sold cigarettes that were not listed on the Directory (2) when they were not licensed (3) these cigarettes did not bear the New Jersey tax

stamps and (4) furthermore, when the investigator purchased the cigarettes, she was not asked to verify her age. See id., ¶¶ 38, 53. The Court will now examine each of these four allegations to determine whether Defendants committed eight violations of the CFA.

First, the Court previously found that Defendants sold cigarettes not listed on the Directory, on June 26, 2008 or October 6, 2008, as required by the Responsibility Act, N.J.S.A. 52:4D-8.b. Defendants violated this law in connection with the sale of cigarettes. The Court finds that Defendants disregard for this law constitutes an unconscionable commercial practice under the CFA.

Second, the Court previously found that Defendants were not licensed to sell cigarettes in New Jersey, on June 26, 2008 or October 6, 2008, as required by the Cigarette Tax Act, N.J.S.A. 54:40A-3. The Court finds that Defendants disregard for this law constitutes an unconscionable commercial practice under the CFA.

Third, Plaintiffs assert that Defendants engaged in another unconscionable commercial practice under the CFA by selling cigarettes without the required New Jersey tax stamps. Plaintiffs submitted picture copies of the cigarette packs that were received by the Investigator on July 14, 2008 and October 16, 2008. See id., ¶ 43 & 59 & Exhs. I, J, L, & M.

No New Jersey tax stamps appear on any of the cigarette packs. id. The Court finds that selling cigarettes that did not include New Jersey tax stamps was an unconscionable commercial practice under the CFA.

Finally, the Court previously found that when the Investigator purchased cigarettes on June 26, 2008 and October 6, 2008, Defendants failed to verify that the Investigator was at least 19 years old as required by the Cigarette Sales Act, N.J.S.A. 54:40A-49c. The Court finds that Defendants disregard for this law also constitutes an unconscionable commercial practice under the CFA.

. Based on the evidence submitted by Plaintiffs, the Court enters a finding that Defendants committed eight (8) additional CFA violations for unconscionable commercial practices when they sold cigarettes into New Jersey.

In addition to the above eight CFA violations for unconscionable commercial practices and the above misrepresentations in violation of the CFA and its advertising regulations, Plaintiffs assert that Defendants made the following omissions in violation of the CFA: (1) Failing to disclose that purchasers of non face-to-face sales are required to pay cigarette and sales taxes pursuant to the Jenkins Act; (2) Failing to disclose that a consumer must be over 19 years of age to purchaser cigarettes in New Jersey.

Again, the CFA, N.J.S.A. 56:8-2 prohibits:

The act, use or employment by any person of any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing, concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise

The Court has reviewed the Money Mailer Advertisement sent to New Jersey Consumers, Red Jacket's list of available cigarettes, Red Jacket Tobacco's order form, and the invoice sent to Investigator. See Cert. of Aziza Salikhov, Exhs. D & E. There are no statements or indications on these forms pertaining to taxes due. id. These omissions were made in connection with the sale and advertisement of cigarettes. Thus, the Court finds that Defendants failed to disclose that purchasers of non face-to-face sales are required to pay cigarette and sales taxes pursuant to the Jenkins Act and are in violation of the CFA and its advertising regulations for this omission.

Also, the Court finds that the Money Mailer Advertisement sent to New Jersey residents fails to disclose that a consumer must be over 19 years of age to purchase cigarettes in New Jersey. See Cert. of Aziza Salikhov, Exh. D. However, the Court did find that Red Jacket Tobacco's list of available brands of cigarettes and order form contained the following

statement: "Must be 18 yrs of age or older to order." See id., Exh. E. Even though the Court found this statement, it was not contained in the Money Mailer Advertisement sent to New Jersey consumers. Therefore, the Court finds that this was an omission by the Defendants under the CFA.

Overall, the Court finds that Defendants violated the Cigarette Tax Act, N.J.S.A. 54:40A-3, The Responsibility Act, N.J.S.A. 52:4D-1 et seq., The Cigarette Sales Act, N.J.S.A. 54:40A-46 et seq., and the New Jersey Consumer Fraud Act (CFA), N.J.S.A. 56:8-2 and its Advertising Regulations, N.J.A.C. 13:45A-9 et seq. Since the Court has decided that Defendants have committed these violations, it will next address the damages requested by Plaintiffs for these violations.

DAMAGES

For these violations, Plaintiffs seek permanent injunctive relief, attorneys' fees in the amount of \$38,245, investigative costs in the amount of \$3,031.40, and civil penalties.

Specifically, Plaintiffs seek permanent injunctive relief for Defendants violation of the Cigarette Tax Act, N.J.S.A. 54:40A-3, the Responsibility Act, N.J.S.A. 52:4D-1 et seq., the Cigarette Sales Act, N.J.S.A. 54:40A-46 et seq., and the Consumer Fraud Act (CFA), N.J.S.A. 56:8-2.

In regards to the Cigarette Tax Act, N.J.S.A. 54:40A-3, Plaintiffs ask the Court to order Defendants to cease and desist from advertising and selling cigarettes in this State unless and until they are properly licensed. The Court orders that Defendants shall immediately and permanently, cease and desist from advertising or selling cigarettes in this State unless and until they are properly licensed in New Jersey pursuant to N.J.S.A. 54:40A-3.

As for the Responsibility Act, N.J.S.A. 52:4D-1 et seq., Plaintiffs ask the Court, pursuant to N.J.S.A. 52:4D-1 l c., to restrain Defendants from selling cigarette brands and manufacturers into New Jersey that are not listed on the Directory because it violates N.J.S.A. 52:4D-8.b. In pertinent part, N.J.S.A. 52:4D-1 l c. states: "The Attorney General, on behalf of the director, may seek an injunction to restrain a threatened or actual violation of section 5 of this act...." Based on this rule, the Court will issue an injunction pursuant to N.J.S.A. 52:4D-1 l c. to prevent Defendants from violating NJSA 52:4D-8.b., selling cigarettes not listed on the Directory.

In regards to the Cigarette Sales Act, N.J.S.A. 54:40A-46 et seq., Plaintiffs request the Court to order Defendants to comply with the reporting requirements of the Jenkins Act pursuant to 15 U.S.C. § 376¹¹, to comply with the requirements of the Cigarette Sales Act, pursuant to N.J.S.A. 54:40-

¹¹ N.J.S.A. 54:40A-49a. requires a cigarette seller to comply with the federal Jenkins Act, 15 U.S.C. § 376.

49b and c¹², if and when Defendants are licensed with the State of New Jersey. In response, the Court orders Defendants to comply with the reporting requirements of the Jenkins Act, 15 U.S.C. § 376. The Court also requires Defendants to comply with requirements of the Cigarette Sales Act N.J.S.A. 54:40-49b and c.

Finally, for Defendants violation of the CFA, N.J.S.A. 56:8-2, Plaintiffs request an injunction prohibiting Defendants from selling and advertising cigarettes to New Jersey consumers pursuant to N.J.S.A. 56:8-8 unless and until they are duly licensed to do so in this State. N.J.S.A. 56:8-8 provides, in pertinent part:

Whenever it shall appear to the Attorney General that a person has engaged in, is engaging in or is about to engage in any practice declared to be unlawful by this act he may seek and obtain in a summary action in the Superior Court an injunction prohibiting such person from continuing such practices or engaging therein or doing any acts in furtherance thereof...

The authority granted to the Attorney General under the CFA is intended to confer "the broadest kind of power to act in the interest of the consumer public." Kugler, 58 N.J. at 537; see State v. Hudson Furniture Co., 165 N.J. Super. 516, 520 (App. Div. 1979). Based on the above rule, the Court grants

¹² N.J.S.A. 54:40-49b requires the seller of cigarettes in a non "face-to-face sale" to verify, collect, or pay all applicable State taxes. Also, N.J.S.A. 54:40-49c. requires the seller of cigarettes in a non "face-to-face sale" to verify that the purchaser is at least 19 years old.

the injunction prohibiting Defendants from selling and advertising cigarettes to New Jersey consumers unless and until they are duly licensed to do so in this State.

Thus, the Court has enjoined Defendants from further violating the Cigarette Tax Act, N.J.S.A. 54:40A-3, the Responsibility Act, N.J.S.A. 52:4D-1 et seq., the Cigarette Sales Act, N.J.S.A. 54:40A-46 et seq., and the Consumer Fraud Act (CFA), N.J.S.A. 56:8-2.

In addition to seeking permanent injunctive relief, Plaintiffs seek attorney's fees in the amount of \$38,245.¹³ Attorneys' fees are authorized by the Cigarette Tax Act, N.J.S.A. 54:40A-24e, the Responsibility Act, N.J.S.A. 52:4D-1 *et seq.*, and the CFA, N.J.S.A. 56:8-19.¹⁴

The Cigarette Tax Act, N.J.S.A. 54:40A-24e, states:

e. Costs; expenses. The costs recoverable in any such proceeding shall be recovered by the director in the event of judgment in his favor... All expenses incident to the recovery of any penalty pursuant to the provisions of this section shall be paid for as any other expense incident to the administration of this act.

¹³ The time and charge break down is as follows (1) AAG James Savage 1.9 hours = \$360.00; (2) SDAG Carol G. Jacobson, 41 hours = \$7,175.00; (3) DAG Melitski, 198 hours = 30,690.00. The attorney billing rates are calculated pursuant to the guidelines issued by the DOJ. As a Assistant Attorney General the billable rate for James Savage is 200 per hour. As a Deputy Attorney General with ten or more years of experience, the billable rate for SDAG Jacobson is 175 per hour. As a Deputy Attorney General with five to ten years of experience, the billable rate for DAG Melitski is 155 per hour." See Certification of Cathy A. Melitski ¶ 12

¹⁴ The Court first finds that the hourly rates for Plaintiffs' attorneys are reasonable and will not be altered by the Court. As to the hours billed by the AAG, SDAG, and DAG, the Court finds that all of the hours listed shall be included in the award of attorney's fees to Plaintiffs.

Therefore, the Court finds that Plaintiffs are entitled to recover attorneys' fees under the Cigarette Tax Act, N.J.S.A. 54:40A-24e.

Additionally, the Responsibility Act, N.J.S.A. 52:4D-11c, states in relevant part: "...[i]n any action brought pursuant to this section, the State shall be entitled to recover the costs of investigation, costs of the action, and reasonable attorneys' fees." The Court finds that Plaintiffs are entitled to attorneys' fees, pursuant to the Responsibility Act, N.J.S.A. 52:4D-11c.

Finally, the Consumer Fraud Act, pursuant to N.J.S.A. 56:8-19 provides "...[i]n all actions under this section, including those brought by the Attorney General, the court shall also award reasonable attorneys' fees, filing fees, and reasonable costs of suit." The Court finds that Plaintiffs are entitled to attorneys' fees, under the CFA, N.J.S.A. 56:8-19. Overall, Plaintiffs are entitled to attorneys' fees of \$38,245 under the Cigarette Tax Act, N.J.S.A. 54:40A-24e, the Responsibility Act, N.J.S.A. 52:4D-11c, and the CFA, N.J.S.A. 56:8-19.

In addition to injunctive relief and attorneys' fees, Plaintiffs request that the Court order Defendants to pay investigative costs and fees, in the total amount of \$3,031.40,¹⁵ for the use of the State of New Jersey, as authorized

¹⁵ The Plaintiffs do not include how the total amount of \$3,031.40 for the use of the state of New Jersey was determined. However, the Certification of Aziza Salikhov states that the Division has incurred investigative costs of \$3,031.40 in connection with this matter. See Cert. of Azizu Salikhov, 78.

by the Cigarette Tax Act, N.J.S.A. 54:40A-24e, the Responsibility Act, N.J.S.A. 52:4D-11c., and the CFA, N.J.S.A. 56:8-11.

The Cigarette Tax Act, N.J.S.A. 54:40A-24e authorizes costs and states:

e. Costs; expenses. The costs recoverable in any such proceeding shall be recovered by the director in the event of judgment in his favor... All expenses incident to the recovery of any penalty pursuant to the provisions of this section shall be paid for as any other expense incident to the administration of this act.

The above rule makes it clear that Plaintiffs are entitled to costs under the Cigarette Tax Act, N.J.S.A. 54:40A-24e.

Plaintiffs next ask the Court to award costs under The Responsibility Act, N.J.S.A. 52:4D-11c. N.J.S.A. 52:4D-11c. states in relevant part: "...[i]n any action brought pursuant to this section, the State shall be entitled to recover the costs of investigation, costs of the action, and reasonable attorneys' fees." The Court awards costs under the Responsibility Act, N.J.S.A. 52:4D-11c.

Finally, Plaintiffs ask the Court to award costs under the CFA, N.J.S.A. 56:8-11. N.J.S.A. 56:8-11 provides that: "[i]n any action or proceeding brought under the provisions of this act, the Attorney General shall be entitled to recover costs for the use of the State." Thus, Plaintiffs are entitled to recover investigative costs and fees as authorized by CFA, N.J.S.A. 56:8-11. Overall, the Court orders that Defendants shall pay

investigative costs and fees, in the total amount of \$3,031.40, for the use of the State of New Jersey as authorized by the Cigarette Tax Act, N.J.S.A. 54:40A-24a., the Responsibility Act, N.J.S.A. 52:4D-11c., and CFA, N.J.S.A. 56:8-11.

In addition to investigative costs and fees, attorneys' fees, and injunctive relief, Plaintiffs lastly seek civil penalties as authorized by the Cigarette Tax Act, N.J.S.A. 54:40A-24, the Responsibility Act, N.J.S.A. 52:4D-11, the Cigarette Sales Act, N.J.S.A. 54:40A-50, and the CFA, N.J.S.A. 56:8-13.

The Cigarette Tax Act, N.J.S.A. 54:40A-24(a) states in pertinent part:

(a) Penalties. Any person who shall engage in any business or activity for which a license is required under the provisions of this act, without first having obtained a license to do so,shall be liable to a penalty of not more than \$250.00, which penalty shall be sued for, and shall be recoverable in the name of the director; and each day that any such business is so engaged in or conducted shall be deemed a separate offense.

Plaintiffs' investigation and knowledge of Defendants' business operating in New Jersey began on June 13, 2008. See Cert. of Aziza Salikhov ¶ 22. Plaintiffs' last telephone contact with Defendants was made in connection with an order for cigarettes on October 6, 2008. See id., ¶ 48. Defendants shipped these cigarettes on October 13, 2008. See id., ¶¶ 57-58, & Exh. L. Defendants were operating their business at least 122 days (from June 13, 2008 to October 13, 2008) without a cigarette license in New

Jersey. Each day is a separate violation. As a result, Defendant's shall pay a civil penalty in the amount of \$30,500 (122 days * 250 per day= 30,500), for violations of the Cigarette Tax Act N.J.S.A. 54:40A-24.

In addition to requesting a \$30,500 penalty under the Cigarette Tax Act, N.J.S.A. 54:40A-24, Plaintiffs also request for the Court to order Defendants to pay a \$10,000 penalty under the Responsibility Act, N.J.S.A. 52:4D-11a.

This section states:

- a. ... each offer to sell cigarettes in violation of section 5 of this act shall constitute a separate violation. For each violation hereof, the director may also impose a civil penalty in an amount not to exceed the greater of 500% of the retail value of the cigarettes sold or \$5,000 upon a determination of violation of section 5 of this act or any regulations adopted pursuant thereto.

Plaintiffs determined that Defendants shall pay a civil penalty in the amount of \$10,000; (5,000 for the June 26, 2008 purchase and 5,000 for the October 6, 2008 purchase) which is the greater of \$5,000 per violation or 500% of the retail value of the cigarettes. This penalty is imposed by the Director of the Division of Taxation.¹⁶ The Director is a Plaintiff in this action. Since the Director is a Plaintiff in this action, the Court orders Defendants to pay the \$10,000 civil penalty for violating the Responsibility Act, N.J.S.A.

52:4D-11a

¹⁶ The Deputy Attorney General was contacted on Tuesday, September 15, 2009 because the Order omitted civil penalties under this section. She resubmitted a revised order on September 22, 2009 that changed paragraph 6 to include civil penalties under the Responsibility Act.

Further, Plaintiffs request that this Court enter a Final Judgment by Default penalizing Defendants for their violation of the Cigarette Sales Act, N.J.S.A. 54:40A-50.¹⁷ Pursuant to N.J.S.A. 54:40A-50a., taxation shall assess a penalty of not less than \$1,000 and not more than \$2,000 for the first violation of the Cigarette Sales Act. This penalty is imposed by the Director of the Division of Taxation. The Director is a Plaintiff in this action. Since the Director is a Plaintiff in this action, the Court orders Defendants to pay a civil penalty in the amount of \$1,000 for violating the Cigarette Sales Act.

Finally, Plaintiffs request that this Court enter a Final Judgment by Default penalizing Defendants in the amount of \$600,000 finding that Defendants committed 60,000 separate violations of the CFA, N.J.S.A. 56:8-2, and its Advertising Regulations, N.J.A.C. 13:45A-9 et seq. The CFA provides for the Court's award of civil penalties. N.J.S.A. 56:8-13 states:

Any person who violates any of the provisions of the act to which this act is a supplement shall, in addition to any other penalty provided by law, be liable to a penalty of not more than \$10,000 for the first offense and not more than \$20,000 for the second and each subsequent offense.

¹⁷ The original Order did not include a penalty for Defendants violation of the Cigarette Sales Act. This conflicted with the Complaint. The Complaint sought for the Court to impose a penalty under this section. Cathy Tully at the DAG's office on September 15, 2009 informed the Court that Taxation imposes this penalty and since Taxation is a Plaintiff in this action, she omitted it from the Order. She submitted a revised order on September 22, 2009 which included a civil penalty for Defendants violation of the Cigarette Sales Act.

Plaintiffs arrived at \$600,000 by considering the number of offenses committed by Defendants. Plaintiffs ask the Court to find that Defendant's advertising and selling cigarettes to New Jersey consumers constitutes 60,000 separate offenses of the CFA, N.J.S.A. 56:8-1 et seq., and its Advertising Regulations, N.J.A.C. 13:45A-9 et seq. for the Red Jacket Money Mailer advertisement sent to New Jersey consumers. Plaintiffs assert that Defendants committed 60,000 separate offenses because Defendants contracted with Money Mailer to mail this advertisement to New Jersey residents on three separate occasions. See Cert. of Aziza Salikhov, ¶ 70 & Exh. O. The advertisements were sent on or about April 3, 2008, May 9, 2008, and June 20, 2008. See id., ¶¶ 71, 73, 75. Moreover, each time the advertisement was sent, it was mailed to at least 20,000 New Jersey Residents, totaling 60,000. See id., ¶¶ 71, 73, 75-79. Based on this evidence, the Court finds that Defendants committed 60,000 separate offenses in violation of the CFA and its accompanying regulations. Each time the advertisement was included in the Money Mailer it constituted a separate offense. Thus, the Court shall include in the Final Judgment by Default that Defendants committed 60,000 separate violations of the CFA N.J.S.A. 56:8-2, and its Advertising Regulations, N.J.A.C. 13:45A-9 et seq., and shall pay a penalty in the amount of \$600,000.

In addition, Plaintiffs request this Court find that Defendants committed eight (8) additional CFA violations for unconscionable commercial practices and order Defendants to pay a penalty in the amount of \$10,000 each totaling \$80,000 for these violations of the CFA, N.J.S.A. 56:8-1 et seq. Once again, N.J.S.A. 56:8-13 states:

Any person who violates any of the provisions of the act to which this act is a supplement shall, in addition to any other penalty provided by law, be liable to a penalty of not more than \$10,000 for the first offense and not more than \$20,000 for the second and each subsequent offense.

Based on the above rule, the Court agrees with Plaintiffs that these penalties are appropriate based on the number of violations and the limited information regarding Defendants financial rewards gained from these fraudulent practices and orders Defendants to pay a penalty in the amount of \$80,000.

The issue before the court is whether it can enter a final judgment by default as to Defendants that includes the above liability and damages, pursuant to R. 4:43-2. R. 4:32-2 provides in pertinent part:

After a default has been entered in accordance with R. 4:43-1 ... a final judgment may be entered in the action as follows:

(b) By the Court. In all other cases . . . the party entitled to a judgment by default shall apply to the court therefor by notice of motion pursuant to R.1:6, served on all

parties to the action, including the defaulting defendant or the representative who appeared for the defaulting defendant

If the Plaintiff also seeks a judgment that provides for injunctive relief and payment of civil penalties and fees and costs than R. 4:43-2(b) is applicable. R. 4:43-2(b), further provides, in pertinent part:

If, to enable the court to enter judgment or to carry it into effect, it is necessary to an account or to determine the amount of damages or to establish the truth of any allegation by evidence or to make an investigation of any other matter, the court, on its own motion or at the request of a party on notice to the defaulting defendant or defendant's representative, may conduct such proof hearings with or without a jury or take such proceedings as it deems appropriate

Plaintiffs make several arguments in support of its motion for the entry of final judgment. First, Plaintiffs argue that pursuant to R. 4:43-2, they are entitled to a final judgment by default as to Defendants. R. 4:32-2 provides in pertinent part:

After a default has been entered in accordance with R. 4:43-1 . . . a final judgment may be entered in the action as follows:

(b) By the Court. In all other cases . . . the party entitled to a judgment by default shall apply to the court therefor . . .

Plaintiffs submitted a request to enter default against Defendants, pursuant to R. 4:43-1 which was entered by the clerk of the Court on April 3,

2009. Plaintiffs state that the Defendants have yet to file an answer or to move to vacate default. Thus, Plaintiffs claim that pursuant to R. 4:43-2(b) they are entitled to this Court's entry of final judgment by default.

Plaintiffs submit that it seeks a judgment that provides for injunctive relief and payment of civil penalties and fees and costs. R. 4:43-2(b), further provides, in pertinent part:

If, to enable the court to enter judgment or to carry it into effect, it is necessary to an account or to determine the amount of damages or to establish the truth of any allegation by evidence or to make an investigation of any other matter, the court, on its own motion or at the request of a party on notice to the defaulting defendant or defendant's representative, may conduct such proof hearings with or without a jury or take such proceedings as it deems appropriate

Whether proof of a plaintiffs' right to relief should be required in a default proceeding is a matter within the discretion of the trial judge. Metric Inv., Inc. v. Patterson, 98 N.J. Super 130 (Law Div. 1967), aff'd, 101 N.J. Super 301 (App. Div. 1968); Douglas v. Harris, 35 N.J. 270, 276-277 (1961); Reilly v. Perehinys 33 N.J. Super 69 (App. Div. 1954).

In Reilly v. Perehinys, it was not error for trial court to enter a default judgment without requiring proofs as to defendant's liability in death action where defendants made no answer to complaint. 33 N.J. Super 69 (App. Div. 1954). The court recognized the New Jersey rule which makes the issue of proof of liability following a default a matter for the discretion of the trial court, and added that in certain circumstances, such as where the defendant was an incompetent or an infant, where the defendant had been served by publication, where the complaint was quite indefinite, or where circumstances existed which stirred the court's suspicion, proof of defendant's liability should be required.

Here, Defendants are competent adults that Plaintiffs have served by certified and regular mail with the Summons and complete and definite Complaint and First Amended Complaint. Finally, there are no circumstances which stir the court's suspicion to require proof of liability.

Even if this Court were to decide differently than the Reilly v. Perehinys court and require proof as to Defendants liability to enter default, Plaintiffs argue that they have already submitted sufficient proof for the Court to enter Final Judgment by Default finding that Defendants violated the Cigarette Tax Act, N.J.S.A. 54:40A-1 et. seq.; the Tobacco Product Manufacturers' Responsibility Act ("Responsibility Act"), N.J.S.A. 52:4D

et. seq.; the Cigarette Sales Tax Act, N.J.S.A. 54:40A-46A et. seq.; and the New Jersey Consumer Fraud Act ("CFA"), N.J.S.A. 56:8-1 et. seq., as well as its Advertising Regulations, N.J.A.C. 13:45A-9.1 et seq., and to award the relief Plaintiffs seek, namely, injunctive relief, civil penalties, attorneys' fees and investigative costs. This proof includes a certification from Investigator Aziza Salikhov and accompanying exhibits, a certification from Chief Edward Vrancik and accompanying exhibits, a certification from DAG Cathy A. Melitski and accompanying exhibits, and a brief.

The Court enters Final Judgment by Default as to Defendants finding for the claims and damages asserted by the State of New Jersey. Motion for Final Judgment by Default is hereby *granted*.

The Office of the Attorney General shall submit an order to the Court in accordance with this decision.