

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Center for Tobacco Products,

Complainant,

v.

Schatze's Sports Bar & Grill, Inc.,

Respondent.

Docket No. C-14-280
FDA Docket No. FDA-2013-H-1482

Decision No. CR3091

Date: January 27, 2014

INITIAL DECISION AND DEFAULT JUDGMENT

The Center for Tobacco Products (CTP) initiated the above-captioned matter when it filed an Administrative Complaint for Civil Money Penalties (Complaint) with the Departmental Appeals Board, Civil Remedies Division (CRD) and the Food and Drug Administration's (FDA) Division of Dockets Management. CTP seeks to impose civil money penalties under the Federal Food, Drug, and Cosmetic Act (Act) and the Act's implementing regulations.

The Complaint alleges the following facts. Respondent owns an establishment that sells tobacco products and is located at 2301 East Main Street, Belleville, Illinois 62221. Complaint ¶ 3. CTP conducted three inspections of the establishment. Complaint ¶ 9. During an inspection, an FDA-commissioned inspector observed that "on June 22, 2012, . . . [Respondent] u[tilized] a vending machine [to sell regulated tobacco products]" In addition, "the bartender on duty told the inspector that minors are allowed to enter [the establishment] prior to 9:00 PM." Complaint ¶ 10.

On September 27, 2012, CTP issued a warning letter to Respondent specifying the violation that the inspector observed. The letter warned Respondent that if it failed to correct the violation, civil money penalties could be imposed on it and that it was Respondent's responsibility to ensure compliance with the law. Complaint ¶ 10.

Bobby Minard, Respondent's Manager, responded to the warning letter on Respondent's behalf in an October 12, 2012 telephone call. "Mr. Minard stated that the vending machine was moved upstairs[]to a portion of the facility where minors are neither present nor permitted to enter at any time." Complaint ¶ 11.

During a subsequent inspection, FDA-commissioned inspectors documented the following at Respondent's establishment:

[A] person younger than 18 years of age was able to purchase a package of Marlboro Gold Pack 100's cigarettes from a vending machine in Respondent's establishment on July 12, 2013, at approximately 2:10 PM; . . . [and] the minor's identification was not verified before the sale, as detailed above, on July 12, 2013, at approximately 2:10 PM.

Complaint ¶ 1.

In compliance with 21 C.F.R. §§ 17.5 and 17.7, CTP served Respondent with the Complaint on December 5, 2013, via United Parcel Service. CTP charged Respondent with violating 21 C.F.R. § 1140.14(c) (utilizing a vending machine to sell tobacco products in a non-exempt facility), 21 C.F.R. § 1140.14(a) (sale of tobacco products to a minor), and 21 C.F.R. § 1140.14(b)(1) (failure to verify the age of a person purchasing tobacco products by means of photographic identification containing the bearer's date of birth). Complaint ¶¶ 1, 10. CTP asked the CRD to impose a \$2,000 civil money penalty based on four alleged violations of the regulations in a 24-month period. Complaint ¶ 13.

The Complaint provided detailed instructions related to filing an answer and requesting an extension of time to file an answer. Complaint ¶¶ 14-18, 20-22. The Complaint stated that failure to file an answer could result in the imposition of a civil money penalty against Respondent. Complaint ¶ 19. Further, after CTP filed the Complaint, CRD sent Respondent an Initial Order informing Respondent of the requirement to file an answer to avoid a default judgment. CRD sent a form answer along with the Initial Order that Respondent could fill out and file with CRD. Respondent neither filed an answer nor requested an extension of time within the 30-day time period prescribed in 21 C.F.R. § 17.9.

If a respondent does not file an answer within 30 days of a properly served complaint, the regulations provide that:

[T]he presiding officer shall assume the facts alleged in the complaint to be true, and, if such facts establish liability under the relevant statute, the presiding officer shall issue an initial decision within 30 days of the time the answer was due, imposing:

- (1) The maximum amount of penalties provided for by law for the violations alleged; or
- (2) The amount asked for in the complaint, whichever amount is smaller.

21 C.F.R. § 17.11(a). Further, a failure to file a timely answer means that “the respondent waives any right to a hearing and to contest the amount of the penalties and assessments” imposed in the initial decision. 21 C.F.R. § 17.11(b).

Accepting the facts alleged in the Complaint as true, I find that those facts establish Respondent’s liability under the Act. *See* 21 U.S.C. §§ 333(f)(9), 387c(a)(7)(B), 387f(d); 21 C.F.R. §§ 1140.1(b), 1140.14. I also find that CTP’s request to impose a \$2,000 civil money penalty is permissible. *See* 21 C.F.R. § 17.2.

Therefore, Respondent is directed to pay a civil money penalty in the amount of \$2,000. This initial decision becomes final and binding upon both parties 30 days after the date of its issuance. 21 C.F.R. § 17.11(b).

It is so ordered.

/s/
Scott Anderson
Administrative Law Judge