

**Department of Health and Human Services**

**DEPARTMENTAL APPEALS BOARD**

**Civil Remedies Division**

Center for Tobacco Products  
(FDA No. FDA-2012-H-0901),

Complainant

v.

Lambert Enterprises, Inc. d/b/a Lamberts Marathon #3,

Respondent.

Docket No. C-12-1137

Decision No. CR2649

Date: October 17, 2012

**INITIAL DECISION AND DEFAULT JUDGMENT**

The Center for Tobacco Products (CTP) began this matter by serving a complaint on Respondent, Lambert Enterprises, Inc. d/b/a Lamberts Marathon #3, at 1529 North Broadway Street, Joliet, Illinois, and by filing a copy of the complaint with the Food and Drug Administration's (FDA) Division of Dockets Management. The complaint alleges that Lamberts Marathon #3 impermissibly sold tobacco products to a minor, violating the Federal Food, Drug, and Cosmetic Act (Act) and its implementing regulations, 21 C.F.R. Part 1140. CTP seeks to impose against Respondent Lamberts Marathon #3 a \$250 civil money penalty.

As provided for in 21 C.F.R. sections 17.5 and 17.7, on August 29, 2012, CTP served the complaint on Respondent Lamberts Marathon #3 by United Parcel Service. In the complaint and accompanying cover letter, CTP explained that, within 30 days, Respondent should pay the penalty, file an answer, or request an extension of time in which to file an answer. CTP warned Respondent that, if it failed to take one of these

actions within 30 days, the Administrative Law Judge could, pursuant to 21 C.F.R. § 17.11, issue an initial decision ordering it to pay the full amount of the proposed penalty.

Respondent Lamberts Marathon #3 has not filed an answer within the time prescribed. 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:

- At Respondent's business establishment, 1529 North Broadway Street, Joliet, Illinois, on January 3, 2012, an FDA-commissioned inspector observed the sale of cigarettes or smokeless tobacco to a person younger than 18 years of age;
- At Respondent's business establishment, 1529 North Broadway Street, Joliet, Illinois, on January 3, 2012, an FDA-commissioned inspector observed staff's failure to verify prior to sale, by means of photo identification containing the bearer's birth date, the age of a person purchasing tobacco products;
- In a warning letter dated February 16, 2012, CTP informed Respondent of the inspector's January 3, 2012 observations, and that such actions violate federal law, 21 C.F.R. §§ 1140.14(a) and 1140.14(b). The letter further warned that Respondent's failure to correct its violation[s] could result in a civil money penalty or other regulatory action;
- At approximately 5:53 p.m. (Central Time) on April 19, 2012, at Respondent's business establishment, 1529 North Broadway Street, Joliet, Illinois, an FDA-commissioned inspector observed the sale of Newport Box cigarettes to a person younger than 18 years of age.

These facts establish Respondent Lamberts Marathon #3'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). Under 21 C.F.R. section 1140.14(a), no retailer may sell cigarettes or smokeless tobacco to any person younger than 18 years of age. Under 21 C.F.R. section 1140.14(b)(1), a retailer must verify, by means of photo identification containing the bearer's date of birth, that no person purchasing the tobacco product is younger than 18 years of age.

A \$250 civil money penalty is permissible under 21 C.F.R. section 17.2.

**Order**

For these reasons, I enter default judgment in the amount of \$250 against Respondent Lambert Enterprises, Inc. d/b/a Lamberts Marathon #3. Pursuant to 21 C.F.R. section 17.11(b), this order becomes final and binding upon both parties within 30 days of the date of its issuance.

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/s/  
Carolyn Cozad Hughes  
Administrative Law Judge