11720. Adulteration of popcorn. U. S. v. 37 Bags * * *. (F. D. C. No. 21373. Sample No. 72615–H.)

LIBEL FILED: November 19, 1946, District of Utah.

ALLEGED SHIPMENT: On or about November 2 and 20, 1945, from Nampa, Idaho.

PRODUCT: 37 100-pound bags of popcorn at Salt Lake City, Utah, in possession of John Scowcroft & Sons Co. The product was stored under insanitary conditions after shipment. Some of the bags were rodent-gnawed, and rodent excreta and urine stains were observed on them. Examination showed that the product contained rodent excreta, rodent-gnawed kernels, and larvae.

NATURE OF CHARGE: Adulteration, Section 402 (a) (3), the product consisted in whole or in part of a filthy substance; and, Section 402 (a) (4), it had been held under insanitary conditions whereby it may have become contaminated with filth.

DISPOSITION: December 20, 1946. Default decree ordering product used for animal feed, under the supervision of the United States marshal.

11721. Adulteration of cracked wheat and misbranding of flour. U. S. v. 108 Sacks, etc. (and 1 other seizure action). (F. D. C. Nos. 21423, 22862. Sample Nos. 52683–H, 91829–H.)

LIBELS FILED: November 5, 1946, and April 21, 1947, Southern District of Indiana and District of New Mexico.

ALLEGED SHIPMENT: On or about August 30, 1946, and March 1, 1947, by General Mills, Inc., from Minneapolis, Minn., and Amarillo, Tex.

PRODUCT: 108 100-pound sacks of cracked wheat at Indianapolis, Ind., and 119 cases, each containing 10 bags, of flour at Clovis, N. Mex.

LABEL, IN PART: "Gold Medal Cracked Wheat," or "5 Lbs. Washburn Crosby Gold Medal Flour Enriched Flour."

NATURE OF CHARGE: Cracked wheat. Adulteration, Section 402 (a) (3), the product consisted in whole or in part of a filthy substance by reason of the presence of larvae.

Flour. Misbranding, Section 403 (e) (2), the product failed to bear a label containing an accurate statement of the quantity of the contents. (The bags contained less than the declared weight.)

DISPOSITION: February 19 and May 21, 1947. No claimant having appeared, judgments of condemnation were entered and the Indianapolis lot was ordered destroyed and the Clovis lot was ordered delivered to a charitable institution.

11722. Adulteration of crushed wheat. U. S. v. 92 Bags * * *. (F. D. C. No. 21383. Sample No. 35803–H.)

LIBEL FILED: October 28, 1946, Eastern District of Missouri.

ALLEGED SHIPMENT: On or about September 14, 1946, by Pillsbury Mills, Inc., from Atchison, Kans.

PRODUCT: 92 100-pound bags of crushed wheat at St. Louis, Mo.

NATURE OF CHARGE: Adulteration, Section 402 (a) (3), the article consisted in whole or in part of a filthy substance by reason of the presence of beetles.

DISPOSITION: November 30, 1946. Pillsbury Mills, Inc., claimant, having consented to the entry of a decree, judgment of condemnation was entered and the product was ordered released under bond for conversion into stock feed, under the supervision of the Federal Security Agency.

CHOCOLATE AND RELATED PRODUCTS

CANDY

11723. Alleged misbranding of candy. U. S. v. 193 Cartons * * *. Tried to the court. Judgment dismissing libel. (F. D. C. No. 18373. Sample No. 12081–H.)

LIBEL FILED: November 14, 1945, District of Rhode Island.

ALLEGED SHIPMENT: On or about October 8, 1945, by the Liberty Chocolate Co., from Boston, Mass.

PRODUCT: 193 cartons of candy at Providence, R. I.

NATURE OF CHARGE: Misbranding, Section 403 (d), the container of the article was so filled as to be misleading, since the boxes could hold approximately 50 percent more candy.

DISPOSITION: On January 8, 1946, the case was tried to the court, and the following decision was handed down:

HARTIGAN, *District Judge:* "This libel was filed by the United States of America and prays seizure and condemnation of a certain articles of food in accordance with the Federal Food, Drug and Cosmetic Act (21 U. S. C. 301 *et seq.*)

"It charges the Liberty Chocolate Company shipped in interstate commerce from Boston, Massachusetts, to Providence, Rhode Island, through the Keogh Storage Company, Inc., on or about October 8, 1945, an article of food consisting of 193 cartons, more or less, each containing 18 boxes of a food labeled in part: 'Benevento Brand Nougat Net Weight 9 Ounces. Contains 18 Pieces Weighing ½ Ounce Each, Consisting of Sugar, Honey, Almonds, Egg Whites, Cinnamon, Wafer * * *.'

"The aforesaid article was misbranded in interstate commerce, within the meaning of said Act, 21 U. S. C. 343 (d), in that its container is so filled as to be misleading since the boxes could hold approximately 50 percent more candy.

"There is no testimony to that effect offered by the Government, that they could hold approximately 50 percent more candy.

"That the aforesaid article is in the possession of Giso Brothers Cigar Company, at 300 Broadway, Providence, Rhode Island, or elsewhere within the jurisdiction of this Court.

"That by reason of the foregoing, the aforesaid article is held illegally within the jurisdiction of this Court and is liable to seizure and condemnation pursuant to the provisions of said Act, 21 U. S. C. 334.

"Wherefore the libellant prays that process in due form of law according to the course of this Court in cases of admiralty jurisdiction issue against the aforesaid article; that all persons having any interest therein be cited to appear herein and answer the aforesaid premises; that this Court decree the condemnation of the aforesaid article and grant libellant the costs of this proceeding against the claimant of the aforesaid article; that the aforesaid article be disposed of as this Court may direct pursuant to the provisions of said Act; and that libellant have such other and further relief as the case may require.

"Arcangelo Cataldo, of Boston, has filed a claim of ownership and says he is the true and lawful owner of said 193 cartons, more or less, of the article labeled in part: 'Benevento Brand Nougat Net Weight Nine Ounces,' and that no other person is interested therein. He prays that the said cartons may be returned to him upon giving such stipulations as the Court may direct.

"Said Cataldo has filed an answer which, in effect, states that the claimant now is and at all of the times herein mentioned, was the owner of said 193 cartons, more or less, and that he duly filed customary claim of ownership and prayer for stipulation as may be directed by the Court.

"He admits he was the owner of the Liberty Chocolate Company that shipped in interstate commerce from Boston, Massachusetts, to Providence, Rhode Island, via Keogh Storage Company, Inc., on or about October 8, 1945, an article of food consisting of 193 cartons, more or less, each containing 18 boxes of a food labeled in part: 'Benevento Brand Nougat Net Weight Nine Ounces,' containing 18 pieces weighing one-half ounce each, consisting of sugar, honey, almonds, egg whites, cinnamon, wafer.

"He denies that the aforesaid articles were misbranded in interstate commerce within the meaning of the Act, 21 U. S. C. 343 (d).

"He admits the aforesaid articles were in the possession of the Giso Brothers Cigar Company of Providence, as stated in the libel.

"He denies that the aforesaid article is illegally within the jurisdiction of this Court and is liable to seizure and condemnation pursuant to the provisions of 21 U. S. C., sec. 334.

"He further answers stating for a long period of time he has been individually engaged in the business of manufacturing candy under the name of Liberty Chocolate Company, located at 114 Commercial Street, Boston, Massachusetts; that he has manufactured and packaged, under his individual name, the article complained of in the libel for several years; that the large carton measures

approximately 6 inches wide, 8 inches long, and 1⅛ inches in depth; that within this package there is contained small boxes, 18 in number, bearing the identical description and representation as appears on the outer package, which small box measures 1¼ inches wide, 2 inches in length, and approximately 1 inch in depth; that within said box there is packaged and it contains a piece of candy commonly known as 'Torrone' and each piece of candy within each small box weighs one-half ounce and is wrapped with a piece of wafer; each piece of candy within said box measures approximately 1 inch in width, and 1⅞ inches in length, and approximately ½ inch in depth; that these boxes and cartons are similar in size and description and contents commonly manufactured by other manufacturers in the trade.

"And he has introduced in evidence Exhibits A and B, to which the Government has not objected, which are somewhat similar in size and packaging and number of smaller packages in the larger packages as are in the Government's Exhibit 1.

"And that at no time did the claimant know or have any intimation from any source that these cartons and boxes were misbranded, because the container was so made, formed or filled as to be misleading.

"The claimant prays the libel be dismissed with costs.

"Title 21, sec. 343, provides as follows: 'A food shall be deemed to be misbranded, (d), if its container is so made, formed or filled as to be misleading.'

"The Government has offered in evidence the testimony of Abraham E. Ledderer of the Food and Drug Division to the effect that he turned over the samples—I believe he said six of the cartons shipped, as is admitted—to the Division in Boston.

"Meyer Matluck, the chemist for the Food and Drug Division, testified to receiving the samples from the chief chemist. And there is no dispute, I think, between the parties that the six samples received by Mr. Matluck were those sampled by Mr. Ledderer. And that he made examination and out of three packages he took five smaller packages; that he made an examination of the candy, the wrappers; and that the cubic volume of the candy averaged about 1.72 inches by 1.05 by .58. The interior of the package measured 1.95 inches by 1.25 by .95 inches. The interior volume of the smaller carton was 2.32 cubic inches. The average volume per piece of candy is 1.05 cubic inches; that the candy occupies 45.3 percent of the entire volume of the carton. There is no testimony whether that 45.3 percent refers to the larger carton or to the smaller cartons. The Government left it in that way. Therefore, the Court does not know whether it refers to the larger carton or the so-called smaller cartons.

"The Government has offered no testimony that anybody has been misled by this package. There is no testimony that anything has been palmed off on anyone. The Government apparently solely relies on the provisions of sec. 343 (d).

"Exhibit 1 contains markings in English and, I presume, in Italian although there is nothing in the record to help the Court on it, whether it is Italian or anything else. But the Court will assume it is Italian. The English part on Exhibit 1 reads: 'BENEVENTO Brand.' Below that is the picture of an arch. Then lower down it reads: 'NOUGAT,' in large size lettering; and just below that, 'Net Weight 9 Ounces'; the size of the lettering of the weight, the Court would estimate, although there is no testimony in regard to it, being approximately—a little more, I would say, than one-eighth of an inch. Below that in little smaller lettering: 'Contains 18 Pieces Weighing ½ Ounce Each, Consisting of Sugar, Honey, Almonds, Egg Whites, Cinnamon, Wafer.' And below that: 'Manufactured in U. S. A. by Arcangelo Cataldo, 114 Commercial St., Boston, Mass.'

"I shall not assume to read the reverse side which, apparently, is in Italian, but having read the English side and from my limited knowledge of Italian, would take it to be the same as the English. The heading says, 'BENEVENTO,' for example, and 'TORRONE,' which, I understand from the parties, is the Italian of 'Nougat.'

"There is no testimony presented to the Court that this type of package, Exhibit 1, has been palmed off on anybody, nor is there any evidence to assist the Court that it is misleading. The testimony introduced by Mr. Matluck, when he took out the candy from the smaller packages showing the way they were wrapped and so on, did not impress the Court that such wrapping and

size was misleading. The Court would feel it to be stretching that statute all out of proportion to its purpose if it were to find on the evidence in this case, dealing with this particular nougat, the way it is shaped and wrapped, that that container was 'so made, formed or filled as to be misleading.'

"The physical appearance of that does not convince the Court that the Government has established its contention. I made this ruling without taking into consideration the defendant's Exhibits A and B which have been offered in evidence for the purpose of showing substantially that other manufacturers of a like article so package their product. That was the sole purpose, I take it, of those exhibits. The Government has not objected to those Exhibits A and B, but the Court makes its findings without taking those two exhibits into consideration because, in the Court's opinion, they are immaterial for the purpose of this case. The only question before this Court relates to the product that was seized, not some other product.

"The smaller packages contained in the larger package of Government's Exhibit 1, except for the size, bear substantially the same markings as the larger package with the exception that in the upper left-hand corner in the English description on the smaller packages there appears in plain English the following words: 'Net Weight ½ Ounce'; the said marking of 'Net Weight ½ Ounce' being, in the opinion of the Court, a more Conspicuous marking of the weight than even the net weight marking on the outer side of Exhibit 1.

"There is nothing, in the opinion of the Court, in the shape and size of the larger package or the smaller packages that would be misleading to a person, and there has been no testimony on behalf of the Government that such markings would be misleading or would likely be misleading to an average purchaser. Under all of the facts in this case, as I have indicated, and in the absence of the Government in showing the Court any authority other than its plain statement that in its opinion such marking is misleading, the Court cannot, as a matter of law, say that the defendant has misbranded the product, nor can it say, as a matter of law, that the containers are so made, formed or filled as to be misleading.

"The Court, therefore, dismisses the libel and orders the return of the seized property to the claimant."

On January 30, 1946, a decree was entered ordering the libel dismissed and the product returned to the claimant. On appeal to the Circuit Court of Appeals for the First Circuit, the decision of the District Court was affirmed, the court handing down the following opinion:

MAHONEY, *Circuit Judge:* "This is an appeal from the dismissal of a libel brought under the Federal Food, Drug and Cosmetic Act of 1938 (52 Stat. 1040 (1938), 21 U. S. C. 301 et seq. (1940)), for the condemnation of certain articles of food consisting of 193 cartons, more or less, each containing eighteen boxes of a food labeled in part: 'Benevento Brand Nougat Net Weight 9 Ounces Contains 18 Pieces Weighing ½ Ounce Each, Consisting of Sugar, Honey, Almonds, Egg Whites, Cinnamon, Wafer * * *', which were shipped in interstate commerce from Boston to Providence. The libel charged misbranding within the meaning of § 403 (d)[1] of the Act in that its container is so filled as to be misleading since the boxes could hold approximately 50 per cent more candy.

"In his answer the claimant sought the return of the articles alleging that he was the owner of the Liberty Chocolate Company which shipped the articles from Boston to Providence in interstate commerce and denied that they were misbranded and liable to seizure and condemnation. He averred that he had manufactured and packaged the articles under his individual name for a long time and that the large carton measures approximately 6" x 8" and is 1⅛" deep and each carton contains eighteen small boxes; each small box measures 1¼" in width, 2" in length and about 1" in depth, and bears the same description and representation as the outer package; that each of these small boxes contains one piece of candy, one-half ounce in weight, known as 'Torrone.' Each piece is wrapped with a piece of wafer and measures approximately 1" in width, 1⅞" in length and ½" in depth. These boxes and cartons are similar in size, description and contents to those of other manufacturers in

[1] Sec. 403 (d) A Food shall be deemed to be misbranded—if its container is so made, formed, or filled as to be misleading. 21 U. S. C. § 343 (d) (1940).

the trade. He denied that they were misbranded and prayed for a dismissal of the libel.

"The question is whether the containers of the article were so made, formed or filled as to be misleading thereby constituting misbranding within the meaning of § 403 (d) of the Act.

"The libelant contends that the libelee has violated the provisions of § 403 (d) of the Act by shipping in interstate commerce packages of food, in this instance candy, which are slack-filled, that is, in containers only partly filled with candy and partly filled with wrapping and is so prepared that it would be a source of deception to the public. It contends that the containers are less than 50 per cent filled with candy and refers to the Congressional history of the Act to demonstrate that slack-filling was one of the things that Congress meant to prohibit for the protection of the public.

"There was produced in evidence for the libellant one of six large containers which had been taken from the 193 cartons originally shipped in interstate commerce and marked 'Exhibit 1.' A witness for the libellant testified that the large cartons were flat and rectangular in shape, with flaps at both ends, and that they contained eighteen small cartons which completely filled the larger one. From each of three large cartons there were taken five small units containing candy. The candy was unwrapped and it was determined that the average dimensions per piece of candy was 1.05 cubic inches. The internal volume of the small cartons was determined to be 2.32 cubic inches. The candy occupied 45.3 per cent of the entire volume of the carton. He also testified that it was due to bulky wrapping that the candy appeared to fill the package adequately but he said that if the wrapped candy were pressed tightly against the side of the carton a considerable amount of space became apparent and if the wrapped candy were pressed toward the end of the box a considerable end space also became evident. He also said that when the paper was removed and the candy placed back in the box it was pretty loose. Certain small containers were handed to the judge and the witness demonstrated what his report meant.

"There is no hard and fast rule as to what would constitute slack-filling. Whether or not over 50 per cent space in a particular package of candy was slack-filling is a question of fact for the district court to decide. It had before it samples of the containers, both large and small; it examined them and commented on the fact that apparently there was a very slight space in the package.

"In making its decision the court referred to the fact that there was no evidence before it that containers of the type of Exhibit 1 had been 'palmed off' on the public, and also that there was no testimony on behalf of the libellant that the markings would be misleading or would likely be misleading to an average purchaser, and seemed to rely upon the fact that proof of actual deception in the sale of the candy was necessary, citing *United States* v. *2 Bags, etc., of Poppy Seeds*, 54 F. Supp. 706 (N. D. E. D. Ohio, 1944). However this case had been overruled by the Circuit Court of Appeals, *United States* v. *2 Bags, etc., of Poppy Seeds*, 147 F. (2d) 123 (C. C. A. 6th, 1945). Whether or not the articles in question had been 'palmed off' on the public or whether or not the markings on the package were proper markings were questions not relevant to the issue in this case which the district court was called upon to consider.

"Although the trial court did refer to these conditions which are covered by other sections of the Act, it nevertheless held that there was no testimony to the effect that the boxes could hold approximately 50 per cent more candy, and was not convinced by the testimony that the wrapping and size were misleading. It stated that it would be 'stretching the statute all out of proportion to its purpose if it were to find on the evidence in this case, dealing with this particular nougat, the way it is shaped and wrapped, that that container was so made, formed or filled as to be misleading,' and that there was nothing 'in the shape and size of the larger package or the smaller packages that would be misleading to a person.' Moreover, the court held that it could not as a matter of law say either that the product has been misbranded or that its 'containers are so made, formed or filled as to be misleading.'

"The Federal Rules of Civil Procedure govern proceedings on appeals in actions for the forfeiture of property for violation of a statute of the United States. Rule 81 (a) (2). This case is an action under the Federal Food, Drug and Cosmetic Act of 1938, which is a statute of the United States and is on appeal before us. Under Rule 52 (a) of said Rules, findings of fact shall

not be set aside unless clearly erroneous. We cannot say the finding that the container was not so made, formed or filled as to be misleading is clearly erroneous.

"The decree of the District Court is affirmed."

11724. Adulteration of stick candy. U. S. v. Carmelita Candy Co., a partnership, and Robert T. Woolery. Pleas of guilty. Partnership fined $250; individual fined $5.00. (F. D. C. No. 21574. Sample Nos. 56271–H, 56272–H.)

INFORMATION FILED: April 10, 1947, Western District of Oklahoma, against the Carmelita Candy Co., Oklahoma City, Okla., and Robert T. Woolery, plant manager.

ALLEGED SHIPMENT: On or about August 16, 1946, from the State of Oklahoma into the State of Missouri.

LABEL, IN PART: (Box) "Carmelita Candy Co. 36/5 Mint Tulsa-Oklahoma City, Okla."

NATURE OF CHARGE: Adulteration, Section 402 (a) (4), the article had been prepared under insanitary conditions whereby it may have become contaminated with filth.

DISPOSITION: May 8, 1947. Pleas of guilty having been entered, the court imposed fines of $250 against the partnership and $5 against the individual.

11725. Adulteration of candy. U. S. v. 32 Cartons * * *. (F. D. C. No. 21786. Sample No. 72633–H.)

LIBEL FILED: November 27, 1946, District of Utah.

ALLEGED SHIPMENT: On or about March 30 and April 6, 1946, by the Bennett & Crews Co., from Waco, Tex.

PRODUCT: 32 30-pound cartons of candy at Provo, Utah.

LABEL, IN PART: "Peanut Crunch."

NATURE OF CHARGE: Adulteration, Section 402 (a) (3), the article consisted in whole or in part of a filthy substance by reason of the presence of insects, insect excreta, and webbing.

DISPOSITION: February 14, 1946. No claimant having appeared, judgment was entered ordering that the product be destroyed by being utilized for animal feed.

CHOCOLATE AND CHOCOLATE PRODUCTS

11726. Adulteration of chocolate coating. U. S. v. 10 Cartons * * * (and 1 other seizure action). (F. D. C. Nos. 22363, 22467. Sample Nos. 53199–H, 53200–H, 53839–H, 53840–H.)

LIBELS FILED: January 7 and 31, 1947, Southern District of Ohio.

ALLEGED SHIPMENT: Between the approximate dates of March 1 and November 7, 1946, by the Hershey Chocolate Corp., from Hershey, Pa.

PRODUCT: Chocolate coating. 10 cartons, each containing 5 10-pound cakes, at Columbus, Ohio, and 351 bales, each containing 20 10-pound blocks, at Middletown, Ohio.

LABEL, IN PART: "Hershey's * * * Chocolate Coating."

NATURE OF CHARGE: Adulteration, Section 402 (a) (3), the article consisted in whole or in part of a filthy substance by reason of the presence of larvae, insect fragments, insects, and insect parts.

DISPOSITION: January 24 and February 6, 1947. The Maple Dell Candy Co., Columbus, Ohio, claimant for the Columbus lot, and Sunshine Biscuits, Inc., Dayton, Ohio, claimant for the Middletown lot, having consented to the entry of decrees, judgments of condemnation were entered and the product was ordered released under bond, conditioned that it be brought into compliance with the law, under the supervision of the Federal Security Agency.

11727. Adulteration of chocolate malt flavored sirup. U. S. v. 24 Cases * * *. (F. D. C. No. 21338. Sample No. 50050–H.)

LIBEL FILED: October 24, 1946, Southern District of Mississippi.

ALLEGED SHIPMENT: On or about January 22, 1946, by Plaza Products, from Brooklyn, N. Y.