

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	No.
)	
GOURMET EXPRESS MARKETING, INC.,)	
a corporation, and PATRICK A. BRUNO, an)	Judge
individual,)	
)	
Defendant.)	

COMPLAINT FOR INJUNCTION

The United States of America, by its attorney, Gary S. Shapiro, United States Attorney for the Northern District of Illinois, for its complaint, states as follows:

Introduction

1. This action is brought on behalf of the United States Food and Drug Administration (“FDA”) under the Federal Food, Drug, and Cosmetic Act (the “Act”), 21 U.S.C. § 332(a), to enjoin and restrain the defendants from:

A. violating 21 U.S.C. § 331(a), by introducing, or delivering for introduction, into interstate commerce, food that is adulterated within the meaning of 21 U.S.C. §§ 342(b)(2) and (b)(4) and misbranded within the meaning of 21 U.S.C. §§ 343(b), (e)(2), and (t); and

B. violating 21 U.S.C. § 331(k), by causing food to be adulterated within the meaning of 21 U.S.C. §§ 342(b)(2) and (b)(4) and misbranded within the meaning of 21 U.S.C. §§ 343(b), (e)(2), and (t) while the food is held for sale after shipment in interstate commerce.

Jurisdiction and Venue

2. This court has jurisdiction over this action under 21 U.S.C. § 332(a) and 28 U.S.C. §§ 1331 and 1345, and personal jurisdiction over all parties. Venue in this district is proper pursuant to 28 U.S.C. § 1391(b) and (c).

Defendants

3. Gourmet Express Marketing, Inc., processes and repacks various frozen seafood products. The firm is incorporated under the laws of the state of Illinois and, until February 2010, was doing business at 920 West Fullerton Avenue, Addison, Illinois, within the jurisdiction of this court. The firm is currently doing business at 230 South Lombard Road, Addison, Illinois, within the jurisdiction of this court.

4. Patrick A. Bruno is president and owner of Gourmet Express Marketing, Inc. He controls the firm's finances and is responsible for all aspects of its operations. Defendant Bruno conducts his business at 230 South Lombard Road, Addison, Illinois, within the jurisdiction of this court.

5. The defendants have been and are now engaged in processing and distributing articles of food, within the meaning of the Act, 21 U.S.C. § 321(f), namely seafood such as ocean perch, swai, and shrimp.

6. The defendants introduce articles of food into interstate commerce by selling their products to customers in locations outside Illinois, including, among other places, Minnesota.

7. The defendants process and distribute articles of food that have been shipped to them from outside Illinois. For example, they purchase seafood, such as swai, which is a product of Vietnam, and ocean perch, which is a product of China. In addition, the defendants purchase

shrimp, a product of Thailand, that is shipped to their facility from California.

8. As described in the paragraphs below, the defendants have not accurately represented the fish species or net weight on the labels of their seafood, which causes their products to be adulterated and misbranded within the meaning of the Act.

Statutory Provisions

9. A food is deemed adulterated under the Act if any substance has been: (a) substituted wholly or in part therefore; or (b) added to or mixed or packed with it to increase its bulk or weight. 21 U.S.C. §§ 342(b)(2) and (b)(4), respectively.

10. A food is deemed misbranded under the Act if it: (a) is offered for sale under the name of another food; (b) is in package form and does not bear a label containing an accurate statement of the quantity of the contents in terms of weight; or (c) it purports to be or is represented as catfish, unless it is a fish classified within the family Ictaluridae. 21 U.S.C. §§ 343(b), (e)(2), and (t), respectively.

11. The Act prohibits the “introduction or delivery for introduction into interstate commerce of any food . . . that is adulterated or misbranded” and the causing of such introduction or delivery for introduction. 21 U.S.C. § 331(a).

12. The Act also prohibits doing (or causing to be done) any act with respect to a food “if such act is done while such article is held for sale (whether or not the first sale) after shipment in interstate commerce and results in such article being adulterated or misbranded.” 21 U.S.C. § 331(k).

FDA Inspections and Warning Letter

13. FDA conducted an inspection of the defendants' operations between March–April 2010 as a follow-up to an FDA Warning Letter issued to the defendants on February 16, 2010.

14. The Warning Letter notified the defendants that, based on the results of FDA's inspections conducted in 2009, their frozen shrimp products were: (a) adulterated because the defendants added an ice glaze to increase the products' bulk or weight; and (b) misbranded in that the products' labels failed to bear an accurate statement of the net quantity of contents because the net quantity included the weight of the ice glaze. The letter further stated that laboratory analyses of samples of the defendants' seafood collected during FDA's August-September 2009 inspection revealed that products labeled as "Pacific Snapper" or "Red Snapper" were actually ocean perch, causing the food to be adulterated and misbranded under the Act.

15. FDA's March–April 2010 inspection documented that the defendants continued to add an ice glaze to increase the weight of their products and to substitute fish species.

16. As described below, FDA laboratory analyses of the defendants' frozen cooked shrimp samples collected during the 2010 inspection confirmed the discrepancies in the declaration of net weight on the product labels.

17. During the 2010 inspection, FDA investigators also took samples from the firm's facility, and from one of their customers, of the defendants' seafood labeled "Catfish" or "Pacific Snapper Fillets." Laboratory analyses revealed that the seafood samples were neither pacific snapper nor catfish, but ocean perch and swai.

18. The August/September 2009 inspection revealed that the defendants were substituting seafood species – ocean perch for pacific snapper and swai for catfish – and including the ice glaze

in the net weight of the seafood.

19. Subsequently, during the inspection in November 2009, FDA investigators observed that the defendants had not taken corrective action to address the findings of the August/September 2009 inspection.

Laboratory Analyses

20. FDA tested samples of the defendants' frozen cooked shrimp collected during the inspections in 2009 and 2010 to evaluate the defendants' net-weight representations on the product labels. The results revealed that, in the 2009 and 2010 samples, the actual weight of the products was, respectively, 21.5% and 14.4% under the labeled weight.

21. To confirm the defendants' species substitution, FDA sent samples of the defendants' "Pacific Snapper" and "Catfish" collected between 2009 and 2010 to undergo DNA testing at the Smithsonian National Museum of Natural History Museum Support Facility ("Smithsonian Support Facility").

22. FDA compared the Smithsonian Support Facility's DNA test results with the standards of DNA sequences from FDA's Regulatory Fish Encyclopedia to determine the true identity of the fish.

23. FDA concluded that the DNA sequences of the defendants' "Catfish" were consistent with the sequence standard for *Pangasius hypophthalmus* (known as swai in the marketplace) and were distinct from *Ictalurus punctatus* and *Ictalurus furcatus*, which are the species most commonly associated with the market name "catfish."

24. FDA concluded that the DNA sequences of the defendants' "Pacific Snapper" were consistent with DNA sequences for *Sebastes norvegicus* (known as ocean perch) and were distinct

from *Lutjanus peru*, commonly known as pacific snapper.

Defendants' Violations

25. Because the defendants added an ice glaze to their frozen cooked shrimp to increase the product's net weight, their shrimp is:

A. adulterated within the meaning of 21 U.S.C. § 342(b)(4) in that a substance has been added to it to increase its bulk or weight; and

B. misbranded within the meaning of 21 U.S.C. § 343(e)(2) in that the label fails to bear an accurate statement of the product's weight.

26. Because the defendants substituted the seafood that was named on the product labels with other fish species, their "Pacific Snapper" (which is actually ocean perch) and their "Catfish" (which is actually swai) are:

A. adulterated within the meaning of 21 U.S.C. § 342(b)(2) in that they have been substituted with another species; and

B. misbranded within the meaning of 21 U.S.C. § 343(b) in that they are offered for sale under the name of another fish.

27. The defendants' swai is also misbranded because it was represented as catfish but is not classified, as required by statute, within the *Ictaluridae* family. See 21 U.S.C. § 343(t).

28. By introducing into interstate commerce adulterated and misbranded articles of food, and by adulterating and misbranding articles of food after they have been shipped in interstate commerce, the defendants have violated the Act. 21 U.S.C. §§ 331(a) and (k).

History of Violations

29. The defendants continued to sell food that they ice-glazed and labeled in a manner

that did not reflect the products' true weight or fish species even after being warned that their actions did not comply with the Act.

30. During the three inspections between 2009–2010, FDA investigators informed Defendant Bruno that they observed his ice-glazing and false-species labeling and that he needed to halt these practices.

31. FDA issued a Warning Letter to the defendants in 2010, notifying them of the violations documented by FDA.

32. In their response to the Warning Letter, the defendants admitted to having substituted fish species during their processing operations over the past 12 years.

33. FDA's 2010 inspection revealed that the defendants had not taken corrective actions.

34. Based on the defendants' history of violations, the United States believes that, unless restrained by order of the court, the defendants will continue to violate 21 U.S.C. §§ 331(a) and (k).

WHEREFORE, the United States respectfully requests that this court:

I. permanently restrain and enjoin, under the provisions of 21 U.S.C. § 332(a), the defendants and each and all of their officers, agents, representatives, employees, contractors,

attorneys, successors, assigns, and any and all persons in active concert or participation with any of them who receive actual notice of the court's order, from directly or indirectly:

A. violating 21 U.S.C. § 331(a) by introducing, delivering, and causing to be introduced or delivered for introduction, into interstate commerce any article of food that is adulterated within the meaning of 21 U.S.C. §§ 342(b)(2) or (b)(4); and

B. violating 21 U.S.C. § 331(k) by doing and causing to be done any act that causes any article of food to become adulterated within the meaning of 21 U.S.C. §§ 342(b)(2) or (b)(4), while such food is held for sale after shipment in interstate commerce; and

C. violating 21 U.S.C. § 331(a) by introducing, delivering, and causing to be introduced or delivered for introduction, into interstate commerce any article of food that is misbranded within the meaning of 21 U.S.C. §§ 343(b) or (e)(2) or (t); and

D. violating 21 U.S.C. § 331(k) by doing and causing to be done any act that causes any article of food to become misbranded within the meaning of 21 U.S.C. §§ 343(b) or (e)(2) or (t), while such food is held for sale after shipment in interstate commerce; and

II. order the defendants and each and all of their officers, agents, representatives, employees, contractors, attorneys, successors, assigns, and any and all persons in active concert or participation with any of them who receive actual notice of the court's order, to cease receiving, processing, preparing, packing, labeling, and distributing at or from their plant located at 230 South Lombard Road, Addison, Illinois, or at or from any other facility, any seafood unless and until the defendants bring their operations into compliance with the Act to the satisfaction of FDA; and

III. award the United States its costs herein, including costs of investigation to date, and such other equitable relief as the court may deem just and proper.

Dated this 8th day of April, 2013.

Respectfully submitted,

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