

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

Plaintiff,

MEMORANDUM AND ORDER

- against -

96-CV-3575 (SJ)

910 CASES, MORE OR LESS, OF AN  
ARTICLE OF FOOD, et al.,

Defendants.

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A P P E A R A N C E S:

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Attorney for Defendant Maxi  
International Trading Corp.

JOHNSON, District Judge:

This matter came before the Court upon a written request dated  
January 28, 1998 by the Government ("Plaintiff") requesting a hearing to determine

whether Defendant Maxi International Trading Corp. ("Defendant" or "Maxi International") had violated this Court's warrant for arrest of articles *in rem* and prior orders in this case and to have the Court impose sanctions for each alleged violation. The Court held a hearing on this issue and the following comprises this Court's Findings of Fact and Conclusions of Law.

### **BACKGROUND**

Although familiarity with the procedural background of this case is presumed, this Court briefly reviews the history of the case. On July 23, 1996, this Court issued a warrant for arrest of articles *in rem* for goods contained in a warehouse operated by Maxi located at 167-170 North 11<sup>th</sup> Street in Brooklyn, New York ("the warehouse") after United States Consumer Safety Officers ("CSOs") from the Food and Drug Administration ("FDA") discovered that the warehouse was infested with rodents in violation of 21 U.S.C. §§ 342(a)(3) and (4). The warrant provided, in part, that the defendant goods were to remain in the custody of the Marshals and that none of the seized articles of food could be moved or sold.

On September 27, 1996, the Government brought an Order to Show Cause seeking an order of contempt for violation of the warrant and a decree of condemnation, forfeiture, and destruction. After a hearing was held on October 8, 1996, this Court issued a Memorandum and Order, dated December 4, 1996, holding (1) that the evidence presented by Plaintiff was clear and convincing that Maxi violated the warrant by

moving and removing certain of the seized articles of food (or allowing them to be removed) from the warehouse and that Maxi International was not reasonably diligent in attempting to comply with the warrant; and (2) that Plaintiff established by more than a fair preponderance of the evidence that the defendant articles of food, which were stored on the first floor of the warehouse, were adulterated while held for sale after shipment in interstate commerce within the meaning of the Food, Drug and Cosmetic Act., 21 U.S.C. § 342(a)(4).<sup>1</sup>

As a result of its findings as set forth above, the Court granted Plaintiff's request to hold Maxi International in contempt for violating the Warrant and directed Maxi International: (1) to return to the warehouse all defendant articles of food that have been removed from Maxi International's premises or to identify the current possessor of such defendant articles of food; (2) to pay to Plaintiff the full value or proceeds obtained from the sale, if any, of the defendant articles of food; (3) not to interfere further with the seizure of the defendant articles of food and to comply fully with the Warrant; and (4) to pay Plaintiff \$5,000 in sanctions for each future violation of the Warrant that occurs after the date of the December 4, 1996 Memorandum and Order. The Court also directed that a hearing be set to consider Maxi International's finances and to determine the amount of

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<sup>1</sup> Although there were defendant articles of food stored on the second floor of the warehouse (as well as the first floor), the Court stated that it did not find at that time that the goods stored on the second floor of the warehouse were adulterated. December 4, 1996 Memorandum and Order, p. 16.

a contempt fine against it. The Court also granted Plaintiff's request for a Decree of Condemnation of the seized goods on the first floor of the warehouse and ordered that claimants Bona and Ho pay for the condemnation and destruction of those adulterated articles of food on the first floor of the warehouse to which they made verified claims.

On January 14, 1997, the Court issued a Partial Decree of Condemnation, Forfeiture and Destruction and Writ of Assistance (the "Partial Decree of Forfeiture") ordering the forfeiture, condemnation and destruction of the seized defendant articles of food on the first floor of Maxi International's warehouse, ordering Bona and Ho to pay the costs of destruction, authorizing the United States Marshal's Service and any other authorized federal agent to use all reasonable means necessary to gain access to the warehouse, and enjoining Maxi International from taking any action to obstruct or delay the U.S. Marshal's Service and its agents from removing the defendant articles of food that were stored on the first floor of the warehouse.

On February 14, 1997 and March 14, 1997, hearings were held, pursuant to the December 4, 1996 Memorandum and Order, on the issues of Maxi International's finances and the amount of the contempt fine that should be set against it. Also presented at the hearings was: (1) evidence that certain defendant articles of food were still missing from Maxi International's warehouse; (2) evidence of additional violations of the Warrant by Maxi International since the date of the December 4, 1996

Memorandum and Order; and (3) further evidence of the condition of the seized defendant articles of food on the second floor of the warehouse.<sup>2</sup>

After the hearing, the Court rendered its Decision in a Memorandum and Order, dated July 1, 1997 holding that Maxi International: (1) pay Plaintiff damages in the amount of \$13,702.00 for the cost of the defendant articles of food that were missing from the warehouse after the Court's December 4, 1996 Memorandum and Order; (2) pay Plaintiff compensatory damages in the amount of \$2,335.89, for the time spent by government officials in taking inventories of the seized articles of food in order to monitor whether Maxi International complied with the Warrant after the date of the December 4, 1996 Memorandum and Order;<sup>3</sup> (3) pay Plaintiff the costs of destruction for those defendant articles of food stored on the first floor of the warehouse that were missing from the warehouse in January 1997, when the government destroyed the

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<sup>2</sup> In February 1997, Bona and the Government entered a Consent Decree of Condemnation with respect to the defendant articles of food which Bona claimed on the second floor of the warehouse. Pursuant to the Consent Decree, all defendant articles of food claimed by Bona on the second floor of the warehouse either have been reconditioned and returned to Bona or destroyed.

<sup>3</sup> The government also requested reimbursement for time spent by government officials on January 6, 1997, when the government attempted to destroy the defendant articles of food stored on the first floor of the warehouse pursuant to the December 4, 1996 Memorandum and Order, but no one was available to provide the government officials with access to the warehouse. The Court, however, denied the government's request for these costs in the amount of \$1,428.00 finding that insufficient evidence was presented on the issue of notice to Maxi International. July 1, 1997 Memorandum and Order, pp. 13-14.

defendant articles of food stored on the first floor, and subsequently, were returned to the warehouse;<sup>4</sup> (4) pay Plaintiff any attorneys' fees, subject to the Court's approval, incurred by the government since the date of the December 4, 1996 Memorandum and Order; (5) pay Plaintiff \$25,000 in sanctions for its further violations of the Warrant by its removal of cartons of five different items of the defendant articles of food since the date of the December 4, 1996 Memorandum and Order; and (6) pay Plaintiff \$10,000 in sanctions for each future violation of the Warrant, the December 4, 1996 Memorandum and Order and/or any other order or directive issued by this Court with respect to this matter. The Court, in its July 1, 1997 Memorandum and Order, also granted Plaintiff's request for a Decree of Condemnation of the seized defendant articles of food on the second floor of Maxi International's warehouse.

On August 4, 1997, the Court issued a Partial Decree of Condemnation, Forfeiture and Destruction ordering the forfeiture, condemnation and destruction of the seized defendant articles of food stored on the second floor of Maxi International's warehouse and ordering claimant Ho to pay the costs of destruction of those forfeited defendant articles of food to which it made a verified claim.

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<sup>4</sup> The destruction of the defendant articles of food stored on the first floor of the warehouse was carried out in January 1997, after the Court issued the partial decree and writ of assistance, dated January 14, 1997. Some of the defendant articles of food stored on the first floor were not destroyed, however, because they were missing from the warehouse. July 1, 1997 Memorandum and Order, pp. 5-11.

On March 18, 1998, a hearing was held at which evidence was presented regarding the removal of additional defendant articles of food from Maxi International's warehouse in further violation of the Warrant, the December 4, 1996 Memorandum and Order and the July 1, 1997 Memorandum and Order. Additionally, the Declaration of Janell Mayo Duncan, Assistant Chief Counsel, FDA, Department of Health and Human Services, dated March 17, 1998, and the Declaration of Assistant United States Attorney Linda M. Marino, dated March 17, 1998, were submitted in support of the government's request for \$6,090.62 in attorneys' fees incurred by the government since the December 4, 1996 Memorandum and Order, and a stipulation between counsel was entered on the record that the cost to the government of destroying the defendant articles of food that were stored on the first floor of the warehouse and were not available for destruction by the government in January, 1997 was \$269.46.

#### **FINDINGS OF FACT**

a. Maxi International's Further Violations Of The Warrant

1. CSO Cornelius Gallagher testified that he is the lead investigator on this case and has been involved with the investigation of the warehouse for two years. Tr. 3- 4.<sup>5</sup> On September 25, 1997, he participated in the destruction of certain of the

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<sup>5</sup> References to "Tr. \_\_" are to pages of the transcript of the hearing held before the Court on March 18, 1998.

defendant articles of food at Maxi International's warehouse pursuant to this Court's order. Tr. 11. The defendant articles of food that were destroyed on September 25, 1997 were all soft package merchandise stored on the second floor of the warehouse (except merchandise that claimant Bona had claimed, reconditioned and removed from the warehouse in March 1997) and some of the defendant articles of food stored on the first floor of the warehouse that were missing from the first floor when the defendant articles of food from the first floor were destroyed by the government in January, 1997. Tr. 12-13.

2. CSO Gallagher testified that an inventory was taken of all of the defendant articles of food in the warehouse that were destroyed on September 25, 1997. Tr. 13. CSO Gallagher also testified that the last inventories taken of the defendant articles of food at the warehouse, prior to the September 25, 1997 inventory, were in February 1997. Tr. 13-14. CSO Gallagher and other FDA CSO's took an inventory of the defendant articles of food on the second floor of the warehouse on February 13, 1997 and an inventory of the defendant articles of food on the first floor of the warehouse on February 28, 1997. Tr. 13-15.

3. CSO Gallagher testified that by comparing the inventories taken of the defendant articles of food that were in the warehouse in February, 1997 to the inventory taken in September, 1997, it was determined that certain of the defendant articles of food had been removed from the warehouse since February, 1997. Tr. 18.

4. Specifically, a comparison of the February, 1997 and September, 1997 inventories showed the following:

(a) on February 28, 1997, there were 14 cartons of Thin Pine brand egg noodles in the warehouse and on September 25, 1997, there were only 11 cartons of these egg noodles in the warehouse; therefore, three cartons of egg noodles were missing, Tr. 19;

(b) on February 28, 1997, there were 19 cartons of salted black beans in the warehouse and on September 25, 1997, there were only 16 cartons of salted black beans in the warehouse; therefore, three cartons of black beans were missing, id. 19;

(c) on February 28, 1997, there were 15 cartons plus one extra unit of oat milk in the warehouse and on September 25, 1997, there were no cartons or units of oat milk in the warehouse; therefore, 15 cartons of oat milk were missing, Tr. 19-20;

(d) on February 28, 1997, there were seven cartons of lotus seed in the warehouse and on September 25, 1997, there were no cartons of lotus seed in the warehouse; therefore, seven cartons of lotus seed were missing, Tr. 20;

(e) on February 28, 1997, there was one carton and one extra package of salted in-the-shell peanuts in the warehouse and on September 25, 1997, there were no cartons or packages of salted in-the-shell peanuts; therefore, one carton of salted in-the-shell peanuts was missing, Tr. 20;

(f) on February 13, 1997, there were 96 cartons of Golden Nutrition sugar on the second floor of the warehouse and on September 25, 1997, there were only 92 cartons of Golden Nutrition sugar in the warehouse; therefore, four cartons of Golden Nutrition sugar were missing. Tr. 21;

(g) on February 13, 1997, there were 18 cartons of Rose Brand mushrooms, 14 ounce packages, 25 to a carton, on the second floor of the warehouse, and on September 25, 1997, there were only 12 cartons of these mushrooms in the warehouse; therefore, six cartons of these mushrooms were missing, Tr. 22;

(h) on February 13, 1997, there were 17 cartons of Rose Brand mushrooms, 7 ounces x 50 packages, on the second floor of the warehouse, and on September 25, 1997, there were only nine cartons of these mushrooms in the warehouse; therefore, eight cartons of these mushrooms were missing, id.; and

(i) on February 13, 1997, there were 40 cartons of sliced ginseng on the second floor of the warehouse, and on September 25, 1997, there were only 27 cartons of sliced ginseng in the warehouse; therefore, 13 cartons of sliced ginseng were missing, id.

5. Also, admitted into evidence were photographs that CSO Gallagher testified depicted certain of the defendant articles of food (set forth in ¶ 5, above) that were in the warehouse on February 28, 1997 but were not in the warehouse on September 25, 1997. These photographs were:

(a) Government Exhibits 1-5 which depict some of the cartons of oat milk that were in the warehouse on February 28, 1997 but were not in the warehouse on September 25, 1997, Tr. 22-23;

(b) Government Exhibit 6 which depicts the seven cartons of lotus seeds that were in the warehouse on February 28, 1997 but were not in the warehouse on September 25, 1997, Tr. 23; and

(c) Government Exhibit 7 which depicts the one carton and package of in-the-shell peanuts that were in the warehouse on February 28, 1997 but were not in the warehouse on September 25, 1997, Tr. 23-24.

6. CSO Gallagher further testified about conversations he had with Ms. Lilly Fung, a representative of Maxi International, on September 25, 1997, regarding missing defendant articles of food. Tr. 25-28. He testified that he mentioned that cartons of Rose Brand mushrooms were missing from the second floor of the warehouse, and Ms. Fung told him that they were downstairs on the first floor. Tr. 25-26. CSO Gallagher testified that when he went downstairs to count the cartons of mushrooms, he found six sealed and banded cartons of mushrooms that were completely empty. Id. Government Exhibit 8, which was admitted into evidence, is a photograph depicting CSO Gallagher holding up three of the empty mushroom cartons, the total weight of which (had they been full of mushrooms) should have been approximately 78 pounds. Tr. 27.

7. CSO Gallagher also testified that he mentioned to Ms. Fung that cartons of salted black beans were missing, and she told him that the cartons were not missing, but, rather, had been put in the dumpster. Tr. 27-28. CSO Gallagher went to the dumpster and found the three cartons, but instead of containing black beans, the cartons were filled with garbage. Id. Government Exhibit 9 was admitted into evidence, which is a photograph that depicts the three cartons that were supposed to contain black beans but contained garbage, instead. Tr. 28.

b. Plaintiff's Attorneys' Fees

The Declaration of Janell Mayo Duncan, Assistant Chief Counsel, Food and Drug Administration, Department of Health and Human Services, dated March 17, 1998, and the Declaration of Assistant United States Attorney Linda M. Marino, dated March 17, 1998, establish that the government's reasonable attorneys' fees incurred since the December 4, 1996 Memorandum and Order are \$6,090.62 (\$1,256.25 for Ms. Duncan's time and \$4,834.37 for AUSA Marino's time). Tr. 61.

c. The Cost of Destroying the Defendant Articles  
Of Food Stored On The First Floor of the  
Warehouse That Were Not Available To The  
Government For Destruction in January, 1997

8. Counsel have stipulated that the cost to the government of destroying the defendant articles of food that were stored on the first floor of the warehouse, were not available for destruction by the government in January, 1997, and subsequently, were returned to the warehouse and then destroyed was \$269.46. Tr. 60-61.

d. The Defenses Presented By  
Maxi International

9. The only evidence presented by Maxi International in defense of this action was the testimony of Hao Ran Xia, who testified that he worked at Maxi Natural Food Wholesale at 170 North 11th Street, Brooklyn, New York, from March 1997 until the end of August 1997. Tr. 58. Mr. Xia said that he tidied the warehouse, loaded the food items and some times made deliveries. Tr. 59. He mainly worked on the first floor and seldom worked on the second floor of the warehouse. Id. Mr. Xia also testified that he learned, during the course of his employment, that the FDA had seized various articles of food at the warehouse and that he was told by Mr. Xu not to touch certain merchandise that was wrapped with yellow band. Id. He also testified that he did not see anybody remove from the warehouse any items that were wrapped in any seal. Tr. 60.

10. The defense argued that the total value of the missing goods was less than \$ 5,000 and that it would have been foolhardy for Defendant to have risked a \$ 90,000 fine for removal of these valueless products. The defense also argued that the inventory list kept by the Government was not accurate and therefore the removal of certain items from the warehouse could not be established by clear and convincing evidence.

#### CONCLUSIONS OF LAW

11. The Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1345 and 1355 and 21 U.S.C. § 334.

12. In its December 4, 1996 Memorandum and Order, the Court directed Maxi International:

not to interfere further with the seizure of the defendant articles of food and to comply fully with the Court's Warrant for Arrest of Articles In Rem, dated July 23, 1996, executed by the United States Marshals on July 31, 1996; and (4) to pay Plaintiff \$5,000 in sanctions for each future violation of the Warrant that occurs after the date of this Memorandum of Order.

13. In its July 1, 1997 Memorandum and Order, the Court directed Maxi International:

to pay Plaintiff \$10,000.00 in sanctions for each future violation of the Warrant, Memorandum and Order dated December 4, 1996, and/or any orders or directives issued by this Court with respect to this matter.

14. This Court finds that the Government has established at the hearing with clear and convincing evidence that, since February 1997, Maxi International has engaged in nine additional violations of the Warrant. The Government demonstrated that after the inventories were taken by the CSO's on February 13, 1997 and February 28, 1997 and prior to the final destruction of the defendant articles of food on September 25, 1997, numerous cartons of nine different items of the defendant articles of food had been removed from Maxi International's warehouse. These items are:

- (a) three cartons of Thin Pine brand egg noodles, Tr. 19;
- (b) three cartons of black beans, id. 19;
- (c) 15 cartons of oat milk, Tr. 19-20;
- (d) seven cartons of lotus seed, Tr. 20;
- (e) one carton of salted in-the-shell peanuts, Tr. 20;
- (f) four cartons of Golden Nutrition sugar, Tr. 21;
- (g) six cartons of Rose Brand mushrooms, 14 ounce packages, 25 to a carton, Tr. 22;
- (h) eight cartons of Rose Brand mushrooms, 7 ounces x 50 packages, id.; and
- (i) 13 cartons of sliced ginseng id.

15. Pursuant to the July 1, 1997 Memorandum and Order, Maxi International shall pay \$10,000.00 for each of these nine violations, for a total of \$90,000.00.<sup>6</sup>

16. The July 1, 1997 Memorandum and Order also directs Maxi International:

to pay Plaintiff any attorney's fees, subject to approval by this Court, that it has incurred since the date of the first Memorandum and Order . . . .

17. Pursuant to the July 1, 1997 Memorandum and Order and based on the Declaration of Janell Mayo Duncan, Assistant Chief Counsel, Food and Drug Administration, Department of Health and Human Services, dated March 17, 1998, and the Declaration of Assistant United States Attorney Linda M. Marino, dated March 17, 1998, Maxi International is directed to pay the government reasonable attorneys' fees incurred by the government since the December 4, 1996 Memorandum and Order in the amount of \$6,090.62.

18. The July 1, 1997 Memorandum and Order further

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<sup>6</sup> The sanction against Maxi International for the nine additional violations of the Warrant since February, 1997 is calculated pursuant to the July 1, 1997 Memorandum and Order at \$10,000 per violation (not pursuant to the December 4, 1996 Memorandum and Order at \$5,000 per violation) because these defendant articles of food were removed after the February 14, 1997 and March 14, 1997 hearings that resulted in the July 1, 1997 Memorandum and Order and the articles of food still were missing from the warehouse after July 1, 1997.

directs Maxi International:

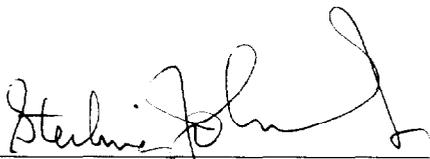
to pay Plaintiff for the costs, as described herein, associated with the destruction of those goods stored on the first floor of the warehouse which were not available to the government in January 1997 . . . .

19. Maxi International is directed to pay to Plaintiff \$269.46, the cost to the government (as stipulated to by counsel for the government and counsel for Maxi International) of destroying those defendant articles of food that were stored on the first floor of the warehouse, were not available for destruction by the government in January, 1997, and subsequently, were returned to the warehouse and destroyed. Tr. 60-61.

20. Therefore, the total amount Maxi International is ordered to pay Plaintiff is \$ 96,360.08.

SO ORDERED:

Dated: Brooklyn, New York  
June 22, 1998

  
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U.S.D.J.