

**8893. Adulteration of frozen whole eggs. U. S. v. 22 Cans of Frozen Whole Eggs. Default decree of condemnation and destruction. (F. D. C. No. 15752. Sample No. 5816-H.)**

**LIBEL FILED:** March 28, 1945, Southern District of New York.

**ALLEGED SHIPMENT:** On or about February 19 and 26, 1945, by the Ballas Egg Products Co., Inc., from Zanesville, Ohio.

**PRODUCT:** 22 30-pound cans of frozen whole eggs at New York, N. Y.

**LABEL, IN PART:** "M Frozen Blend of Egg Yolks & Egg Whites \* \* \* Distributed By Swift & Company \* \* \* Chicago, Ill."

**NATURE OF CHARGE:** Adulteration, Section 402 (a) (3), the product consisted in whole or in part of a decomposed substance.

**DISPOSITION:** April 16, 1945. No claimant having appeared, judgment of condemnation was entered and the product was ordered destroyed.

### FEEDS AND GRAINS

**8894. Action to enjoin and restrain the interstate shipment of misbranded Egg-O-Milk Co.'s Blend and Milkmaid Co.'s Blend. U. S. v. G. Fred Obrecht, individually, and trading under the firm names Hood Mills Co., Egg-O-Milk Co., P. Fred'k Obrecht and Son, Farmers Service Bureau, Gerard Milk Products Co., Milkmaid Co., and Obrecht Sales Co. Tried to the court. Permanent injunction granted. (Inj. No. 92.)**

**COMPLAINT FILED:** April 18, 1945, District of Maryland, against the above-described defendant, with office and principal place of business at Baltimore, Md., and plant at Hoods Mills, Md.

**PURPOSE OF COMPLAINT:** To restrain the defendant from shipping animal feed misbranded in the manner described below.

**NATURE OF CHARGE:** That since December 1, 1931, the defendant had been manufacturing, mixing, blending, packing, and offering for interstate commerce animal feed that was misbranded in the following manner: Section 403 (a), the labeling of the feed was false and misleading; and, Section 403 (b), the feed was offered for sale under the names of other food products.

**PRAYER OF COMPLAINT:** That a preliminary injunction issue, restraining the defendant from commission of the acts complained of; and that, after due proceedings, the preliminary injunction be made permanent.

**DISPOSITION:** On July 25, 1945, judgment was entered which permanently enjoined the defendant from the commission of the acts complained of. In rendering judgment, the court made findings of fact and conclusions of law, and delivered an opinion, as follows:

*COLEMAN, District Judge:*

#### FINDINGS OF FACT

"I. That the defendant, G. Fred Obrecht, has been for many years, and now is, trading and doing business individually, and under the assumed names and styles of Hood Mills Co., Egg-O-Milk Co., P. Fred'k. Obrecht & Son, Farmers Service Bureau, Gerard Milk Products Co., Milkmaid Company, and Obrecht Sales Co., and is now, and has been for many years, engaged in the business of manufacturing, mixing, blending, packaging, selling, marketing, and shipping in interstate commerce animal feeds, foods within the meaning of Section 201 (f) of the Federal Food, Drug, and Cosmetic Act [Title 21 U. S. C. Section 321 (f)]; and that the said defendants conduct business at 4101 E. Monument Street, Baltimore, State of Maryland, and at Hoods Mills, Carroll County, State of Maryland, within the jurisdiction of this Court, and have been so located and engaged in said business for a number of years.

"II. That during the period, and on or about and between December 1, 1931 and March 26, 1945, the defendant, G. Fred Obrecht, individually, and trading under the assumed names and styles aforesaid, introduced and delivered for introduction into interstate commerce at various times and in varying amounts, addressed to consignees in different states of the United States, an animal feed known as 'Egg-O-Milk The Perfect Food—Protein 18%,' which name was contained on the labels on the containers of the said animal feed, and which is hereinafter referred to as 'Egg-O-Milk.'

"III. That the said animal feed 'Egg-O-Milk' is a blended poultry food containing a very small amount of milk and egg, and that there is not a sufficient content in the said feed of either milk or egg to justify reference thereto by use of the name 'Egg-O-Milk.'

"IV. That the defendants do not manufacture or distribute any products or animal feeds with a substantial egg or milk content, and that the trade-name 'Egg-O-Milk' is used by the defendants for no other purpose than in connection with the marketing of this particular product.

"V. That the labeling of the said product 'Egg-O-Milk' is false and misleading in that it represents, suggests, and implies that the said food contains a substantial amount of egg and milk when, in fact, the said food contains only very small and insignificant amounts of egg or milk.

"VI. That the defendants have offered the said product for sale under the names of other foods, to wit, egg and milk, although the said product contains only very small and insignificant amounts of either egg or milk.

"VII. That the name 'Egg-O-Milk Co.' under which defendant G. Fred Obrecht offers the said product 'Egg-O-Milk' for sale, and which he uses on his letterheads and in his correspondence with customers, is false and misleading, since the name of the said company represents, implies, and suggests the presence of milk and egg in substantial quantities in the said product 'Egg-O-Milk,' and is false and misleading in the same manner as the name of the product 'Egg-O-Milk' on the labels thereof.

"VIII. That the defendant, G. Fred Obrecht, trading as Milkmaid Company and Gerard Milk Products Co., on or about the prior to March 17, 1945 introduced into interstate commerce an animal feed known as 'Milkmaid Co.'s Blend,' a food within the meaning of Section 201 (f) of the Federal Food, Drug, and Cosmetic Act [Title 21 U. S. C. Section 321 (f)].

"IX. That the label on the container of the said product states that milk and buttermilk are contained therein, but, as a matter of fact, the said product 'Milkmaid Co.'s Blend,' contains no milk or buttermilk. That the name 'Milkmaid Co.'s Blend' on the label of the said product expressly and by implication represents, suggests, and implies, that milk is a substantial ingredient of the said product; that the contents of the said product do not justify any reference to milk as an ingredient thereof by use of the name 'Milkmaid Co.'s Blend,' or in any other way.

"X. That the defendants do not manufacture, market, or distribute any products or animal feeds with a substantial milk content, and that the trade name 'Milkmaid Co.'s Blend' is used by the defendants for no other purpose than in connection with the marketing and distribution of this particular product.

"XI. That the labeling of the said product known as 'Milkmaid Co.'s Blend' is false and misleading in that it represents, suggests, and implies that the said food contains a substantial amount of milk, when, in fact, the said food contains no milk.

"XII. That the defendants have falsely offered the said product for sale under the name of another food, to wit, milk, although the said product contains no milk.

"XIII. That the names 'Milkmaid Company' and 'Gerard Milk Products Co.' under which defendant, G. Fred Obrecht, offers for sale and markets the said product 'Milkmaid Co.'s Blend,' and which he uses on his letterheads and in his correspondence with customers, are false and misleading, since the names of the said companies represent, suggest, and imply the presence of milk in substantial quantities in the said product 'Milkmaid Co.'s Blend,' and are false and misleading in the same manner as the name of the product 'Milkmaid Co.'s Blend' on the labels thereof.

"XIV. That the names of the aforesaid products, to wit, 'Egg-O-Milk' and 'Milkmaid Co.'s Blend,' and the names of the companies, to wit, 'Egg-O-Milk Co.,' 'Milkmaid Company,' and 'Gerard Milk Products Co.,' are descriptive of the said products, and are used for no other purpose than in connection with these particular products and the marketing thereof. That there is not a sufficient content of milk and egg, or either of them, in the said products respectively, to justify reference to either milk or egg in the labeling thereof, or in the names of the companies under which they are marketed.

"XV. That the protection of the public requires the elimination from the labeling of the said products, and from their trade-names, 'Egg-O-Milk' and 'Milkmaid Co.'s Blend,' and from the names of the said companies 'Egg-O-Milk Company,' 'Milkmaid Company,' and 'Gerard Milk Products Co.,' of any and all reference, express or implied, to milk and egg, or either of them, or to the use by the defendants of the names 'egg' or 'milk' in connection with the said products or their marketing, or as part of either a firm name, trade name, or

label, except as items on the list of ingredients, stating in limiting and definitive language the extent to which they are actually contained therein.

"On the basis of the foregoing, the court makes the following

#### CONCLUSIONS OF LAW

"A. That the defendants have introduced and delivered for introduction, into interstate commerce, in violation of Section 301 (a) of the Federal Food, Drug, and Cosmetic Act [Title 21 U. S. C. Section 331 (a)] misbranded animal feed products, known as 'Egg-O-Milk' and 'Milkmaid Co.'s Blend,' foods within the meaning of Section 201 (f) of the Federal Food, Drug, and Cosmetic Act [Title 21 U. S. C. Section 321 (f)].

"B. That the said foods were and are misbranded within the meaning of Sections 403 (a) and (b) of the Federal Food, Drug, and Cosmetic Act [Title 21 U. S. C. Section 343 (a) and (b)] in that the labeling on the said foods was and is false and misleading, and in that they were and are offered for sale and marketed under the names of other foods.

"C. That the plaintiff is entitled to a decree of injunction, permanently enjoining and restraining the defendants under the provisions of Section 302 (a) of the Federal Food, Drug, and Cosmetic Act [Title 21 U. S. C. Section 332 (a)] from violating the provisions of Section 301 (a) of the Federal Food, Drug, and Cosmetic Act [Title 21 U. S. C. Section 331 (a)] and from introducing or delivering for introduction into interstate commerce foods any animal feeds misbranded within the meaning of Sections 403 (a) and (b) of the Federal Food, Drug, and Cosmetic Act [Title 21 U. S. C. Section 343 (a) and (b)]; and from using the words 'milk' or 'egg,' singly or in combination, in the trade-names of the said foods, upon the labels thereof, or in the names of the companies or firms manufacturing, selling, marketing, and/or distributing the said foods, except that the defendants may use the said words in the list of ingredients of the product heretofore designated as 'Egg-O-Milk,' provided that the said words 'egg' and 'milk' are limited, modified, and described by language indicating that the content of 'egg' and 'milk' as ingredients in the said product is small and of insignificant amount."

#### OPINION

"This is an injunction proceeding brought by the Government under Section 302 (a) of the Federal Food, Drug, and Cosmetic Act (21 U. S. C. A. Secs. 301-392).

"By the weight of the credible evidence, the Government is clearly entitled to a permanent injunction with respect to the use by the defendant of the words 'Egg-O-Milk' either as part of a company or trade name; as part of the label on his product, which is a blended poultry food, whether its use precedes or follows the list of ingredients and the statement as to the protein, fat and fibre content of the product; as descriptive of the product, or for any other purpose, because it has been clearly demonstrated that there can be no other purpose in using the words 'Egg-O-Milk' except in connection with this one particular product, and there is not a sufficient content of either milk or eggs to justify emphasizing such reference to either. In other words, the Government is entitled to such injunctive relief because there has been a misbranding within the meaning of the Federal Food, Drug, and Cosmetic Act (21 U. S. C. A. Sec. 343 (a) and (b)) by (1) use of the words 'Egg-O-Milk' as part of the label of defendant's product, and (2) use of these words in connection with the sale of defendant's product.

"If it had been shown that other products, having a substantial egg or milk content, or both, were manufactured or distributed by the Egg-O-Milk Company or its affiliates, the situation might be different, and the Government might not be entitled to as broad a decree, but there is not a scintilla of evidence in the case that this trade name, 'Egg-O-Milk,' is used for any other purpose than in connection with the marketing of this particular product. Indeed, the letter and the statement in the letter in evidence from the defendant in and of itself fully supports the conclusion that the term is directly misleading as applied to his product.

"The further question arises: should the injunction extend not merely to the prohibition of the use of the trade name, 'Egg-O-Milk,' on the labels and otherwise in connection with the sale of this product, but include as well the prohibition of any reference to eggs or milk in the list of ingredients? I think the

answer is 'no.' Neither the Act nor the Regulations promulgated thereunder require that the ingredients of a product shall all be set out in their actual proportions. It is sufficient if they are enumerated in reasonably accurate, general terms. They need not be put down alphabetically or in the order of their percentages. The amount of proteins, fat and fibre, however, is required to be specifically stated. That has been done here, and I understand there is no dispute in that regard. In other words, the most that the Government is entitled to, in addition to the entire elimination of the use of the words 'Egg-O-Milk,' is a modification of the label, permitting the inclusion of the word 'egg' or 'milk,' if milk, skimmed milk, powdered egg, powdered egg yolk, etc. are in fact among the ingredients, but only in such manner as to make it clear that those ingredients are contained in small amounts. So I shall require that the list of ingredients as part of the label be redrawn and the words 'buttermilk, skimmed milk, powdered egg yolk' be qualified by the words, after each of them: 'in small amounts'; or by some phrase at the end, such as: 'and small amounts of milk and egg, or milk and egg products.' This seems to be fully justified by the weight of the credible evidence which is to the effect that, at most, none of the samples have shown more than a very small percentage— one per cent or one-half of one per cent,—of milk or egg content.

"The defendants have introduced no analyses by chemists to offset the analyses introduced by the Government. There is nothing to indicate that the Government's testimony is not entirely trustworthy or accurate. Therefore, we believe that the Government has made out a clear case for an injunction as respects the label, as well as respects the use of the trade name generally. Section 403 (a) and (b) of the Act (21 U. S. C. A. Sec. 343 (a) and (b)) declares that 'A food shall be deemed to be misbranded—(a) If its labelling is false or misleading in any particular. (b) If it is offered for sale under the name of another food.' The same applies to the use of the words 'Milkmaid' by the Milkmaid Company, because, although malt appears to be one of the important ingredients of defendant's blended food product known as 'Milkmaid Co.'s Blend,' the prefix 'milk' causes the same sort of misbranding as does the use of the words 'Egg-O-Milk.' We believe nothing more need be said to show the labelling in both instances is clearly false and misleading. Likewise, if the defendant offers his products for sale, and refers to them by his trade names, on his letter-heads or in his correspondence with customers or prospective customers, as 'Egg-O-Milk' or 'Milkmaid,' he is, in effect, misleading the public in the same manner as though he were offering his products 'for sale under the name of another food' within the prohibition of the statute, as just quoted.

"The position of the Government is sound. The very fact that the defendant has seen fit to operate, not merely through one company, but through seven different companies for the purpose of marketing his products and ringing the changes on the use of the words 'milk' or 'egg,' shows an attempt to play up something which, on the evidence in this case, is non-existent. The granting of an injunction in a case of this character under Section 302 (a) of the Act (21 U. S. C. A. Sec. 332 (a)) is not dependent upon whether somebody has been actually harmed or deceived; it depends upon whether (1) the labelling and (2) offering for sale are false and misleading. Prevention is the basis of the relief afforded,—protection of the public against being deceived or misled.

"I may add, finally, that I trust there will not follow in this case what follows in a number of these cases and is quite common in ordinary trade-mark cases, namely, that in spite of what the Court says, the parties come back to the Court, asking to be told what they can do. One side says he didn't think the Court said this or that could be done, and the other side says he thinks the Court did say that it could be done. It is not the province of the Court to tell this defendant precisely what name he shall use, nor is it necessary or appropriate for the Court to give him a list of names. As to a new name, it must be clear from what has just been said that, impliedly, the injunction shall prohibit the use of any new name which embodies the words 'Egg-O-Milk,' 'egg,' 'eggs,' or 'milk,' as long as the defendant does not deal in any other product that has any egg or milk content. If he should, at some future time, manufacture or deal in an entirely new product, that might be a different matter. But as to what name to use now, that is something that the defendant ought to be able to determine in harmony with this decision.

"To summarize and conclude: the injunction runs to the prohibition, under existing circumstances, of the use in any way whatsoever in connection with the marketing of defendant's products, of the words 'Egg-O-Milk,' 'Milkmaid,'

'eggs,' 'egg' or 'milk' as part of either a firm name, trade name, or label; except that the word 'eggs,' 'egg' or 'milk' may be used on labels and otherwise as part of the bona fide description of the egg or milk content of defendant's products, provided such use is qualified by words or phrases indicating the extent, at least in general non-misleading terms, of such content. Any other use of these words in connection with defendant's products would be, in essence, a deception and would be part and parcel of the misbranding. In other words, if defendant shall no longer be permitted to fill an order for 'Egg-O-Milk' or 'Milk-malt' without re-labelling the products as herein explained, it certainly follows that, unless and until he in fact produces or deals in substantially different milk or egg products, he ought not to be allowed to write, or to otherwise hold himself out as though he dealt in 'Egg-O-Milk' or 'Milk-malt,' which clearly implies a product having a substantial milk or egg content, or both.

"I will sign an order in accordance with the opinion just rendered."

**8895. Misbranding of Egg-O-Milk Co.'s Blend. U. S. v. 74 Bags of Egg-O-Milk Co.'s Blend. Default decree of destruction. (F. D. C. No. 15763. Sample No. 3613-H.)**

**LABEL FILED:** April 5, 1945, Eastern District of Virginia.

**ALLEGED SHIPMENT:** On or about December 16, 1943, by the Egg-O-Milk Co., from Baltimore, Md.

**PRODUCT:** 74 100-pound bags of Egg-O-Milk Co.'s Blend at Richmond, Va. Examination showed that the article consisted essentially of soybean flour, wheat flour, small amounts of wheat bran, spray-dried grains resembling those of dried egg, and a trace of yeast.

**LABEL, IN PART:** "Egg-O-Milk Co.'s Blend Buttermilk, Skim Milk, Malt Flour, (Wheat Malt, Barley Malt, Soy Malt,) Powdered Egg-Yolk, Yeast."

**NATURE OF CHARGE:** Misbranding, Section 403 (a), the name "Egg-O-Milk Co.'s Blend" was misleading since the article was formerly sold under the name "Egg-O-Milk," and the name implied that the article consisted essentially of egg and milk. Further misbranding, Section 403 (a), the label statement, "Buttermilk, Skim Milk, Malt Flour, (Wheat Malt, Barley Malt, Soy Malt,) Powdered Egg-Yolk, Yeast," was false and misleading since the article contained little, if any, buttermilk or skim milk.

**DISPOSITION:** May 3, 1945. No claimant having appeared, judgment was entered ordering the product destroyed.

**8896. Misbranding of Dr. MacDonald's Vitamized Egg Mash Maker, Dr. MacDonald's Vitamized Chick and Growing Mash Maker, and Dr. MacDonald's Vitamized Metabolators For Dairy Cattle, Sheep, Beef Cattle, Calves, and Swine. U. S. v. John R. MacDonald (Vitamized Feed Co.). Plea of nolo contendere. Fine, \$400 and costs. (F. D. C. No. 12557. Sample Nos. 8241-F, 8242-F, 8565-F, 8566-F, 8568-F to 8570-F, incl.)**

**INFORMATION FILED:** December 14, 1944, Northern District of Iowa, against John R. MacDonald, trading as the Vitamized Feed Co., Fort Dodge, Iowa.

**ALLEGED SHIPMENT:** Between the approximate dates of March 20 and September 22, 1943, from the State of Iowa into the State of Minnesota.

**PRODUCT:** The Egg Mash Maker and Chick and Growing Mash Maker were sold as supplements for mixing poultry mashes. They consisted essentially of limestone, salt, charcoal, iron compounds, sulfate, iodide, plant material, and small amounts of other mineral substances. The remaining products were stock feeds consisting of cereal matter to which had been added, in various proportions and combinations, ground limestone, salt, charcoal, iron compounds, sulfates, sulfur, copper salts, iodide, oil, ginger, licorice and anise, small amounts of phosphorus, sodium thiosulfate, yeast, fenugreek, charcoal, iodine, iodides, and chloride.

**NATURE OF CHARGE:** *Egg Mash Maker*, misbranding, Section 403 (a), the label statement, "Iodine (I) Not less Than . . . .03906%," was false and misleading since the article contained a smaller amount of iodine. Further misbranding, Section 403 (a), the name of the article, the label statement, "Vitamized Egg Mash Maker," and certain statements in the accompanying circular entitled "Get More Egg By The Vitamized Way" were false and misleading since they represented and suggested that the article contained substances rich in vitamins; that it would produce extra quality eggs; that it contained all of the essential minerals required by poultry; and that it would increase egg production, produce better hatchability of eggs, improve the health of the flock, increase the vitality of poultry, build up body resistance