

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

UNITED STATES OF AMERICA,

Plaintiff,

v.

No. CIV 10-1184 MCA/ACT

UNDETERMINED QUANTITIES OF ARTICLES OF FOOD, CONSISTING OF CHILI PODS, GROUND CHILI, AND CRUSHED CHILI, INCLUDING IN-PROCESS AND FINISHED PRODUCTS, OF ANY LOT NUMBER, PACKAGED OR UNPACKAGED, IN ANY SIZE OR TYPE OF CONTAINER, LABELED OR UNLABELED THAT ARE DETERMINED BY THEIR LABELING OR OTHERWISE TO CONSIST IN WHOLE OR IN PART OF INGREDIENTS THAT HAVE ORIGINATED FROM OUTSIDE THE STATE OF NEW MEXICO, AND THAT ARE LOCATED ANYWHERE IN THE FOOD WAREHOUSE OF DURAN AND SONS, L.L.C., HIGHWAY 187, DERRY, NEW MEXICO, OR ELSEWHERE WITHIN THE JURISDICTION OF THIS COURT,

Defendants.

CONSENT DECREE OF CONDEMNATION AND DESTRUCTION

On December 10, 2010, the United States of America, by its attorneys Kenneth J. Gonzales, United States Attorney for the District of New Mexico, and Raymond Hamilton, Assistant United States Attorney for said District, filed a Verified Complaint for Forfeiture *In Rem* ("Complaint"), which was amended on December 13, 2010 ("Amended Complaint"), against the above-described articles of food ("Articles"). The Amended Complaint alleges that the Articles proceeded against are articles of food that

are adulterated, within the meaning of the Federal Food, Drug, and Cosmetic Act ("Act"), 21 U.S.C. § 342(a)(4), while held for sale after shipment in interstate commerce, in that they have been held under insanitary conditions whereby they may have become contaminated with filth. The Amended Complaint further alleges that the Articles are being held illegally within the jurisdiction of this Court and, therefore, they are liable for seizure and condemnation under the Act, 21 U.S.C. § 334.

Pursuant to a Warrant of Arrest *In Rem* issued by this Court, the United States Marshal for this District seized the Articles on December 13, 2010. Thereafter, the United States caused notice of the Amended Complaint and seizure to be published in accordance with the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions of the Federal Rules of Civil Procedure ("Supplemental Rules") and the applicable rules of this Court. On January 21, 2011, Duran and Sons, Inc. ("Claimant"), through its attorneys, intervened and filed a claim to the seized Articles.

Claimant affirms that it is the sole owner of the seized Articles and that no other person or entity has an interest in the Articles. Claimant further affirms that it will indemnify and hold Plaintiff harmless should any party or parties hereafter file or seek to file a statement of interest in this action or obtain or defend any part of the seized Articles subject to this Consent Decree ("Decree"). Claimant consents to entry of this Decree without contest and before any testimony has been taken.

It is HEREBY ORDERED, ADJUDGED, AND DECREED THAT:

1. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1345 and 21 U.S.C. § 334 and personal jurisdiction over all parties to this action.

2. The seized Articles are articles of food that are adulterated within the meaning of the Act, 21 U.S.C. § 342(a)(4), while held for sale after shipment in interstate commerce, as alleged in the Amended Complaint.

3. The seized Articles, therefore, are condemned pursuant to the Act, 21 U.S.C. § 334(a)(4), and forfeited to the United States.

4. Pursuant to 21 U.S.C. § 334(e), Claimant shall pay to the United States all court costs and fees and other proper expenses, and such additional expenses as may hereinafter be incurred and taxed, including the United States' costs in supervising the destruction of the condemned Articles. Claimant shall pay these costs within ten (10) calendar days of receiving notice from the United States Food and Drug Administration ("FDA"), the United States Marshals Service, or the United States Attorney for this District.

5. Within twenty (20) days of the entry of this Decree, Claimant shall execute and file with the Clerk of this Court a good and sufficient penal bond with surety ("Bond") in the amount of forty-five thousand dollars (\$45,000.00), to be applied to Lot A of the Articles, as designated by a duly authorized representative of the FDA ("FDA representative"), and then held for subsequent application to Lot B of the Articles, as designated by the FDA representative, in the manner set forth in Paragraphs 8 and 15 of this Decree. The Bond shall be executed and filed in a form acceptable to the Clerk of this Court and payable to the United States of America, and conditioned on Claimant's abiding by and performing all the terms and conditions of this Decree and of such further orders and decrees as may be entered in this proceeding.

6. After the filing of the Bond with this Court, Claimant shall give written notice to the Director, Denver District Office, U.S. Food and Drug Administration, Department of Health and Human Services, Building 20-Denver Federal Center, 6th Avenue and Kipling Street, Denver, Colorado 80225, that Claimant, at its own expense, is prepared to destroy the Articles under the supervision of a FDA representative.

7. Claimant shall not commence, permit any other person to commence, or cause any other person to commence, destroying any part of any Lot of the seized Articles unless and until Claimant: (a) submits to FDA a written statement detailing the proposed time, place, and method of destruction ("destruction plan"); (b) receives written approval of the destruction plan from FDA; and (c) receives written authorization from FDA to commence destroying any part of any Lot of the Articles. Each Lot of the Articles shall be destroyed at Claimant's expense, at the rates specified in Paragraph 16 of this Decree, under the supervision of a FDA representative.

8. Following Claimant's payment of costs pursuant to Paragraph 4 and posting of the Bond as required by Paragraph 5 of this Decree, and following receipt of written authorization to commence destruction as described in Paragraph 7, the United States Marshal for this District, upon receiving notice from the United States Attorney or the FDA representative, shall release the Articles comprising Lot A from his custody to the custody of the Claimant for the sole purpose of destroying the Articles pursuant to the destruction plan described in Paragraph 7. Thereafter, the United States Marshal, upon receiving notice from the United States Attorney or the FDA representative that Lot A has been destroyed pursuant to the destruction plan, shall, in turn, release Lot B of the Articles from his custody to the custody of the Claimant for the sole purpose of

destroying the Articles pursuant to the destruction plan described in Paragraph 7. In no event shall a Lot be released to Claimant for destruction pursuant to this Decree unless there is on file with the Clerk of the Court a Bond in the amount of forty-five thousand dollars (\$45,000.00).

9. Claimant shall at all times, until each Lot of the seized Articles has been destroyed, retain such Articles intact for examination or inspection by the FDA representative without prior notice to Claimant in a place made known to and approved by FDA, and shall maintain the records or other proof necessary to establish the identity of the seized Articles comprising each Lot to the satisfaction of the FDA representative.

10. Within twenty (20) calendar days of receiving FDA's written authorization to commence destroying each Lot of the seized Articles under Paragraph 7, Claimant shall complete the destruction of each Lot of the Articles in accordance with the destruction plan approved pursuant to Paragraph 7, at its own expense and under the supervision of FDA.

11. Claimant shall destroy each Lot of the seized Articles in a manner that complies with all federal laws and with all state and local laws in the jurisdiction in which the seized Articles are destroyed.

12. If Claimant breaches any conditions stated in this Decree, or in any subsequent decree or order in this proceeding, Claimant shall, at its own expense, immediately return any part of any Lot of the seized Articles to the United States Marshal for this District or otherwise dispose of any part of any Lot of the seized Articles pursuant to further order of this Court. In the event that return of any part of any Lot of the seized Articles becomes necessary pursuant to this paragraph, Claimant shall be

responsible for all costs of storage and disposition that are incurred by the United States.

13. If, within forty-five calendar (45) days of the entry of this Decree, Claimant does not avail itself, in the manner stated in the Decree, of the opportunity to repossess each Lot of the Articles for the purpose of destruction, the United States Marshal for this District shall destroy the Articles comprising each Lot and make due return to this Court regarding their disposition. Claimant shall bear the costs of storage and destruction that are incurred by the United States pursuant to this Paragraph, and shall pay such costs within ten (10) calendar days of receiving an invoice from FDA, the United States Marshals Service, or the United States Attorney for this District.

14. If Claimant fails to abide by and perform all the terms and conditions of this Decree, then the Bond posted pursuant to Paragraph 5 of this Decree shall, on motion of the United States in this proceeding, be forfeited in its entirety to, and judgment entered in favor of, the United States.

15. The United States Attorney for this District, upon being advised by a FDA representative that all of the condemned Articles have been destroyed in compliance with this Decree, and that Claimant has paid all costs submitted to Claimant as of that date, will transmit such information to the Clerk of the Court, whereupon the Bond given in this proceeding shall be returned to the Claimant.

16. Claimant shall reimburse the United States for the costs of supervising Claimant's compliance with the terms of this Decree, including all inspections, examinations, reviews, evaluations, and analyses conducted pursuant to this Decree, at the standard rates prevailing at the time the activities are accomplished. As of the date

this Decree is signed by the parties, the rates are as follows: \$87.57 per hour and fraction thereof per FDA representative for time spent on supervision; \$104.96 per hour or fraction thereof per FDA representative for laboratory or analytical work; \$0.50 per mile for travel expenses by automobile; government rate or the equivalent for travel by air or other means; and the published government per diem rate for subsistence expenses where necessary. In the event that the standard rates applicable to FDA supervision of court-ordered compliance are modified, these rates shall be increased or decreased without further order of the Court.

17. Representatives of FDA shall be permitted, without prior notice and as and when FDA deems necessary, to make inspections of Claimant's facility and, without prior notice, take any other measures necessary to monitor and ensure compliance with the terms of this Decree. During such inspections, FDA representatives shall be permitted access to buildings, equipment, containers, and packaging materials therein; to take photographs and make video recordings; to take samples; and to examine and copy all records relating to the receiving, processing, preparing, packing, holding, and distributing of any and all articles of food. The inspections shall be permitted upon presenting a copy of this Decree and appropriate credentials. The inspection authority granted by this Decree is separate from, and in addition to, the authority to make inspections under the Act, 21 U.S.C. § 374.

18. If, at any time after this Decree has been entered, FDA determines, based on the results of an inspection, analyses of samples, labeling, promotional materials, or any other information, that Claimant has violated the Act, its implementing regulations or this Decree, or that additional corrective actions are necessary to achieve compliance

with the Act, its implementing regulations, or this Decree, FDA may, as and when it deems necessary in its sole discretion, direct Claimant to cease manufacturing, processing, packaging, labeling, holding, selling, and/or distributing any or all articles of food and/or to take any other corrective action(s) as FDA deems necessary to bring such articles of food into compliance with the Act, its implementing regulations, and this Decree.

19. Should Plaintiff bring and prevail in a contempt action to enforce the terms of this Decree, Claimant agrees to pay all attorney's fees, travel expenses incurred by attorneys and witnesses, court costs, expert witness fees, and investigative and analytical expenses incurred in bringing this action.

20. Claimant shall abide by the decisions conferred upon FDA under this Decree, which decisions shall be final. All such decisions shall be vested in FDA's discretion and, if contested, reviewed by this Court under the arbitrary and capricious standard set forth in 5 U.S.C. § 706(2)(A). Review by the Court of any FDA decision rendered pursuant to this Decree shall be based exclusively on the written record before FDA at the time the decision was made. No discovery shall be authorized or allowed by either party.

21. All notifications, correspondence, and communications to FDA required by this Decree (a) shall be addressed to the Director, Denver District Office, U.S. Food and Drug Administration, Department of Health and Human Services, Bldg 20-Denver Federal Center, 6th Avenue and Kipling Street, Denver, Colorado 80225; (b) shall reference the civil action number; and (c) shall be prominently marked "Duran and Sons, L.L.C. Decree Correspondence."

22. Claimant shall bear its own costs and attorney's fees in connection with this action.

23. This Court retains jurisdiction over this action for the purpose of enforcing or modifying this Decree and for the purpose of granting such additional relief as may be necessary or appropriate.

IT IS SO ORDERED, this 31st day of January, 2011.



M. CHRISTINA ARMIJO
UNITED STATES DISTRICT JUDGE

Respectfully submitted this 28th day of January, 2011.

We hereby consent to entry of the foregoing consent Decree:

For Claimant Intervenor:

Electronically signed 01/27/11

/s/ Carl M. Duran

CARL M. DURAN

Director

Duran and Sons, L.L.C.

/s/ Stephen Hubert

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