DEL MONTE FOODS, INC.  
FreshCut™ Pineapple 
*In-House*

- When a federal regulatory body has provided clear direction regarding the use of a particular term on a product's label, it will be afforded great weight by NAD when reviewing use of the same term in the product's other advertising.

- An advertiser may, in advertising food, use the term "fresh" to describe the ingredients used to prepare its processed product, provided such statements are true, clearly refer to the ingredients and do not imply that the final food product is unprocessed.

Basis of Inquiry: Dole Packaged Foods Company ("Dole") challenged "FreshCut™" trade advertising, product labeling and usage as a brand name for Del Monte Corporation ("Del Monte") pineapple products. Alleging that, as currently used, the term implies that the canned, processed pineapples are fresh, contrary to FDA regulation and prior NAD/NARB decisions. The challenged claims as they appear in brochures and other trade publications are as follows:

* use of the term “FreshCut™” as a brand name.

* “Like its always been, our pineapple is picked at peak ripeness and packed the same day-guaranteed to lock in sweet taste.”
• “After seeing the FreshCut™ concept and tasting the product, more consumers described the Del Monte product as excellent.”

• “...Del Monte FreshCut™ is always packed from fresh pineapple...”

• “The New Approach...”

Challenger’s Position: Dole Packaged Foods Company (“Dole”) challenged “FreshCut™” trade advertising, product labeling and usage as a brand name for Del Monte Corporation (“Del Monte”) pineapple products, alleging that, as currently used, the term implies that Del Monte’s canned, processed pineapples are fresh, contrary to FDA regulation and the principles articulated in prior NAD/NARB decisions. In its initial letter, the challenger argued that the word “FreshCut™” is prominently featured in the brochure and used repetitively by the advertiser in an attempt to convey that the pineapple is truly fresh. As support for its assertion, Dole referred to the centerfold page of the brochure where the term “FreshCut™” is shown in (8) eight canned pineapple product shots, in heavy type and capital letters “twice the height of the letters in Pineapple.” It then pointed out that the term “FreshCut™” appears at least 10 times on the centerfold page and at least (6) six times on the back panel.

The challenger also objected to the advertising linking “FreshCut™” to phrases such as “picked at peak ripeness and packed the same day” and “...is always packed from fresh pineapple...” Collectively, the challenger maintained, the advertiser directly and by implication associates “freshness” with the product (pineapple) not the process (cutting).

Using “FreshCut™” in this manner, Dole argued, misleads consumers into thinking that the canned pineapple is fresh and that the processing has been improved, making Del Monte’s canned pineapple fresher than before. As “proof” of this deception the challenger pointed to the “Central Location” bar chart in the advertiser’s brochure which showed a “dramatic” increase in consumer preference (from 47% to 62%) and purchasing intent (from 47% to 68%) after the company introduced the new name for its traditional (unchanged) canned pineapple product. The challenger also referenced brochure quotations demonstrating that “after seeing the FreshCut™ concept and tasting the product, more consumers described Del Monte as excellent,” even though the pineapple is picked “Like its always been.”

The challenger emphasized that the latter phrase (“Like its always been”) is crucial to understanding the misleading nature of the FreshCut™ advertising. Dole explained that there is nothing new, different or unique about the Del Monte FreshCut™ product or its manufacturing process which justifies usage of the term FreshCut™. Del Monte continues to produce its canned pineapple in the same manner it used before introducing the new name FreshCut™. It is standard practice in the pineapple industry to pick, pack and process the fruit within 24 hours of harvesting. In fact, Dole insisted, the canning process described by Del Monte is not different from Dole’s canning operations in the Philippines. “FreshCut™” therefore, is nothing more than a new marketing expression for a well established manufacturing process. For this reason, Dole objected to the last page of the brochure which emphasized “The New Approach.” This according to the challenger, implies that “there is something about the FreshCut™ brand which permits Del Monte to claim that its products are actually fresh.”

As further support for its position, Dole cited excerpts from an FDA press release, several federal court cases, the Federal Register (58 Fed. Reg. 2401& 2402) and 49 C.F.R. §101.95 to show that the FDA has actively regulated usage of the term “fresh” on food labeling and in brand names, unequivocally stating that products which have been heated, frozen or subjected to any other chemical/thermal processing/preservation cannot be called fresh. Dole further emphasized this point with a quote from the FDA describing the type of product it intended to regulate: “[A] definition for fresh is necessary to preclude the types of misuses of the term that the agency most frequently encounters i.e., use of the term to imply that a product is unprocessed, when in fact it has been processed. The definition has particular applicability where there are processed and unprocessed forms of the food available.” Dole also referred to the NARB panel decision regarding Campbell’s Soup In a Jar, which concluded that “freshness” could not be used to describe soup ingredients which are added to the product in their fresh state, but are then processed (i.e. cooked) before being offered for sale to the public.

Del Monte’s FreshCut™ pineapple, argued the challenger, violates FDA regulations and NARB’s recommendations and cannot be called fresh because it is subjected to thermal processing before sale. Contrary to the advertiser’s arguments, the processed pineapple is not an “ingredient” in the product, it is the product. More importantly, even if the advertiser’s product is “packed from fresh” pineapple, it is not fresh at the point of sale to the consumer. Such distinctions, Dole insisted were discussed in the Campbell Soup challenge, where the NARB panel recommended that the advertising be modified “to more accurately communicate that the advertiser’s glass jar soups do not contain, but have been prepared from or cooked with fresh vegetables.” Similarly, FreshCut™ can be distinguished from other brand names such as “Freshlike” because the latter term suggests that the food product is “like fresh thereby informing the consumer that the product itself is not fresh.”

If anything, stated the challenger, the FreshCut™ pineapple apples claims present a greater deviation than the pasta sauce claims examined by the FDA and the soup claim subject to the NARB decision. Tomato sauce, soup and milk are almost always cooked/pasteurized before being sold to consumers, while pineapple is more frequently sold and consumed in its fresh, raw state.
For all of these reasons, Dole requested that the FreshCut™ brand name, product labeling and trade advertising be modified or discontinued.

Advertiser’s Position: The advertiser informed NAD (and provided verifying documentation) that it is engaged in ongoing discussions with the FDA concerning FreshCut™ brand name and product labeling, and therefore requested that NAD refrain from exercising its jurisdiction on the labeling issue.

In response to the challenger’s criticisms of its trade advertising claims, Del Monte explained that the FreshCut™ concept was created to combat the misconception that Del Monte’s pineapple product is packed from “lesser quality ingredients” or has been processed / preserved prior to canning. Del Monte verified, through Del Monte Philippines (“DMPI”), that its manufacturing operation is structured so that the pineapple is picked and packed on the same day, usually within the hours from 4-8. The procedure involves picking the pineapple, washing it and then placing the product into a machine that peels and cores it. Afterwards, the pineapple is sliced and/or diced and put into a can. What is particularly important, stated the advertiser, is the fact that the pineapple is fresh when it is put into the can and sealed. The advertiser confirmed that, to ward off bacteria, the canned product is subjected to thermal processing before being shipped to the general public for sale.

Citing 21 C.F.R. § 145.180, the advertiser maintained that the FDA recognizes its “standards of identity” two types of “canned pineapple”: pineapple that is “... prepared from mature, fresh or previously canned” pineapple...consist[ing] of one of the optional styles of the pineapple ingredient...and may be packed in one of the optional packing media.” (emphasis added). The FDA, Del Monte pointed out, as articulated in 58 Fed. Reg. 2405-2406 has also stated that the term “fresh” can be used to disclose the fresh nature of ingredients in a processed food “provided statements clearly refer to the ingredient and do not imply that the food itself is unprocessed.” (emphasis added).

This exception to the general “fresh” rule allows brand names such as “Freshlike” Brand Vegetables and permits the term “fresh” to be used for pasteurized milk, because the term does not imply that the food is unprocessed. Consumers understand that milk is nearly always pasteurized, and “Freshlike” vegetables are different from fresh vegetables. Similarly the advertiser pointed out, “fresh” has been used in connection with processed or chemically produced foods such as: “Sunfresh” brand Citrus Salad, Hunt’s Choice Cut “Packed Fresh” Diced Tomatoes, S&W Fine Foods “Fresh Ready-Cut” Pasta Sauce and Springfield “Fresh Pack” Pickles. Along these lines, the advertiser provided examples showing that Dole has also used the term “fresh” for its pineapple juice and Mandarin oranges, to promote the “fresh nature of their ingredients.” This, argued the advertiser, is the very same practice that Dole now seeks to prohibit in this challenge before the NAD.

Del Monte also referred to FDA Compliance Policy Guide, § 562.450 Identity of Foods, to show that “food packed in a can need not be labeled canned,” because consumers know that food products in cans are processed.

Applying these FDA principles, the advertiser asserted that the term FreshCut™ literally means “fresh when cut or prepared for processing.” Del Monte pointed out that the ingredients in the FreshCut™ product are fresh pineapple and pineapple juice. No preservatives or other ingredients are added to the product. According to the advertiser, the principal display panel which states: “Packed From Fresh Pineapple,” clearly communicates this, and does not contradict the fact that the pineapple is heat treated after it has been sealed in the can. Informing consumers that FreshCut™ pineapple is “packed from fresh” ingredients is valuable information to consumers. Many pineapple juices for example are made from concentrate. Other Del Monte pineapple products and mixed fruit products, the advertiser explained, are not packed fresh. Thus, the FreshCut™ product differs in a material aspect because, concentrated or previously canned pineapple is not used. The “Central Location” survey, according to Del Monte, confirmed that “consumers value the information that Del Monte is packed from fresh pineapple,” since more consumers rated the product as excellent.

Furthermore, a can is shown in all advertising. The advertiser maintained that consumers know that FreshCut™ pineapple is processed, by virtue of the fact that the product is in a can, positioned on shelves at room temperature. Such forms of packaging have been used for thermally processed canned fruits for over 100 years, creating a strong presumption that consumers will not reasonably think that the canned contents are fresh.

Del Monte dismissed the challenger’s arguments that FreshCut™ invokes the same concerns found in the Citrus Hill FRESH CHOICE, Citrus World’s FRESH N’ NATURAL, and RAGU brand pasta sauce cases. The advertiser maintained that those FDA rulings presented different factual scenarios because the products involved were not packed from fresh ingredients. Moreover, stated Del Monte, in the orange juice cases, there was a “very high likelihood of consumer confusion because fresh juice and pasteurized juices are marketed side-by-side in the same types of jugs. In contrast, argued the advertiser, it is highly unlikely that consumers would mistake canned pineapple for fresh pineapple.

Likewise, Del Monte asserted, the NAD/NARB Campbell Soup case is distinguishable because in that case a glass jar was used, creating the impression that its contents are fresh. Unlike its position with respect to canned products, the FDA requires advertisers in § 562.450 using glass jars to include the word “canned or pasteurized” on the label if “stored or displayed under refrigeration which might cause consumers to believe it is fresh.” Further-
more, maintained the advertiser, it is clear that the soup advertising went several steps further than FreshCut™ by incorporating the snapping of fresh vegetables, and using the term “fresh” in an unqualified manner.

Finally, the advertiser argued, “The New Approach...” claim clearly relates to its new pricing approach for grocery retailers that sell the canned pineapple. Del Monte informed NAD that FreshCut™ advertising is limited to grocery retailers (3 outlets), and market has a specialized interest and knowledge in pricing strategies. By adopting a line pricing approach, the advertiser, and promoting 20 oz. pineapple with other #300 canned fruits, the advertiser believes that the retailers can maximize profits. This communication, stated Del Monte, is clear from the advertising, and “The New Approach...” cannot be reasonably construed to imply that the process or product has changed.

DECISION

Rationale for the Decision: NAD recently had the opportunity to evaluate usage of the term “fresh” in advertising claims as it applied to the vegetable ingredients in the Campbell Soup case. The decision in that case outlined in detail how the FDA’s definition of terms used on food labels, while not binding on the Federal Trade Commission (“FTC”), would generally be applied by the FTC in food advertising regulation in an effort to “provide consumers with clear and consistent information about the content of the foods they purchase.” (See FTC Enforcement Policy Statement on Food Advertising). Recognizing the significance of the FTC harmonization statement, both NAD and NARB agreed that FDA standards should likewise be generally applied in the forum of self-regulation.

Del Monte disclosed and documented that the company is currently involved in negotiations with the FDA over the usage of the FreshCut™ brand name on its product label. In deference to the FDA, as the federal agency with clear regulatory authority over food labeling, NAD has elected to refrain from evaluating the FreshCut™ term as it appears on the label or its usage as a brand name in the instant challenge. NAD will, however retain jurisdiction over and evaluate the use of the term FreshCut™ as it appears in the context of Del Monte’s advertising.

FDA regulation 21 C.F.R. § 101.95(a) provides that the term “fresh” may not be used on food labeling, in a manner that suggests or implies that the food is in its raw state if the food has been frozen, subjected to any form of thermal processing, or any other form of processing.

However, as the advertiser correctly points out, 21 C.F.R. § 145.80 provides that “canned pineapple” can be prepared from “mature, fresh or previously canned pineapple,” and under this section, pineapple is recognized as an ingredient of the product. More to the point, the FDA in 58 Fed. Reg. 2405 states that it “believes ... that consumers are not generally misled when such statements clearly refer to the ingredients and do not imply that the food is unprocessed.”

As NAD noted in its Campbell’s decision, while labeling pasteurized milk as “fresh” is acceptable to the FDA, using the term for pasteurized pasta sauce is not, because “fresh” for pasta sauce implies that the food and or the ingredients are not processed or preserved. In that case, NAD determined that the pasta sauce reasoning was applicable to the claim “Soups stocked so full with fresh carrots, fresh celery, fresh onions...”. Applying 21 C.F.R. § 101.95(a), NAD concluded that the claim could reasonably be interpreted to mean that the soup contained fresh vegetables when, in fact, at the point of sale, it did not. Both NAD and NARB recommended that the claim be modified to “more accurately communicate that its glass jar soups have been prepared from or cooked with fresh vegetables.”

In the instant case, the advertiser concedes that its FreshCut™ pineapple product is thermally processed to protect it from bacteria and prepare it for a shelf-life of several months before being sold to the public. Furthermore, it does not dispute that FreshCut™ pineapple, at the point of purchase, is not “fresh”. NAD agrees with the advertiser that the FDA allows manufacturers to communicate the fresh nature of the ingredients used in a processed product, recognizes the distinction between “fresh” versus “canned” produce and identifies pineapple as an “ingredient” in canned pineapple. Nonetheless, FDA has made it clear that in any label claims regarding fresh ingredients “such statements must clearly refer to the ingredients and not imply that the food is unprocessed.” (emphasis added).

Here, pineapple the ingredient, is also pineapple the “food” or end product. Del Monte’s “Central Location test” demonstrated that the name change has had a significant impact on consumers perception of the quality of the product. More consumers “viewed the [pineapple]product as excellent” when the FreshCut™ term was used as a descriptor, even though there is nothing new, different or unique about the processing, or for that matter, the product. Del Monte’s FreshCut™ pineapple is the same product as its previously named canned pineapple and the FreshCut™ “packing process” is no different from what is used for other canned pineapple (i.e. Dole). NAD was concerned that the claim: “...Del Monte FreshCut™ is always packed from fresh pineapple...” connotes a material change in Del Monte’s pineapple product and/or processing which allows the pineapple to be fresh at the point of contact with consumers. Specifically, use of the phrase “packed from” fresh pineapple, without additional qualification, could reasonably be interpreted to mean that FreshCut™ pineapple is a breakthrough product, containing fresh pineapple, sealed in a can which has not been subjected to heat processing. Given today’s innovations in packaging, genetic engineer-
ing and applications of computer technology to “quick time” distribution, “it is probable that one effect of this approach is that some consumers will conclude that the breakthrough is even more dramatic than in fact it is.”

Furthermore, the FDA’s canned pineapple definition in 21 C.F.R. § 145.80 works against the advertiser’s position in one material respect: It states that “Canned pineapple is the food prepared from fresh or previously canned pineapple.” (emphasis added). The challenged phrase, “packed from,” like the operative phrase “stocked with,” in the Campbell’s case does not go far enough to communicate that the food has in fact been heat treated and is therefore processed, not fresh.

NAD determined that the fact that other products use terms such as: “Sunfresh” Salad, “Packed Fresh” Tomatoes, “Fresh Ready-Cut” Pasta Sauce and “Fresh Pack” Pickles on their labels does not resolve the question of whether the term FreshCut™, as found in the context of the challenged advertising, is inaccurate or potentially misleading. Assuming arguendo that the FDA has approved these terms for the purposes of food labeling, they may nonetheless be determined to be misleading in the context of an advertisement that implies that the food is unprocessed.

Therefore, NAD recommends, along the same lines as its recommendation in the Campbell’s case, that the claim “…Del Monte FreshCut™ is always packed from fresh pineapple…” be modified to more accurately communicate that FreshCut™ has been prepared from fresh pineapple.

With respect to the “New Approach…” claim, NAD determined that the phrase applies to and is clearly limited to Del Monte’s recommended pricing strategy. “The New Approach…” in context, appears in large letters surrounded by a blue border. Underneath the phrase it states: “Del Monte® 20 oz. pineapple now has the same price and accur...” del Monte #300 major fruit.” Another line of copy underneath it states: “Line pricing and promoting Del Monte Pineapple with Del Monte #300 means more profit.” Because these claims appear in a brochure directed at a trade audience, which has a particular interest in pricing strategies, and the term “FreshCut™” did not appear in conjunction with these phrases, NAD concluded that the advertisement’s target audience was not likely to understand the claim: “The New Approach…” to apply to the FreshCut™ product and/or processing.

Conclusion: NAD recommends that the claim that “…Del Monte FreshCut™ is always packed from fresh pineapple…” be modified to more accurately communicate that FreshCut™ canned pineapple has been processed before sale. NAD determined that the claim “The New Approach” as used in the context of the challenged advertisement, reasonably refers to the advertiser’s proposed pricing strategy not the FreshCut™ product and/or processing, and therefore was substantiated. Because the product’s label is currently under review by the Food and Drug Administration, NAD will defer to the FDA with respect to the use of the term “FreshCut™” as it appears on the product label.

Advertiser’s Statement: Del Monte Corporation is pleased that the NAD agrees that an advertiser may use the term “fresh” to clearly and accurately describe ingredients used in a processed food product. Del Monte is also pleased with the NAD’s decision that FreshCut™ can be used in advertising in a manner consistent with the NAD’s recommendation. It has always been Del Monte’s goal to clearly communicate to consumers that products bearing the FreshCut™ trademark are made from fresh ingredients (and not the obviously canned product itself is ‘fresh’). Del Monte believes that consumers do not view shelf-stable, canned pineapple as a “fresh” or “breakthrough product” by virtue of being told that the product is “packed from fresh pineapple” (both the technology and “packed” terminology having been used in the canned product industry for over a hundred years). Further, Del Monte is concerned that using the terminology “prepared from” is potentially confusing to consumers in that it may suggest more processing of the product ingredient than actually occurs. Nonetheless, Del Monte accepts the NAD’s recommendation. The trade materials which were the subject of the challenger’s complaint are no longer being distributed.

Finally, Del Monte is gratified that the NAD properly determined that in the context of the challenged advertising, ‘The New Approach’ claim referred to a new pricing strategy, and had no relationship to the use of the FreshCut™ trademark. Del Monte continues to be a firm supporter of the NAD self-regulatory process. (#3444 NFV, closed 3/16/98)

1 See Campbell’s Soups In A Jar, NAD Case Report, July 1992, p. 100.
2 Id. NAD decision: “Given FDA’s clear regulation on the use of the term fresh on food labels and FTC’s harmonization statement, and in the absence of any court law to the contrary, NAD will also afford great weight to FDA’s regulation in the instant matter.” See also Report of NARB Panel 96. (...REGARDING CAMBELL’S SOUP IN GLASS JARS), p. 4: “reinforcement of the FDA’s uniformity and education program is beneficial to an industry that will benefit from clear guidance.”
3 21 C.F.R. § 145.180(a). Canned pineapple (density) — canned pineapple is the food prepared from mature, fresh or previously canned pineapple conforming to the characteristics of (L.) Merrill and from which peel and core have been removed. The food consists of one of the optional styles of pineapple ingredients specified in paragraph (a)(2) of this section and may be packed in one of the optional packing media specified in paragraph (a)(3) of this section..." "Like its always been, our pineapple is picked at peak ripeness and packed the same day.” NAD has determined that this claim on its face is not deceptive. Nonetheless, it communicates that there is nothing new or revolutionary about FreshCut processing or the product. Furthermore, the advertiser did not dispute Dole’s assertion that: “The canning process described in Del Monte’s response letter is no different from the operations of Dole’s canny...”
4 Report of NARB Panel 96. (...REGARDING CAMBELL’S SOUP IN GLASS JARS), p. 3.
5 See Webster’s New Universal Unabridged Dictionary: “prepared—2. (of food) processed by the manufacturer or seller as by cooking, cleaning, or the like, so as to be ready to serve or use with little or no further preparation.”