

NATIONAL ADVERTISING REVIEW BOARD

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NARB PANEL # 141

March 14, 2007

Appeal of the NAD Final Decision Regarding Advertising for
Perdue Short Cuts Poultry Products

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REPORT OF NARB PANEL 141

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Background

This case arose from a challenge filed by Kraft Foods Global, Inc. (“Kraft”) concerning claims made by Perdue Farms Incorporated (“Perdue”) on labels and in print advertising for Perdue Short Cuts poultry products.

NAD found that use of the phrase “no preservatives” was inconsistent with consumers’ reasonable expectations because Perdue Short Cuts poultry products contain two ingredients that are used as preservatives. NAD similarly found that use of the phrase “Fresh Fully Cooked” was inconsistent with consumers’ reasonable expectations because the products contained preservatives and were subject to high pressure processing.

Findings and Conclusions

No preservatives

Print advertising and labeling for Perdue Short Cuts poultry products states that the products have “No Preservatives.”

Perdue Short Cuts poultry products contain 2% or less of sodium diacetate and sodium lactate, which the label indicates are “for flavor.” However, sodium diacetate and sodium lactate can be used as both flavoring and antimicrobial agents.¹ The U.S. Department of Agriculture’s Food Safety and Inspection Service (FSIS) has adopted regulations² that set limits on the use of sodium diacetate and sodium lactate in meat and poultry products depending on the purposes for which they are used. The regulations approve the use of sodium diacetate and sodium lactate as antimicrobial agents up the following maximum amounts: 0.25% by weight of total formulation for sodium diacetate, and 4.8% by weight of total formulation for sodium lactate. The regulations approve their use as flavoring agents as long as they do not exceed the following amounts: 0.25% for sodium diacetate, and 2.0% for sodium lactate.

Perdue argues that, when used in the concentrations found in Perdue Short Cuts products, sodium diacetate and sodium lactate should be considered to be flavorings and not antimicrobial preservatives. Perdue relies heavily on a determination by the Director of FSIS’ Labeling and Consumer Protection Staff in approving the Perdue Short Cuts product label containing the claim of no preservatives. Perdue argues that FSIS is charged with ensuring that meat and poultry labels are

¹ Antimicrobial agents inhibit the growth of certain pathogens. Perdue did not dispute that antimicrobial agents are “preservatives,” and the panel has no question that reasonable consumers would view them as such.

² 9 C.F.R. §424.21(c).

not false and misleading, and asks this panel to give extraordinary, if not decisive, deference to the approval of Perdue's label by FSIS staff in light of Congressional intent to place regulation of meat and poultry labels solely within the domain of FSIS.

The initial FSIS review of the Perdue Short Cuts product label focused on use of the word "fresh" on the label, and determined that "fresh" could not be used because FSIS policies prohibit using "fresh" to describe products treated with antimicrobial substances. The inspector cited to the fact that Perdue's Hazard Analysis Critical Control Point (HACCP) program³ relied on the use of sodium diacetate and sodium lactate as instruments of antimicrobial control. Perdue subsequently modified its HACCP program to eliminate reliance on sodium diacetate and sodium lactate as antimicrobial agents, and after a series of appeals the label was found to be acceptable by FSIS' Labeling and Consumer Protection Staff.

While NAD is not required to defer to federal regulatory rulings,⁴ there is no question that NAD and NARB endeavor to harmonize their decisions with applicable federal regulations and rulings. As noted by NAD, however, NAD and NARB will not automatically defer to regulatory determinations. In determining whether to defer to an agency regulatory determination, NAD/NARB decisions make it clear that NAD should consider several factors that include the extent to which the agency considered the specific claim at issue as well as the extent to which the agency issued a decision explaining its rationale and thinking.

FSIS' initial concern with the Perdue Short Cuts label was that it used the word "fresh," a term that cannot be used in products treated with antimicrobial substances, in a product that included sodium diacetate and sodium lactate. FSIS was primarily concerned with the inconsistency between Perdue's assertion that sodium diacetate and sodium lactate were used for flavorings and the fact that Perdue relied on the antimicrobial properties of these ingredients in its HACCP program. After appeals to several levels of FSIS, Perdue ultimately obtained approval from the Director of Labeling and Consumer Protection Staff after Perdue changed its HACCP program to remove reliance on the antimicrobial properties of sodium diacetate and sodium lactate. However, there is no indication that FSIS Labeling and Consumer Protection Staff addressed the question of whether consumers would be misled by a label that said "no preservatives" on a product containing ingredients that have antimicrobial properties. The record does not show that the Labeling and Consumer Protection Staff either considered the impact of the claim on consumers or explained its reasoning with regard to whether the claim of "no preservatives" was false and misleading to consumers. Thus, although respecting and considering the authority and important responsibilities of FSIS, the panel does not believe that the determination made by FSIS staff with regard to the Perdue label should be dispositive of the outcome in this case.

The FSIS staff determination turned in part on the manufacturer's intentions in using sodium diacetate and sodium lactate in its poultry products. The advertising self regulatory process and this

³ Under FSIS regulations, manufacturers are required to establish and maintain a HACCP program to control pathogens. Manufacturers with more comprehensive HACCP programs are subject to less regulatory oversight.

⁴ NAD will not review language on labels where that language is mandated or expressly approved by federal law or regulation. In this case, however, the language on Perdue's label was not mandated and was approved not by regulation but rather by FSIS staff as part of an administrative review.

panel, however, must consider consumer perceptions. No consumer perception study evidence was presented as to what consumers would reasonably take away from the “no preservative” claim. The panel must therefore put itself in the shoes of reasonable consumers to determine the likely consumer takeaway. The panel has determined that the “no preservative” claim would be reasonably interpreted by consumers as confirming the absence of any ingredients that have an antimicrobial effect as used in that product, even if that effect is secondary to other ingredient attributes.

FSIS regulations set the same limits for sodium diacetate when it is used as a flavoring agent or an antimicrobial agent. Additionally, the regulations do not specify a minimum concentration level at which sodium diacetate or sodium lactate may be used as antimicrobial agents.⁵ Perdue conceded that, even in the 2.0% or lower concentrations found in Perdue Short Cuts poultry products, sodium diacetate and sodium lactate have “secondary” antimicrobial effects. The panel believes that reasonable consumers would not expect to have these ingredients in a product labeled as having no preservatives, even if these ingredients could be used at higher concentration levels to achieve greater antimicrobial effect.

Fresh fully cooked

The panel considered use of the word “fresh” in the context in which it appears on Perdue’s labels, with the additional description that the product is “fully cooked.”

NAD precedent indicates that reasonable consumers are likely to interpret “fresh” as meaning that a food is unprocessed and has not been frozen or subjected to other forms of preservation. In this proceeding, no consumer perception evidence was submitted with regard to how consumers reasonably interpret “fresh fully cooked.” The panel believes that reasonable consumers would likely interpret this phrase as meaning that the product was fresh at the time it was cooked and was not subjected to processing other than whatever was involved in cooking. The panel agrees with NAD in this case that reasonable consumers would likely interpret “fresh fully cooked” as meaning that the product does not contain preservatives, and also that the product was not subject to processing such as the high pressure processing used as part of Perdue’s efforts to decrease the growth of pathogens.⁶

Decision

⁵ The research submitted in the record does not clearly establish a minimum percentage of sodium diacetate and sodium lactate that must be present before an antimicrobial effect is achieved, although there is indication that sodium lactate at a 2.0% level has antimicrobial effects.

⁶ The advertising industry self regulatory process does not enforce government labeling regulations or policies. However, it looks to these regulations and policies as useful guides. FSIS policies do not permit use of the word “fresh” to describe any product that has been treated with antimicrobial agents. And while FSIS policies do not specifically prohibit use of the word “fresh” with regard to products subject to high pressure processing, those policies are not intended to provide an exhaustive list of all processing practices that negate describing a product as “fresh.” The panel believes that high pressure processing falls within the general intent of FSIS policies that prohibit use of the word “fresh” in describing processed products.

The panel recommends that Perdue discontinue use of the terms “no preservatives” and “fresh” on meat and poultry products that contain sodium diacetate and/or sodium lactate in concentrations sufficient to have any antimicrobial effects. The panel also recommends that Perdue discontinue use of the term “fresh” on meat and poultry products that have been subjected to high pressure processing.

Advertiser Statement

Perdue Farms, Inc. respectfully disagrees with the NARB decision and is particularly concerned with the ongoing uncertainty it introduces into the FSIS label approval function. Nevertheless, we respect the voluntary process and appreciate the Panel’s consideration. We are proceeding with plans to reformulate the products in question and will carefully consider the decision in our development of future advertising.