

# Florida Citrus Packers

*a non-profit co-operative association*

"Since 1960"

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RICHARD KINNEY  
Executive Vice President

January 5, 2004

Dockets Management Branch (HFA-305)  
Food and Drug Administration  
Room 1061  
5630 Fishers Lane  
Rockville, MD 20852

Re: Docket No. 02N-0209, Request for Comments on First Amendment Issues,  
67 Fed. Reg. 34,942, May 16, 2002

Dear Sir or Madam:

Florida Citrus Packers offers comments on the Food and Drug Administration request for First Amendment issues regarding Tropicana Products, Inc. submission on the use of the term "fresh" on pasteurized NFC juices. We realize that the comment period is closed but only recently were we made aware of its significance and potential effect on the market and our segment of the business.

Florida Citrus Packers is a non-profit trade association representing the fresh commercial citrus industry. Our growers and packers ship approximately 55 million 4/5-bushel cartons annually --- fresh oranges, grapefruit and tangerines. There are almost 100 fairly large packinghouses in Florida employing some 15,000 harvesters, graders, packing and production personnel. Depending on the season, we represent 5 to 8 percent of Florida's 10 - 12 million metric tons of citrus production and movement annually. The Florida Citrus Packers along with the Florida Gift Fruit Shippers Association represent many truly fresh and fresh squeezed non-pasteurized citrus producers.

The Food and Drug Administration (FDA) has the unenviable task of reviewing and considering the meaning of "fresh". The task is unenviable because of the many attempts to mislead consumers by subtle and deceptive means or language. Certainly, the consumer is well served by FDA maintaining a clear and precise definition of the term for obvious reasons. Misleading terms or mislabeled products have inappropriate and ill-advised advantages in the marketplace. It's therefore essential that the FDA assume its legal authority to maintain product and manufacturer credibility in the marketplace. If the definition of fresh were obscure, ill defined or open to many interpretations, then everyone would be hurt because the word or words would lose their meaning. There would be little or no perceived difference between fresh and processed. Everything would be fresh or fresh-like. Marketers would define their own terminology.<sup>1</sup> Accordingly, we concur with

<sup>1</sup> Some sentences, terms and phrases taken from The Packer, Opinion Section, August 21, 2000, article written by Larry Waterfield.

FDA policy that “the term fresh should not be applied to foods which have been subjected to any form of heat or chemical processing.”

**Not From Concentrate (NFC) orange juice is a manufactured product. It may be pasteurized several times (at 200°F), stored for months, essence enhanced, and blended. Can FDA reasonably allow the application of the descriptive term “fresh” to this product?**

The term “fresh” as it applies to oranges, tangerines and grapefruit is a critically important “selling point”. When we in fresh citrus promote our product we necessarily utilize terms and labeling that establish the product’s uniqueness. The term “fresh” is a critically important selling point to Florida citrus growers, packers and shippers. It has equity, it is recognized by the consumer as superior and preferred, having additional health benefits and taste attributes. No wonder so many attempts to use it, borrow it, re-define it have been waged by so many manufacturers. “Fresh” is what all manufactured juices aspire to emulate. It is nonsensical to empower producers of manufactured foods to deceive the consuming public into believing that their products are fresh. The average consumer expects and deserves protection from such practices in matters of health. Manufactures of truly fresh products expect and deserve protection from overtly deceptive product identification that essentially steals the identity, equity and economic viability of their products. More specifically, we believe the use of the term “fresh squeezed – pasteurized” would falsely represent, suggest, and contribute to the impression that NFC is in fact “fresh.” We believe that if its pasteurized, it is no longer fresh. This is contradiction in terms.

We cite two cases below that concur with the premise that “fresh” should be narrowly defined. Coca-Cola Co. v. Tropicana Products, Inc., 690 F2d. 312 (1982) decided by the 2<sup>nd</sup> Circuit Court of Appeal (New York), which prohibited Tropicana from representing in its advertising that its product contained only “fresh-squeezed, unprocessed juice,” when it had in fact been pasteurized.

On May 27, 1987, U.S. District Judge William Terrell Hodges, issued an injunction in the case of Tropicana Products, Inc., v. Citrus World, Inc., United States District Court, Middle District of Florida, Case No. 87-648 Civ-T-010, prohibiting Citrus World, Inc. from marketing pasteurized orange juice under the trademark “Fresh N’ Natural Brand” and must remove the suggestion of inference that the product was “fresh.” The amended labels, which the federal court approved, describe the product as “pasteurized” and do not show juice flowing from the fruit into a container.

From the two cited cases, it appears that the Courts will not permit the use of the word “fresh” in advertising or the use of a trademark, which represents orange juice as “fresh” when it is in fact a pasteurized product.<sup>2</sup>

Legal counsel for Tropicana has attempted to support arguments for “fresh” to be applied to not-from-concentrate orange juice by suggesting it is similar to milk i.e., all milk is pasteurized therefore the consumer has no other market choice and there is no need to have

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<sup>2</sup> Legal references from J. Harden Peterson, Jr., to Department of Citrus, June 10, 1987.

a point of differentiation. To the contrary, citrus is offered to consumers in many forms – fresh fruit, fresh cut segments, fresh squeezed, and pasteurized products. The suggestion that NFC is the same as fresh attempts to make a complicated case against simple fact --- pasteurized NFC is not fresh. Accepting such a basis for a change in policy would suggest there is little or no difference in “fresh” product and pasteurized... however, various nutritional studies have indicated that fresh product and pasteurized product are different. For example, let’s consider vitamin C, folic acid, and antioxidant attributes of fresh and processed orange juice... in a study conducted by Carol S. Johnston, Arizona State University East, Department of Nutrition, and published in *Beverages in Nutrition and Health*, she states,

*There are many bioactive components present in citrus fruits, including vitamins, ascorbic acid (vitamin C), and folic acid; phytochemicals, flavonoids, and limonoids; citric acid; and dietary fiber. The antioxidant capacity of citrus is attributed to vitamin C and flavonoids. The vitamin C content of orange juices and oranges can be compared using food composition tables, and published ORAC values provide an indication of the potential antioxidant benefit of oranges and orange juice. Fresh orange juice 8 fl. oz. Or 248 mL) is a concentrated source of vitamin C, containing 50% more than a single orange. Similarly, the antioxidant capacity of fresh orange juice is higher than that of a single orange. Orange juice processing (pasteurization and storage), however, reduces its vitamin C content (frozen reconstituted juice, chilled juice in plastic tubs, chilled juice in cartons), as well as its antioxidant capacity.....*

*Orange juice is the leading dietary source of vitamin C for Americans; hence, the consumption of highly processed orange juice may affect Americans’ vitamin C status. Interestingly, the prevalence of vitamin C deficiency in Americans has increased from 5% to 11 – 16% during the last 20 years. Because Americans consume more fruits and vegetables today than they did 20 years ago, the increased prevalence of vitamin C deficiency is likely a reflection of food choices and, perhaps, food processing, notably orange juice processing. As a side note, orange juice is also an important source of folic acid, and, similar to vitamin C, folic acid levels in chilled orange juice are reduced 50% compared to fresh orange juice.*

Thermal pasteurization results in denaturing and inactivating many enzymes that are naturally present in fresh juice. An article published in 2001 on flavonoids indicates that about 40% of the total phenolic content of orange juice is lost during pasteurization.<sup>3</sup> Certainly, pasteurization alters flavor components as well.

Recent field studies and retail grocer interviews, conducted by Citrus Grower Associates, Inc., found that consumers assign multiple meanings to the term fresh. Consumers believe and expect that something labeled fresh, has not been manufactured, altered or treated for shelf life extension. Furthermore, “fresh” products are believed to be a more healthy alternative to manufactured, altered or treated products. Evidence points to significant nutritional differences between the products that cannot be ignored. When the term “squeezed” is added behind the word “fresh”, consumers attribute an entirely new meaning to the product. “Fresh Squeezed” is perceived to have a time element that is not as closely associated with products simply labeled “fresh”. Thus, the artificial term “Fresh Squeezed – Pasteurized” would seem to be doubly confusing and exponentially as misleading when applied to a manufactured product. Pasteurized juice packaged in a carton and sold at retail, is not “fresh” in the sense of nutrition, health or time.

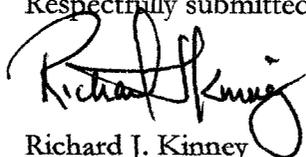
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<sup>3</sup> *In vitro* availability of flavonoids and other phenolics in orange juice, J. Agric. Food Chem, 2001, 49, 1035 - 1041

We believe this and other research is compelling and strongly supports current FDA policy that the consumer should not be confused further by obscuring the meaning of fresh, subjecting the term to numerous interpretations, especially as it applies to fresh citrus products and pasteurized juice.

“Fresh squeezed – pasteurized” is an extreme conflict in terms. This term is akin to stating that rough-cut lumber is smoothly finished. It not only makes no logical sense, it is contradictory. Allowing such terminology as “Fresh Squeezed – Pasteurized” on NFC juices would be a disservice to consumers and the fresh citrus industry, as well as a violation of current FDA policy and legal precedent. We respectfully request FDA reject the Tropicana petition for use of the term “fresh” on a manufactured product.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Richard J. Kinney". The signature is stylized with a large, looping initial "R".

Richard J. Kinney  
Executive Vice President  
Florida Citrus Packers