

## Dole Beats 'All Natural' Fruit Labeling Class Action

By David Siegel

*Law360, New York (December 09, 2014, 1:28 PM ET)* -- A California federal judge handed a pretrial victory to Dole Foods Co. Inc. on Monday in a class action accusing the company of mislabeling its products as "all natural fruit," ruling that the labels are not likely to deceive consumers.

Plaintiff Chad Brazil alleged that Dole misrepresented that its frozen berry and other mixed fruit products contain all natural ingredients — both on the products' labels and on the company's website. Under U.S. Food and Drug Administration policies, use of the term "natural" on a food product's label means nothing synthetic or artificial has been added, but Dole uses artificial citric acid and ascorbic acid as chemical preservatives, according to Brazil's suit.

Dole argued in a motion for summary judgment that its "all natural" labels refer only to the actual fruit used. It also claimed that all of its ingredient suppliers said they only used natural fermentation to make the additives in its fruit products, and that customers could reasonably expect citric and ascorbic acids to be included in foods purported to contain no synthetic ingredients.

U.S. District Judge Lucy Koh agreed and granted Dole's motion for summary judgment, thus disposing of Brazil's claims.

"Brazil has offered no evidence that citric acid and ascorbic acid, the two allegedly synthetic ingredients found in the challenged Dole products, 'would not normally be expected to be in' those products, as the FDA definition requires," Judge Koh said. "Absent any evidence that reasonable consumers would not normally expect citric acid and ascorbic acid to be found in the challenged Dole products, Brazil cannot rely on FDA's informal policy to show that those consumers were likely to have been misled."

William Stern of Morrison & Foerster LLP, who represents Dole, told Law360 that he thinks Judge Koh's decision could serve as a bellwether in similar suits involving "all natural" claims, noting that the same group of class counsel from the Brazil case has filed 48 cases in the Northern District of California.

Stern said Judge Koh's ruling was the first time a judge made a decision on the merits in an "all natural" labeling case versus other cases that got past a motion to dismiss and were then settled. Manufacturers have paid tens of millions of dollars to settle these claims and to change their labels, Stern said, and it is rare today to find the term "all natural" on a label.

"Brazil marks the first merits ruling defining exactly what it is that plaintiffs in these cases must prove,"

Stern said. "The bar Brazil sets is a high one."

Stern said the hundreds of lawsuits in recent years over "all natural" labeling is the result of an ambiguity of the FDA's making because the agency espoused an informal "natural" policy two decades ago but never defined exactly what that term means. He added that manufacturers petitioned the FDA to clarify that meaning, but the agency declined.

"Plaintiffs lawyers have exploited that ambiguity by trying to get courts to impose their meaning," Stern said.

Judge Koh's ruling was the latest setback in Brazil's attempts to hold Dole accountable for the allegedly misleading labels.

In November, Judge Koh decertified the damages class in the case, ruling that the damages model set forth by Brazil's expert Oral Capps can't measure only the damages attributable to Dole's alleged misbranding. As a result, the model "fails to provide a means of showing damages on a classwide basis through common proof," and Brazil hasn't satisfied Rule 23's requirement that common issues predominate over individual ones, Judge Koh held at the time.

Attorneys for Brazil did not immediately respond to a request for comment Tuesday.

Brazil is represented by Charles Barrett of Charles Barrett PC, Brian Herrington of Barrett Law Group PA and Ben F. Pierce of Pratt & Associates.

Dole is represented by William L. Stern, Claudia M. Vetesi, Kathleen B. Roney and Lisa A. Wongchenko of Morrison & Foerster LLP.

The case is Brazil v. Dole Food Co. Inc. et al., case number 5:12-cv-01831, in the U.S. District Court for the Northern District of California.

--Additional reporting by Jeff Sistrunk. Editing by Andrew Park.