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Food & Consumer Packaged Goods Litigation

Sugar Lawsuit Dismissed on Preemption Grounds

In re Whole Foods Market, Inc., Greek Yogurt Marketing and Sales Practices Litigation, No. 1:14-mc-2588 (W.D. Tex.): In this multidistrict putative class action, Plaintiffs alleged that Defendant Whole Foods Market, Inc. misrepresents its "365 Everyday Value Plain Greek Yogurt" as having two grams of sugar per serving when it contains at least 11 grams of sugar per serving. The Court recently issued an order dismissing Defendant Whole Foods Market, Inc.'s motion to dismiss as moot (on settlement grounds), and granting the remaining Defendants' motion to dismiss with leave to amend. The Court granted the remaining Defendants' motion to dismiss after finding that Plaintiffs' state law claims were expressly preempted by the FDCA. Specifically, the Court agreed with Defendants that Plaintiff had failed to allege that the scientific testing conducted by *Consumer Reports* (upon which the Second Amended Complaint relied) complied with the prescribed testing methodology set forth in the FDA's regulations. The Court found that Plaintiffs had failed to state a claim because they relied *solely* upon the *Consumer Reports* testing, even after affirmatively alleging that it did not follow the applicable protocols. If allowed to proceed on this record, the Court reasoned, Plaintiffs "would impose liability inconsistent with the FDCA." The Court also declined to hear Plaintiffs' spoliation of evidence argument, which accused Defendants of destroying all existing stock of the products at issue. Instead, the Court encouraged Plaintiffs to attempt to obtain FDA-compliant test results from a third party to support their filing of a third amended complaint, and instructed Plaintiffs to raise the issue of spoliation only if they were unable to obtain such results due to destruction of the product at issue. [Order](#).

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