Proskauer

Nothing Fishy About Whole Foods' Fish Oil Supplement Product Label

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In line with prior precedent, the Second Circuit recently affirmed that the product label for Whole Foods' fish oil softgel product did not deceptively misstate the quantity of Omega-3s it contained. *Foster v. Whole Foods Market Group, Inc.*, No. 23-285-cv (2d Cir. Dec. 8, 2023). The Court found that because the front label was merely ambiguous, rather than misleading, the challenged claim was not deceptive because reference to the back label would quickly dispel the plaintiff's alleged confusion.

In *Foster*, the plaintiff alleged she was deceived into believing Whole Foods' fish oil softgel product contained 1000mg of Omega-3s based on the close proximity of the statement "Omega-3s EPA & DHA" above the statement "1000mg Per Serving" on the front label. However, the back label revealed that the product actually contained 1000mg of fish oil, and just 300mg of Omega-3s. In affirming dismissal, the Court noted the product's front label included four subsidiary statements: (1) "Omega-3s EPA & DHA;" (2) "1000mg Per Serving;" (3) "From Small Cold-Water Fish;" and (4) "Molecularly Distilled." The Court acknowledged that while these statements were all in close proximity, the plaintiff had failed to adequately allege that a reasonable consumer would read "1000 mg Per Serving" only in conjunction with the first line referencing Omega-3s, rather than reading each of the subsidiary lines to independently describe the principal label, "Fish Oil." As such, the Court found the plaintiff did not adequately allege a reasonable consumer would be misled.

The Court distinguished this case from its prior holding in *Mantikas v. Kellogg Co.*, 910 F.3d 633 (2d Cir. 2018), which had reversed the dismissal of a false advertising case at the pleading stage. In *Mantikas*, the Second Circuit held that clarifying information on the back label cannot not overcome "clearly inaccurate" factual representations on the front label. Here, the Court found *Mantikas* did not apply because the product label did not include an "affirmatively inaccurate" statement. Rather, because the challenged claim was at most ambiguous, the additional language on the back label of the product could be considered to clarify any arguable ambiguity on the front.

The ruling in *Foster* confirms that where a challenged label claim is merely ambiguous, rather than misleading, a product's front and back labels may both be used to inform consumers regarding the qualities of that product. This is in line with precedent in other Circuits, including recent decisions from the Ninth Circuit.

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- **Baldassare Vinti**
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- **Marielle T. LaBerge**
  Associate