BEFORE THE UNITED STATES
JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

IN RE: BABY FOOD MARKETING, SALES PRACTICES, AND PRODUCTS LIABILITY LITIGATION	MDL No. 2997

BEECH-NUT NUTRITION COMPANY, CAMPBELL SOUP COMPANY, GERBER PRODUCTS COMPANY, THE HAIN CELESTIAL GROUP, INC., NURTURE, INC., PLUM, PBC, AND SPROUT FOODS, INC.'S RESPONSE TO MOTION TO TRANSFER

This proposed multidistrict litigation seeks to consolidate putative class actions filed against many of America's leading baby food companies (the "Underlying Actions"). The plaintiffs in these actions allege that the products at issue are mislabeled because their labels do not inform consumers that their ingredients — including common vegetables, fruits, and grains — contain purportedly "unsafe" levels of naturally-occurring heavy metals. The manufacturers expressly dispute these allegations. They maintain that their products are both safe and properly labeled and that there is no applicable scientific or regulatory basis for the plaintiffs' claims.

The manufacturers' position is consistent with that of the U.S. Food & Drug Administration ("FDA"), which on April 8, 2021 set out its proposed Action Plan for addressing naturally-occurring heavy metals in agricultural products, including baby and toddler foods. The FDA stated that its own testing shows "children are not at an immediate health risk from exposure to toxic elements at the levels found in foods." *See* Ex. A. It also explained that these elements are naturally found in the environment and "enter our food supply through our air, water, and soil" such that there are "limits as to how low these levels can be." *Id.* The FDA explained that the presence of varying levels of heavy metals is unavoidable, and thus to be expected, whether one is eating baby food, consuming fruits or vegetables purchased from a supermarket or farmers' market, or preparing one's own food from produce grown in one's own garden. *Id.* But given the

nutritional value of these products, the safest option — for babies and adults alike — is a varied and balanced diet, not avoiding fruits, vegetables, and grains. *Id.*; *see also* FDA, "The Key To A Well-Balanced Diet Is Eating A Variety Of Healthy Foods," *available at* https://www.fda.gov/media/146439/download (last accessed Apr. 13, 2021).

In the last two months, the Underlying Actions have clustered in a handful of jurisdictions ("home jurisdictions" or "home districts") corresponding to the locations where the respective manufacturers are headquartered — or, in the case of Gerber Products Company ("Gerber"), where it was headquartered until recently. In most cases, the plaintiffs in the Underlying Actions have filed single-defendant cases in one or more manufacturers' home districts. In most jurisdictions, the bulk (if not all) of the Underlying Actions against any given at-home defendant have been consolidated before a single judge. And the defendants are in the process of moving the rest of the Underlying Actions into their home jurisdictions — whether by voluntary agreement with the plaintiffs or via motions to transfer (and to sever claims against multiple defendants, if needed).

There is no need for this Panel to centralize all of the Underlying Actions into a single multidistrict litigation. The actions against each of the respective manufacturers can be litigated far more efficiently in a single court before a single judge in that defendant's home district, which is preferable to establishing an industry-wide multidistrict litigation cluttered with different claims against various combinations of named defendants. And there are obvious "alternatives to centralization," such as intra-district consolidation and transfer of cases under Section 1404, that obviate the need for a multidistrict litigation — just as this Panel suspected. *See* Docket No. 3.

Centralization is particularly inappropriate here because the defendants are competitors who have sourced, manufactured, marketed, packaged, labeled, advertised, and sold hundreds of different products under different brands and product lines. These products contain different

ingredients from different growers, are manufactured in different facilities, and are labeled and advertised differently. Centralizing all of the Underlying Actions before a single judge would have the opposite result envisioned by Section 1407: it would lead to substantial inefficiencies as a single court attempts to grapple with the unique, unrelated facts for each defendant, thereby delaying adjudication of the central merits issues. This Panel routinely declines similar requests for industry-wide consolidation, and it should do so here.

In addition to the putative class actions identified by the proponents of this multidistrict litigation (the "*Albano* Plaintiffs"), there are two individual (non-class action) personal injury claims that have been filed in federal courts. Notably, the *Albano* Plaintiffs have not proposed to include any individual, non-class, personal injury actions in the proposed MDL, and for good reason.[1] Personal injury claims involve a host of complex and medical scientific issues that go well beyond, and are not implicated by, the false advertising class actions. Moreover, by their nature, these personal injury lawsuits will hinge on questions of causation and injury that will vary from product to product and from plaintiff to plaintiff. These lawsuits can be adjudicated separately, and there is no need to include them in any potential MDL of putative class actions asserting false advertising claims. The defendants stand ready to coordinate discovery across all the cases and share discovery that is generated by the individual defendants in their home-court consolidated actions (or any false advertising MDL), eliminating any potential rationale for joining these personal injury cases in a multidistrict litigation.

Finally, if the Panel is inclined to consolidate some or all of the Underlying Actions into a single multidistrict proceeding, defendants respectfully suggest that the Panel should assign the

[1] Nevertheless, on March 17, 2021, the plaintiffs in *AG, et al. v. Plum, PBC, et al.* (N.D. Cal. Case No. 4:21-cv-01600), a non-class, personal injury action, filed a notice of potential tag-along action. *See* Docket No. 15.

proceeding to one of the following judges: the Honorable Noel Hillman of the District of New Jersey; the Honorable Mary Kay Vyskocil of the Southern District of New York; or the Honorable Thomas McAvoy of the Northern District of New York. If the Panel is reluctant to assign the MDL to Judge McAvoy due to his senior status, defendants propose the Honorable Brenda K. Sannes as an alternative to Judge McAvoy. All four judges are distinguished, capable judges, and three of the four — Judge Hillman, Judge Vyskocil, and Judge McAvoy — currently preside over a critical mass of "baby food" cases within their respective districts. None of these jurists currently presides over an MDL, and all of these judges are located in geographically central locations that are convenient for the parties and their counsel. All of these factors weigh heavily in favor of designating one of these judges as the transferee judge.

BACKGROUND

I. Summary of the Underlying Actions.

On February 4, 2021, the U.S. House Subcommittee on Economic and Consumer Policy issued a report (the "Report") concerning purportedly excessive and undisclosed levels of heavy metals, including arsenic, cadmium, lead, and mercury, in many baby and toddler foods. The Report selectively cited information provided by many of America's leading manufacturers of baby and toddler foods, including Beech-Nut Nutrition Company ("Beech-Nut"), Gerber Products Company ("Gerber"), The Hain Celestial Group, Inc. ("Hain Celestial"), Nurture, Inc. ("Nurture"), Campbell Soup Company ("Campbell") and its subsidiary Plum, PBC ("Plum"),[2] and Sprout Foods, Inc. ("Sprout"). All of these manufacturers dispute the purported findings of the Report.

[2] Since 2013, Plum has operated as an indirect wholly-owned subsidiary of Campbell. Some of the Underlying Actions involving products sold under the Plum brand identify both Campbell and Plum as defendants, while others only name Plum. On March 31, 2021, Sun-Maid Growers of California announced it had acquired Plum from Campbell. Closure of the sale remains pending.

The day after the House Subcommittee issued its Report, plaintiffs began filing lawsuits. To date, the vast majority of these lawsuits are putative class actions that assert false advertising, breach of warranty, and consumer fraud claims on behalf of one or more putative classes of consumers against a single defendant. These lawsuits collectively challenge the labeling of hundreds of baby food products sold under many different product lines and manufactured by over half a dozen different companies.

In some cases, the plaintiffs allege that the manufacturers "misrepresented" their products as healthy in light of the allegedly "dangerous" levels of heavy metals found in these products. In other cases, the plaintiffs allege that the products are mislabeled because they fail to disclose the presence of (naturally occurring) heavy metals or the purported "risks" associated with their consumption. Based on these allegations, the plaintiffs assert various statutory and common-law claims on behalf of putative class members — who collectively encompass all consumers in the United States who bought any baby or toddler food product manufactured by any defendant. The manufacturers dispute these allegations, deny that their labeling and marketing practices are false or misleading in any way, and maintain that their products are accurately and properly labeled.

As explained in more detail below, the Underlying Actions have largely consolidated themselves in a handful of districts corresponding to the manufacturers' home districts. Nineteen of the Underlying Actions are pending in the Eastern District of New York, where Hain Celestial is located; 12 are pending in the District of New Jersey, where both Campbell and Plum are currently headquartered and where Gerber was formerly headquartered; 13 (soon to be 14) are pending in the Northern District of New York, where Beech-Nut is headquartered; and nine of the Underlying Actions are pending in the Southern District of New York, where Nurture is currently headquartered. Moreover, each manufacturer has initiated efforts to transfer cases filed in other

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