BEFORE THE UNITED STATES
JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

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

INTERESTED PARTY WALMART INC.'S RESPONSE TO PLAINTIFFS' MOTION FOR TRANSFER OF ACTIONS TO THE EASTERN DISTRICT OF NEW YORK PURSUANT TO 28 U.S.C. § 1407

Defendant Walmart Inc. ("Walmart") joins the *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*, MDL No. 2997, ECF No. 3 (the "Joint Opposition"), and submits this Interested Party Response (the "Response") to *Plaintiffs' Motion for Transfer of Actions to the Eastern District of New York Pursuant to* 28 U.S.C. § 1407, MDL No. 2997, ECF No. 1 (the "Motion").

INTRODUCTION

Since three plaintiffs in one case (the "*Albano* Plaintiffs") moved to consolidate what is now nearly 90 different lawsuits against a multitude of defendants asserting claims under the laws of numerous jurisdictions (the "Underlying Actions"), plaintiffs and defendants across the universe of Underlying Actions have opposed the Motion. For good reason—centralization of the Underlying Actions is inappropriate and does not achieve any of the objectives for which 28 U.S.C. section 1407 or Rule 6.2(a) of the Rules of Procedure of the United States Judicial Panel on Multidistrict Litigation were enacted. Each Underlying Action presents complex, individualized questions that outweigh potential common questions, and centralization will not further the convenience of the parties or witnesses, or advance the just and efficient conduct of the Underlying Actions. Further, parties to the respective Underlying Actions are already working to consolidate

and coordinate aspects of those proceedings within the individual districts where they are pending, obtaining any efficiencies to be had through centralization in a single multidistrict litigation ("MDL").

Even if this Panel is inclined to grant the Motion, the Walmart Actions (defined below) should be excluded. Unlike every other defendant in the Underlying Actions—and notwithstanding mistaken allegations in several complaints to the contrary—Walmart does not manufacture any of the baby food products at issue in the Underlying Actions. To the contrary, Walmart is a retailer only. Including a retailer in a manufacturer MDL would add unnecessary complexity to what is already likely to be an unwieldy litigation. Further, Walmart is named in only two of the nearly 90 Underlying Actions; in one of those, Walmart is the sole defendant, and in the other, the plaintiff seeks damages for personal injuries that are highly individualized and unique to that plaintiff. Thus, even if this Panel centralized the Underlying Actions, the Walmart Actions can and should be excluded.

BACKGROUND

As a grocer/retailer, Walmart sells a number of infant and baby food products in its stores, including its private label Parent's Choice and Parents' Choice Organic brand infant and baby food. Walmart does not manufacture Parent's Choice or any other baby food products, including those at issue in the Underlying Actions.

The Underlying Actions commenced after The U.S. House of Representatives Subcommittee on Economic and Consumer Policy, Committee on Oversight and Reform ("Subcommittee") released a report on heavy metals in baby foods on February 4, 2021, which focused overwhelmingly on manufacturers of baby food products. The report's discussion of Walmart was largely limited to a reference to two Parent's Choice products, neither of which was

alleged to have violated any food safety regulations or guidance relating to heavy metals.[1] As of the date of this filing, nearly 90 Underlying Actions have been filed.

On March 8, 2021, the *Albano* Plaintiffs filed the Motion. At that time, Walmart had not been named as a defendant in any Underlying Action. Since then, Walmart has been named in two cases that have been tagged for inclusion if an MDL is formed: (1) *Shipra Kochar v. Walmart, Inc.*, Case No. 3:21-cv-02343-JD (N.D. Cal. Mar. 31, 2021) ("*Kochar*"); and (2) *IM, individually and represented by her mother and guardian ad litem Allison Ibert v. Plum, PBC, et al.*, Case No. 4:21-cv-02066-YGR (N.D. Cal. Mar. 24, 2021) ("*IM*" and together with *Kochar*, the "Walmart Actions")[2]. *Kochar* is a putative class action in which plaintiff alleges fraud-based and consumer-protection claims against Walmart. No other defendants are named in that suit. In *IM*, plaintiff

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[1] On August 16, 2018, consumerreports.org ("Consumer Reports") reported that 50 packaged baby foods, only one of which was a Parent's Choice baby food product sold by Walmart, contained at least some detectable amount of arsenic, mercury, cadmium, and lead—naturally occurring elements found in food, water, air, and soil. In October 2019, the advocacy group Healthy Babies Bright Futures ("Healthy Babies") released a report regarding the presence of four heavy metals (arsenic, lead, cadmium, and mercury) in 168 individual baby food items sold under 61 brand names by 17 retailers. Only seven of those 168 items were Parent's Choice products. The Subcommittee report referenced two of the products identified in the Healthy Babies' Report in its discussion of Walmart.

[2] Walmart is also the sole defendant in two additional lawsuits, neither of which has been designated a tag-along action as of the date of this filing: (1) *Teresa Wilson, et al. v. Walmart, Inc.*, Case No. 3:21-cv-00082-DPM (E.D. Ark. Apr. 28, 2021) ("*Wilson*"), and (2) *Asha Davis, on behalf of herself and all others similarly situated v. Walmart, Inc.*, Case No. 3:21-cv-03674 (N.D. Cal. May 17, 2021) ("*Davis*"). In *Wilson*, plaintiffs assert twelve causes of action against Walmart Inc. on behalf of themselves and a putative nationwide class and ten subclasses of similarly situated individuals from ten states. In *Davis*, the plaintiff asserts five causes of action against Walmart Inc. on behalf of herself and a putative nationwide class and two subclasses of similarly situated individuals from seven states. Both *Wilson* and *Davis* are premised on allegedly misleading, deceptive and unfair business practices with respect to marketing, advertising, labeling, packaging, and sale of baby food products. Walmart also was named as a defendant in *Jenna Johnson, on behalf of herself and all others similarly situated v. Beech-Nut Nutrition Co., et al.*, Case No. 2:21-cv-02096-EFM-JPO (D. Kan.), but the plaintiff voluntarily removed Walmart as a defendant in her amended complaint.

alleges strict products liability and negligence claims against Walmart and several baby food manufacturers, including Plum, PBC, Hain Celestial Group, Inc., Gerber Products Company, Nurture, Inc., Beech-Nut Nutrition Company, and Sprout Foods, and claims that consuming defendants' baby food products caused plaintiff to suffer physical injury and bodily impairment. *See IM*, ECF No. 1 ¶¶ 81-86.

ARGUMENT

I. A SINGLE MDL INVOLVING COMPETING AND CROSS-SECTOR DEFENDANTS IS INAPPROPRIATE.

A. Individualized Issues Outweigh Common Questions and Render Centralization Inefficient and Wasteful.

Section 1407 permits centralizing proceedings only upon a determination that centralization "will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions." 28 U.S.C. § 1407(a). This Panel has rejected requests to centralize cases exactly like the Underlying Actions because individualized issues predominate over potential common questions across the cases, rendering centralized proceedings inefficient and wasteful. *See* 28 U.S.C. § 1407. Walmart agrees with the Joint Opposition that stark differences among the Underlying Actions are precisely why the Panel should be hesitant to centralize litigation against multiple, competing defendants involving different products. *See* Joint Opposition at 12-14.

For example, in *In re Credit Card Payment Prot. Plan Mktg. & Sales Practices Litig.*, 753 F. Supp. 2d 1375 (J.P.M.L. 2010), the Panel declined to centralize litigation over allegedly deceptive marketing of defendants' debt cancellation and/or suspension products because each case involved "different credit card issuers regarding different products," each of which were "marketed in different ways and subject to different disclosures." *Id.* at 1375-76. Similarly, in *In re Tropicana Orange Juice Mktg. and Sales Practices Litig.*, 867 F. Supp. 2d 1341 (J.P.M.L.

2012), this Panel declined to centralize claims against multiple manufacturers and retailers of not-from-concentrate orange juice because the actions involved "different products, subject to potential different methods of pasteurizing and processing, different advertisements, and different putative classes of consumers who purchased each product." *Id.* at 1342. The same result is warranted here.

The Underlying Actions involve dozens of different baby foods, manufactured by competing defendants, using raw ingredients from different sources, marketed to distinct age groups, with different packaging and advertising in states across the country. Further, each plaintiff's alleged damages—which differs depending on the type of baby food, when and how much was consumed, and each baby's underlying health—and allegedly misleading marketing and labeling, are also highly individualized. These case-specific issues render the Underlying Actions "markedly different" from other litigation this Panel has previously centralized. *See, e.g., In re Yellow Brass Plumbing Component Prods. Liab. Litig.*, 844 F. Supp. 2d 1377 (J.P.M.L. 2012) (denying centralization of actions against competing defendants that manufactured multiple products); *In re Ambulatory Pain Pump-Chondrolysis Prods. Liab. Litig.*, 709 F. Supp. 2d 1375 (J.P.M.L. 2010) (denying centralization because "individual issues of causation and liability continue to appear to predominate" where different manufacturers crafted different products and plaintiffs have different medical histories).

Centralization also is inappropriate because there are significant variations among the law that potentially applies in each Underlying Action. In *In re Title Ins. Real Estate Settlement Procs. Act (RESPA) & Antirust Litig.,* 560 F. Supp. 2d 1374, 1376 (J.P.M.L. 2008), the Panel rejected centralizing 25 actions because the related cases "encompass[ed] different regulatory regimes in the states in which actions [were] pending along with variances in insurance regulation and law in

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