

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK**

NICOLE STEWART, ELIZABETH
AGRAMONTE and SUMMER APICELLA,
on behalf of themselves and all others similarly
situated,

Plaintiffs,

-against-

HAIN CELESTIAL GROUP, INC.,

Defendant.

CASE NO.

2:21-cv-00678-JS-AYS

**MEMORANDUM OF LAW IN SUPPORT OF GERBER PRODUCTS COMPANY'S
MOTION TO INTERVENE FOR THE LIMITED PURPOSE OF ADDRESSING AND
OPPOSING PLAINTIFFS' MOTION TO CONSOLIDATE**

Gerber Products Company ("Gerber"), respectfully submits this Memorandum of Law in support of its Motion to Intervene in this action (the "Action") for the sole purpose of opposing Plaintiffs' pending motion to consolidate (the "Consolidation Motion") (Dkt. No. 6) as it relates to Gerber.

PRELIMINARY STATEMENT

The Consolidation Motion seeks to consolidate all of the actions pending against Hain Celestial Group, Inc. ("Hain") in the Eastern District of New York stemming from a report issued by a Subcommittee of the U.S. House of Representatives on February 4, 2021 (the "Subcommittee Report"), relating to the alleged presence of heavy metals in certain baby food products. Gerber is an interested party in this Action because the Consolidation Motion, if granted, would consolidate at least three actions in which Gerber is a named defendant with the actions pending (largely only) against Hain in this Court. *See Walls v. Beech-Nut Nutrition Co., et al.*, No. 1:21-

cv-00870 (“*Walls* Action”); *Albano, et al. v. Hain Celestial Group, Inc., et al.*, No. 2:21-cv-01118 (“*Albano* Action”); and *Lawrence v. Hain Celestial Group, Inc., et al.*, No. 21-cv-01287 (“*Lawrence* Action”). Gerber files this motion to inform the Court that it intends to move to sever the claims asserted against it, in this and other districts, stemming from the Subcommittee Report, including in the *Walls*, *Albano*, and *Lawrence* Actions, and to transfer those claims to the District of New Jersey where there currently are five cases stemming from the Subcommittee Report pending against Gerber. Gerber opposes the Consolidation Motion to the extent it seeks to consolidate the claims asserted against Gerber in the *Walls*, *Albano*, and *Lawrence* Actions, and any subsequently filed or transferred action against Gerber that the Consolidation Motion requests to consolidate with the actions pending against Hain in this Court.

BACKGROUND

The Hain EDNY Cases. The Consolidation Motion seeks to consolidate this Action with the *Walls* Action, the *Albano* Action, and at least six other cases,¹ as well as any subsequently filed or transferred related actions, including the *Lawrence* Action (together, the “Hain EDNY Cases”). Gerber is not a party to any action that is subject to the Consolidation Motion, other than the *Walls*, *Albano*, and *Lawrence* Actions.

Allegations in the Hain EDNY Cases. The Hain EDNY Cases all allege that Hain’s baby food products are tainted with toxic heavy metals, including arsenic, lead, cadmium, and mercury. These allegations resulted from the Subcommittee Report, relating to the alleged presence of heavy metals in certain baby food products. There have been numerous lawsuits filed around the country

¹ The other cases are captioned: *Bredberg et al. v. The Hain Celestial Group, Inc.*, No. 2:21-cv-00758; *Mays v. Hain Celestial Group, Inc.*, No. 2:21-cv-00805; *Boyd v. Hain Celestial Group, Inc.*, No. 2:21-cv-00884; *McKeon et al. v. Hain Celestial Group, d/b/a Earth’s Best Organics*, No. 2:21-cv-00938; *Baumgarten v. The Hain Celestial Group, Inc.*, No. 2:21-cv-00944; and *Willoughby v. Hain Celestial Group, d/b/a Earth’s Best Organics*, No. 2:21-cv-00970.

against various baby food manufacturers based on the same allegations contained in the Subcommittee Report.

The *Walls*, *Albano*, and *Lawrence* Actions are the only Hain EDNY Cases that also allege claims against Gerber. In fact, the Consolidation Motion does not even mention any of the complaints’ allegations against Gerber, instead describing the Hain EDNY Cases as “alleg[ing] that certain of *Hain*’s baby food products (the ‘Tainted Baby Foods’) are and were tainted with significant and dangerous levels of toxic heavy metals,” and that “*Hain* misrepresented or omitted disclosure of this fact from consumers.” (Dkt. No. 6 at 1-2 (emphases added).)

Sever and Transfer Motions. The first-filed action against Gerber related to the subject matter of the Subcommittee Report, to the best of Gerber’s knowledge, was filed on February 5, 2021, in the District of New Jersey, and is pending before Judge Claire C. Cecchi. *Shepard v. Gerber Products Company*, No. 2:21-cv-01977 (D.N.J.) (“*Shepard* Action”).² At least four other cases since *Shepard* have been filed against Gerber in the District of New Jersey and are all pending before Judge Cecchi. (*Moore v. Gerber Products Company*, No. 2:21-cv-02516 (“*Moore* Action”); *Wallace et. al. v. Gerber Products Company, et. al.*, No. 2:21-cv-02531 (“*Wallace* Action”); *Cantor, et. al. v. Gerber Products Company*, No. 2:21-cv-03402 (“*Cantor* Action”); and *Pierre-Louis v. Gerber Products Company*, No. 2:21-cv-4791 (“*Pierre-Louis* Action”) (together, the “New Jersey Gerber Actions”)).

The plaintiffs’ joinder of Gerber in the *Walls*, *Albano* and *Lawrence* Actions is improper. By asserting claims against all of the defendants in each of those actions, those plaintiffs have failed to comply with Rule 20(a)(2) of the Federal Rules of Civil Procedure, which provides, in

² On March 12, 2021, plaintiffs in the *Shepard* Action filed a motion to consolidate the New Jersey Gerber Actions before Judge Cecchi in the District of New Jersey.

relevant part, that claims that do not arise out of the same transaction or occurrence should not be joined in one lawsuit. None of the plaintiffs in any of the Hain EDNY Cases that are subject to the Consolidation Motion allege any facts that could establish that the defendants acted pursuant to a common scheme or plan. Nor do they allege that defendants are jointly and severally liable for the plaintiffs' alleged damages. The plaintiffs fail to allege any facts that show a necessary relationship between the defendants; if anything, the plaintiffs' allegations make clear that their claims against each defendant are separate and distinct. For that reason, Gerber intends to sever the claims made against it in those and other cases where it is joined with other defendants and transfer those claims to the District of New Jersey.³

Multidistrict Litigation. On March 8, 2021, plaintiffs in the *Albano* Action filed a motion with the United States Judicial Panel on Multidistrict Litigation for consolidation and transfer of the various cases stemming from the House Subcommittee Report ("JPML Motion"). The JPML Motion seeks to transfer all of the "Related Actions"⁴ to the Eastern District of New York. This Action, along with the *Walls*, *Albano*, and *Lawrence* Actions, are subject to the JPML Motion. In its order issuing a briefing schedule on the JPML Motion, the JPML ordered the parties to "address what steps they have taken to pursue alternatives to centralization (including, but not limited to, engaging in informal coordination of discovery and scheduling, and seeking Section 1404 transfer of one or more of the subject cases)." *In Re: Baby Food Marketing, Sales Practices and Products Liability Litigation*, MDL No. 2997 (Dkt. No. 3) (J.P.M.L.).

³ Gerber is prepared to brief this issue in more detail at the Court's direction and convenience.

⁴ The JPML Motion involves at least 43 actions, including 38 proposed class actions, pending in 12 different federal district courts.

STANDARD

A motion to intervene may be granted under Fed. R. Civ. P. 24(b)(1)(B) for anyone who, on timely motion, “has a claim or defense that shares with the main action a common question of law or fact.” In exercising its discretion, the court should consider factors that include

[T]he nature and extent of the intervenors’ interests, the degree to which those interests are adequately represented by other parties, and whether parties seeking intervention will significantly contribute to [the] full development of the underlying factual issues in the suit and to the just and equitable adjudication of the legal questions presented.

Berroyer v. United States, 282 F.R.D. 299, 302-03 (E.D.N.Y. 2012) (internal quotations omitted).

The test is “flexible and courts generally look at all of the factors rather than focusing narrowly on any one of the criteria.” *Mass. Bricklayers and Mason Funds v. Deutsche Alt-A Secs.*, 273 F.R.D. 363, 365 (E.D.N.Y. 2011).

ARGUMENT

The requirements for intervention for the limited purpose of opposing the Consolidation Motion as to Gerber are satisfied here. First, given that Gerber is a party to the *Walls*, *Albano*, and *Lawrence* Actions, which are the subject of the pending Consolidation Motion (Dkt. No. 6), the question of whether consolidation is appropriate as to Gerber presents a “common question of law” and procedure in this Action. In addition, all of the Hain EDNY Cases, including the *Walls*, *Albano*, and *Lawrence* Actions, appear to stem from the Subcommittee Report. (*Albano* Compl. ¶¶ 4, 29; *Walls* Compl. ¶¶ 5, 6, 19-28; *Lawrence* Compl. ¶¶ 1, 28-31; *Bredberg* Compl. ¶¶ 2-5, 23-25, 31; *Mays* Compl. ¶¶ 23, 25; *Boyd* Compl. ¶¶ 7, 8, 27, 30-32; *McKeon* Compl. ¶¶ 9-11, 34-36; *Baumgarten* Compl. ¶¶ 7-11, 15; *Willoughby* Compl. ¶¶ 9-11, 34-36.)

Second, Gerber has an interest in this Action because, if the Consolidation Motion is granted, it will consolidate claims asserted against Gerber with claims that do not pertain to Gerber



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