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**UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY**

KRISTINA VERCELLONO and)	Civil Action No. 09-cv-2350-DMC-MF
DANIEL VERCELLONO,)	
individually and on behalf of all others)	<u>Document Electronically Filed</u>
similarly situated,)	
)	Return Date: September 8, 2009
Plaintiffs,)	
)	Oral Argument Requested
v.)	
)	
GERBER PRODUCTS COMPANY,)	
<i>et al.</i> ,)	
)	
Defendants.)	

**BRIEF IN SUPPORT OF DEFENDANT GERBER
PRODUCTS COMPANY'S MOTION TO DISMISS
PLAINTIFFS' AMENDED CLASS ACTION COMPLAINT**

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PRELIMINARY STATEMENT

Defendant Gerber Products Company (“Gerber” or the “Company”) submits this brief in support of its motion to dismiss plaintiffs Kristina and Daniel Vercellono’s (collectively, “Plaintiffs”) Amended Class Action Complaint (the “Complaint”) in the above-captioned action pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6) and Plaintiffs’ consumer fraud claim pursuant to Fed. R. Civ. P. 9(b).

Plaintiffs’ claims against Gerber suffer from the same fatal deficiencies as their claims against defendant Johnson & Johnson Consumer Companies, Inc. (“J&J”). Thus, this Court should dismiss Plaintiffs’ claims against Gerber for all of the reasons set forth in the brief in support of J&J’s motion to dismiss the Complaint, which J&J filed on August 7, 2009 (the “J&J Brief”). (*See* Docket Item 42-2.) In order to avoid burdening the Court with lengthy and duplicative submissions, Gerber adopts the arguments set forth in the J&J Brief for purposes of this Motion and incorporates that brief by reference herein.

STATEMENT OF FACTS

The facts supporting Gerber’s Motion to Dismiss are similar to those set forth in the J&J Brief. *See* J&J Brief at 2-4. Thus, only Plaintiffs’ allegations that are unique to Gerber are set forth below.

I. Factual Allegations Against Gerber

Plaintiffs allege that “Gerber manufactured, marketed and/or sold Grins & Giggles Milk & Honey Baby Wash” (“Gerber’s Product”) “to Plaintiffs and Class Members during the relevant period.” Compl. ¶ 11. Based solely upon purportedly “independent laboratory tests” that were allegedly “commissioned and conducted” by Plaintiffs’ counsel (Compl. ¶ 3), Plaintiffs allege that Gerber’s Product was found to contain trace amounts of two substances: (i) 1,4-dioxane at levels of 9.5 parts per million (“ppm”) and (ii) formaldehyde at levels of 340 ppm (*see* Compl. ¶ 57).

The Complaint alleges that Gerber and the other named defendants (collectively, “Defendants”) “represented that the products they marketed, distributed, promoted, sold, and/or made were safe for children,” even though those products were allegedly “contaminated with toxic chemicals linked to increased cancer risk, adverse skin reactions, and other serious problems.” Compl. ¶ 2. With respect to Gerber, the Complaint alleges that the Company marketed its Product as: (i) being “Tear Free, Gentle and Mild, and Hypoallergenic”; (ii) containing “a blend of natural ingredients to gently cleanse”; and (iii) “giv[ing] parents’ children ‘cuddly soft skin.’” Compl. ¶¶ 55-56. Plaintiffs also allege that Gerber characterized its “iconic ‘Gerber Baby’ logo [as] ‘personif[ying] Gerber’s commitment to happy, healthy babies all over the world.’” Compl. ¶ 56.

II. The Complaint Lacks Any Allegations Of Actual Injury

Although the Complaint alleges that Gerber's Product contained trace levels of certain substances, it does not allege any facts showing that Gerber's Product was actually harmful due to the alleged presence of those substances at the alleged levels. Indeed, aside from vague, general allegations that those substances may present potential risks to exposed individuals, the Complaint fails to allege that Plaintiffs, their children, or anyone else has ever suffered any actual harm as a result of using Gerber's Product. Nor does the Complaint allege that Gerber's Product failed to perform as a bath product. Rather, the Complaint merely alleges that Plaintiffs have suffered "exposure" to formaldehyde and 1,4-dioxane and that they were injured by paying the purchase prices for the Defendants' products. *See* Compl. ¶¶ 109, 123.

Based solely on their vague and conclusory allegations, Plaintiffs assert causes of action against all of the Defendants for breach of warranty, violation of all fifty states' unfair and deceptive trade practices acts, and unjust enrichment.

ARGUMENT

As noted above, the arguments set forth in the J&J Brief filed on August 7, 2009 apply equally to, and fully support, Gerber's Motion to Dismiss. Accordingly, Gerber joins in and incorporates by reference all of the legal arguments and points raised in the J&J Brief and will not restate those arguments

at length. For the Court's convenience, below is a concise summary of the grounds supporting Gerber's motion to dismiss the entire Complaint pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6) and to dismiss Plaintiffs' consumer fraud claim pursuant to Fed. R. Civ. P. 9(b).

I. The Complaint Should Be Dismissed For Lack Of Subject Matter Jurisdiction

Plaintiffs lack standing to bring this action because they fail to allege that they have suffered any injury-in-fact as a result of purchasing or using Gerber's Product. Thus, this Court lacks subject matter jurisdiction over Plaintiffs' claims and should dismiss the Complaint pursuant to Fed. R. Civ. P. 12(b)(1). *See* J&J Br. at 9-16; *see also, e.g., Koronthaly v. L'Oreal USA, Inc.*, No. 07-CV-5588 (DMC), 2008 WL 2938045, at *4-*5 (D.N.J. July 29, 2008). As this Court recognized in *Koronthaly*, which is on all fours with this case, Plaintiffs' mere *speculation* that in the future they, their children, or alleged class members might *potentially* suffer some vague, unspecified harm caused by Gerber's Product is insufficient to establish standing. *See Koronthaly*, 2008 WL 2938045, at *1, *4.

In the absence of any allegations of actual physical harm, Plaintiffs attempt to establish standing by seeking to recover the purchase price of Gerber's Product – if they in fact purchased that product. This Court has previously rejected such efforts to establish standing via “purchase price” theories of injury. *See* J&J Br. at 13-16; *and see Koronthaly*, 2008 WL 2938045, at *4-*5; *see also, e.g.,*

Rivera v. Wyeth Ayerst, 283 F.3d 315, 320 (5th Cir. 2002); *Williams v. Purdue Pharma Co.*, 297 F. Supp. 2d 171, 175-76 (D.D.C. 2003).

II. The Complaint Should Be Dismissed Because Plaintiffs Fail To State A Claim For Relief Under New Jersey Or Nevada Law

This Court should also dismiss Plaintiffs' entire Complaint pursuant to Fed. R. Civ. P. 12(b)(6) and their consumer fraud claim pursuant to Fed. R. Civ. P. 9(b) because they fail to state a claim for relief under New Jersey or Nevada law.¹

A. Plaintiffs' Claims Cannot Be Maintained As Consumer Fraud, Implied Warranty, Or Unjust Enrichment Causes Of Action

All of Plaintiffs' claims against Gerber are based on alleged harm caused by Gerber's Product and, thus, cannot be maintained as consumer fraud, breach of implied warranty or unjust enrichment causes of action. *See* J&J Br. at 18-23. Under New Jersey law, all of a plaintiff's claims based on alleged harm caused by a product are subsumed by the New Jersey Products Liability Act. *See Delany v. Stryker Orthopaedic*, No. 08-CV-03210 (DMC), 2009 WL 564243, at *7 (D.N.J. Mar. 5, 2009) (citing *Repola v. Morbark Indus., Inc.*, 934 F.2d 483, 492 (3d Cir. 1991)); *see also Sinclair v. Merck & Co., Inc.*, 948 A.2d 587, 589-90 (N.J. 2008). Thus, Plaintiffs' claims for breach of implied warranties, violation of the New

¹ As set forth in the J&J Brief, this Court is not required to make a choice of law determination because the outcome of this Motion would be the same under either New Jersey or Nevada law. *See* J&J Br. at 16-17; *see also Slater v. Skyhawk*, 187 F.R.D. 185, 193 (D.N.J. 1999).

Jersey Consumer Fraud Act (“CFA”), and unjust enrichment must be dismissed. *See* J&J Br. at 18-23.

B. Plaintiffs’ Consumer Fraud Claims Should Be Dismissed

Plaintiffs’ consumer fraud claims should also be dismissed because they fail to state a claim for relief under either the New Jersey CFA or the Nevada Deceptive Trade Practices Act (“DTPA”). *See* J&J Br. at 23-27.

Under the New Jersey CFA, Plaintiffs are required to allege that they have suffered an “ascertainable loss.” Plaintiffs, however, do not allege that they have suffered any actual, non-speculative injury caused by Gerber’s representations regarding its product. Plaintiffs’ allegations of “economic loss” based on the purchase price of Gerber’s Product are insufficient. *See id.* at 24-25; *see also, e.g., Bosland v. Warnock Dodge, Inc.*, 964 A.2d 741, 749 (N.J. 2009); *Thiedemann v. Mercedes-Benz USA, LLC*, 183 N.J. 234, 248 (N.J. 2005).

Plaintiffs similarly fail to plead a consumer fraud claim under Nevada’s DTPA because they do not qualify as “victims” under that law and do not allege any non-speculative, recoverable damages. *See* J&J Br. at 24-25; *see also, e.g., Picus v. Wal-Mart Stores, Inc.*, 256 F.R.D. 651, 657 (D. Nev. 2009).

Furthermore, courts routinely hold that the purchase of a product, without more, is insufficient to support a private consumer fraud claim. *See* J&J Br. at

25-26; *see also, e.g., Koronthaly*, 2008 WL 2938045, at *1; *Parker v. Howmedica Osteonics Corp.*, No. 07-02400, 2008 WL 141628, at *8 (D.N.J. Jan. 14, 2008).

Plaintiffs' consumer fraud claims should also be dismissed because Plaintiffs fail to plead those claims with particularity, as required by Fed. R. Civ. P. 9(b). *See* J&J Br. at 27; *see also, e.g., FDIC v. Bathgate*, 27 F.3d 850, 876 (3d Cir. 1994).

C. Plaintiffs' Breach of Warranty Claims Should Be Dismissed

Plaintiffs' claims for breaches of implied warranties under the Uniform Commercial Code should be dismissed because Plaintiffs fail to allege that any actual defect or injury resulted from using Gerber's Product, that the product failed to perform the functions for which it was sold, or that the product has a "particular purpose" that is separate and distinct from the ordinary purpose for which the product is sold. *See* J&J Br. at 28-30; *see also, e.g., Franulovic v. Coca Cola Co.*, No. 07-539, 2007 WL 3166953, at *4-*6 (D.N.J. Oct. 25, 2007).

D. Plaintiffs' Unjust Enrichment Claims Should Be Dismissed

Finally, Plaintiffs' unjust enrichment claims should be dismissed because (i) such claims may be maintained only where there is no adequate remedy at law, which is not the case here, and (ii) Plaintiffs' claims are based solely on the allegations that form the basis for their other claims, which should be dismissed for the reasons stated above. *See* J&J Br. at 30-31; *see also, e.g., In re Wal-Mart*

Wage & Hour Employment Practices Litig., 490 F. Supp. 2d 1091, 1125 (D. Nev. 2007); *Adamson v. Ortho-McNeil Pharm.*, 463 F. Supp. 2d 496, 505 (D.N.J. 2006).

CONCLUSION

For all of the foregoing reasons and the reasons set forth in the J&J Brief, Gerber respectfully requests that the Court enter an order dismissing the Complaint in its entirety.

Dated: August 14, 2009 Respectfully submitted,

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