

**SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION**

THE NATIONAL CONSUMERS LEAGUE,

Plaintiff,

v.

GERBER PRODUCTS CO.,

Defendant.

**Case No. 2014 CA 008202 B
Hon. Anita Josey-Herring
Civil I, Calendar 3
Next Event: TBD**

ANSWER TO SECOND AMENDED COMPLAINT AND AFFIRMATIVE DEFENSES

Defendant Gerber Products Company (“Gerber” or “Defendant”) hereby answers the Second Amended Complaint (the “Complaint”) of plaintiff The National Consumers League (“Plaintiff”) as follows:

INTRODUCTION

1. Paragraph 1 of the Complaint contains an introductory statement to which no response is required. To the extent a response is required, Gerber is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 1 of the Complaint and on that basis denies those allegations in full.

2. Gerber denies the allegations contained in Paragraph 2 of the Complaint.

3. Gerber denies the allegations contained in Paragraph 3 of the Complaint.

4. Gerber denies the allegations contained in Paragraph 4 of the Complaint.

5. Gerber denies the allegations contained in Paragraph 5 of the Complaint.

6. Gerber denies the allegations contained in Paragraph 6 of the Complaint.

7. Gerber denies the allegations contained in Paragraph 7 of the Complaint. In addition, pursuant to the Court's February 3, 2017 Order, Gerber specifically denies that Plaintiff is permitted to bring this action, or seek any relief, on behalf of the "General Public of the District of Columbia," or members of the general public.

8. Gerber denies the allegations contained in Paragraph 8 of the Complaint.

JURISDICTION AND VENUE

9. Paragraph 9 of the Complaint states a legal conclusion to which no responsive pleading is required. To the extent a response is required, Gerber denies the allegations contained in Paragraph 9 of the Complaint.

10. Paragraph 10 of the Complaint states a legal conclusion to which no responsive pleading is required. To the extent a response is required, Gerber denies the allegations contained in Paragraph 10 of the Complaint. In addition, pursuant to the Court's February 3, 2017 Order, Gerber specifically denies that Plaintiff is permitted to bring this action on behalf of "residents of this District."

11. Paragraph 11 of the Complaint states a legal conclusion to which no responsive pleading is required. To the extent a response is required, Gerber denies the allegations contained in Paragraph 11 of the Complaint. In addition, pursuant to the Court's February 3, 2017 Order, Gerber specifically denies that Plaintiff is permitted to bring this action on behalf of "consumers in the District of Columbia."

PARTIES

12. Gerber is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 12 of the Complaint and on that basis denies those allegations in full.

13. Gerber is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 13 of the Complaint and on that basis denies those allegations in full.

14. Gerber denies the allegations contained in paragraph 14 of the Complaint, except admits that Gerber is a Michigan corporation with its principal place of business at 12 Vreeland Road, #2, Florham Park, New Jersey 07932.

15. Gerber admits the allegations contained in paragraph 15 of the Complaint.

THE INTERESTS OF NCL

16. Gerber is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 16 of the Complaint and on that basis denies those allegations in full. In addition, pursuant to the Court's February 3, 2017 Order, Gerber specifically denies that Plaintiff has standing to bring this action on behalf of any other individual or entity.

17. Gerber is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 17 of the Complaint and on that basis denies those allegations in full.

18. Gerber is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 18 of the Complaint and on that basis denies those allegations in full.

19. Gerber is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 19 of the Complaint and on that basis denies those allegations in full.

20. Gerber denies the allegations contained in Paragraph 20 of the Complaint.

FACTUAL BACKGROUND

21. Gerber denies the allegations contained in Paragraph 21 of the Complaint.

22. Gerber admits the allegations contained in Paragraph 22 of the Complaint.

23. Gerber denies the allegations contained in Paragraph 23 of the Complaint.

24. Gerber denies the allegations contained in Paragraph 24 of the Complaint that Gerber® Good Start® Gentle infant formula (hereinafter “Good Start”) “is made with partially hydrolyzed whey proteins,” and states that Good Start contains 100% whey protein partially hydrolyzed. The remainder of Paragraph 24 of the Complaint misstates the manner in which Gerber “advertises” Good Start and on that basis Gerber denies those allegations.

25. Gerber denies the allegations contained in Paragraph 25 of the Complaint. To the extent Plaintiff attempts to characterize the language of any of Gerber’s advertising or marketing relating to Good Start, that advertising speaks for itself.

26. Gerber denies the allegations contained in Paragraph 26 of the Complaint. To the extent Plaintiff attempts to characterize the language of any of Gerber’s advertising or marketing relating to Good Start, that advertising and marketing speak for itself. Furthermore, to the extent Plaintiff attempts to characterize the language of any of communications received from the Food and Drug Administration relating to any petition referenced in Paragraph 26 of the Complaint, those communications speak for themselves.

27. Gerber denies the allegations contained in Paragraph 27 of the Complaint. To the extent Plaintiff attempts to characterize the language of any of Gerber’s “health claims on the packages of [] Good Start,” those claims speak for themselves.

28. Gerber denies the allegations contained in Paragraph 28 of the Complaint. To the extent Plaintiff attempts to characterize the language of any of Gerber's advertisements characterized in Paragraph 28 of the Complaint, those advertisements speak for themselves.

29. Paragraph 29 of the Complaint states a legal conclusion to which no responsive pleading is required. To the extent a response is required, Gerber denies the allegations contained in Paragraph 29 of the Complaint.

30. Paragraph 30 of the Complaint states a legal conclusion to which no responsive pleading is required. To the extent a response is required, Gerber denies the allegations contained in Paragraph 30 of the Complaint.

31. Paragraph 31 of the Complaint states a legal conclusion to which no responsive pleading is required. To the extent a response is required, Gerber denies the allegations contained in Paragraph 31 of the Complaint.

32. Gerber denies the allegations contained in Paragraph 32 of the Complaint. To the extent Plaintiff attempts to characterize the express language and terms of any communication between any entity and FDA as referenced in Paragraph 32, those communications speak for themselves.

33. Gerber denies the allegations contained in Paragraph 33 of the Complaint. To the extent Plaintiff attempts to characterize the express language and terms of any communication between any entity and FDA as referenced in Paragraph 33, those communications speak for themselves.

34. Gerber is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 34 of the Complaint with respect to what the FDA may or may not have reviewed, and on that basis denies those allegations in full.

35. Gerber denies the allegations contained in Paragraph 35 of the Complaint. To the extent Plaintiff attempts to characterize the express language and terms of any communication between Gerber and FDA regarding Good Start as referred to in Paragraph 35, those communications speak for themselves.

36. Gerber denies the allegations contained in Paragraph 36 of the Complaint. To the extent Plaintiff attempts to characterize the express language and terms of any communication between Gerber and FDA as referenced in Paragraph 36, those communications speak for themselves.

37. Gerber denies the allegations contained in Paragraph 37 of the Complaint. In addition, Gerber states that Plaintiff either misstates, mischaracterizes or misconstrues Gerber's claims relating to Good Start.

38. Gerber admits only that it received a warning letter from FDA in 2014 with respect to Good Start as alleged in Paragraph 38 of the Complaint, but denies that Good Start was "misbranded in violation of the Federal Food, Drug and Cosmetic Act." To the extent Plaintiff attempts to characterize the express language and terms of any communication between FDA and Gerber regarding Good Start, that communication speaks for itself.

39. To the extent Plaintiff attempts to characterize the express language and terms of any communication between FDA and Gerber regarding Good Start as alleged in Paragraph 39 of the Complaint, that communication speaks for itself and therefore no responsive pleading is required. To the extent a response is required, Gerber denies the allegations contained in Paragraph 39 of the Complaint.

40. To the extent Plaintiff attempts to characterize the express language and terms of any communication between FDA and Gerber regarding Good Start as alleged in Paragraph 40 of

the Complaint, that communication speaks for itself and therefore no responsive pleading is required. To the extent a response is required, Gerber denies the allegations contained in Paragraph 40 of the Complaint.

41. To the extent Plaintiff attempts to characterize the express language and terms of any communication between FDA and Gerber regarding Good Start as alleged in Paragraph 41 of the Complaint, that communication speaks for itself and therefore no responsive pleading is required. To the extent a response is required, Gerber denies the allegations contained in Paragraph 41 of the Complaint.

42. Gerber denies the allegations contained in Paragraph 42 of the Complaint.

43. Gerber denies the allegations contained in Paragraph 43 of the Complaint.

44. Plaintiff fails to specifically define or reference the “logos” referenced in Paragraph 44 of the Complaint. Accordingly, Gerber denies the allegations contained in Paragraph 44 of the Complaint.

45. Gerber denies the allegations contained in Paragraph 45 of the Complaint.

46. Gerber denies the allegations contained in Paragraph 45 of the Complaint.

44. Gerber denies the allegations contained in Paragraph 44 of the Complaint.

45. Gerber denies the allegations contained in Paragraph 45 of the Complaint.

46. Gerber denies the allegations contained in Paragraph 46 of the Complaint.

47. Gerber denies the allegations contained in Paragraph 47 of the Complaint.

48. Gerber denies the allegations contained in Paragraph 48 of the Complaint.

COUNT I

49. Paragraph 49 of the Complaint contains an introductory statement to which no response is required. To the extent a response is required with respect to any conduct relating to Gerber alleged in the Complaint, Gerber denies those allegations in full.

50. Paragraph 50 of the Complaint contains an introductory statement to which no response is required. To the extent a response is required with respect to any conduct relating to Gerber alleged in the Complaint, Gerber denies those allegations in full.

51. Paragraph 51 of the Complaint contains a legal conclusion to which no response is required. To the extent a response is required with respect to any conduct relating to Gerber alleged in the Complaint, Gerber denies those allegations in full.

52. Gerber denies the allegations contained in Paragraph 52 of the Complaint.

53. Paragraph 53 of the Complaint contains an introductory statement to which no response is required. To the extent a response is required with respect to any conduct relating to Gerber alleged in the Complaint, Gerber denies those allegations in full.

Gerber specifically denies that Plaintiff or anyone else is entitled to any of the relief requested in sections a through e of the WHEREFORE clause of the Complaint.

AFFIRMATIVE DEFENSES

By way of affirmative defenses to the claims for relief alleged in the Complaint, Gerber alleges as follows, without assuming the burden of any such defense or allegation that would otherwise rest on Plaintiff:

FIRST AFFIRMATIVE DEFENSE

The Complaint fails to state a cause of action upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

To the extent that the Complaint seeks any relief on behalf of the General Public of the District of Columbia, or any individual or entity, such claims are barred by the Court's February 3, 2017, Order.

THIRD AFFIRMATIVE DEFENSE

Plaintiff's claims are barred by the applicable statutes of limitations.

FOURTH AFFIRMATIVE DEFENSE

Plaintiff has failed to mitigate its alleged damages.

FIFTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred for lack of standing.

SIXTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred for lack of standing.

SEVENTH AFFIRMATIVE DEFENSE

Plaintiff's claims for injunctive relief are barred because it cannot show that it has suffered or will suffer any irreparable harm from Gerber's actions.

EIGHTH AFFIRMATIVE DEFENSE

Plaintiff's claims for equitable relief are barred because it has an adequate remedy at law.

NINTH AFFIRMATIVE DEFENSE

Had Plaintiff purchased the product at issue in the Complaint for consumption, it would

have received and, in the future, will receive all or substantially all of the benefits from that product that it may purport to have hoped and intended that it would receive. To that extent, any damages that Plaintiff might be entitled to recover from Gerber must be correspondingly reduced.

TENTH AFFIRMATIVE DEFENSE

The advertising and marketing claims challenged by Plaintiff in the Complaint were not material to the purchasing decisions of Plaintiff.

ELEVENTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred because the commercial speech of Gerber was not false, deceptive or misleading and is protected under the First Amendment of the United States Constitution.

TWELFTH AFFIRMATIVE DEFENSE

Plaintiff's claims against Gerber are barred in whole or in part by the doctrine of waiver and/or estoppel.

THIRTEENTH AFFIRMATIVE DEFENSE

Plaintiff's claims against Gerber are barred in whole or in part by the doctrine of acquiescence.

FOURTEENTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred in whole or in part because Plaintiff did not sustain or suffer any injury, damage, or loss of any money or property as a result of any actions allegedly taken by Gerber as alleged in the Complaint.

FIFTEENTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred in whole or in part because Plaintiff enjoyed the full benefit of the product alleged in the Complaint.

SIXTEENTH AFFIRMATIVE DEFENSE

Plaintiff's claims for damages are speculative, remote, or impossible to ascertain, quantify, or allocate and, thus, Plaintiff is barred from asserting any claims for damages against Gerber.

SEVENTEENTH AFFIRMATIVE DEFENSE

Plaintiff's claims for damages are barred to the extent those claims are subject to set-off for the value of the benefits that Plaintiff received regarding the product alleged in the Complaint.

EIGHTEENTH AFFIRMATIVE DEFENSE

The imposition of punitive or exemplary damages against Gerber would violate Gerber's constitutional rights under the Due Process clause of the Fourteenth Amendment to the Constitution of the United States, comparable provisions under state law, common law and public policy, and/or applicable statutes and court rules.

NINETEENTH AFFIRMATIVE DEFENSE

Due to the lack of information as to the matters set forth in the Complaint, and the purported cause of action therein, Gerber has insufficient knowledge or information on which to form a belief as to whether Gerber has additional, as yet unstated, affirmative defenses available. Therefore, Gerber reserves the right to assert additional affirmative defenses in the event that discovery indicates said defenses are proper.

PRAYER FOR RELIEF

Gerber denies that Plaintiff, or anyone else, is entitled to any relief sought in the Complaint and prays for judgment as follows:

- A. That Plaintiff take nothing and be afforded no relief;
- B. That Plaintiff's claims be dismissed with prejudice in their entirety and judgment be entered in favor of Gerber;
- C. That Gerber be awarded its costs and expenses incurred in this action;
- D. For all other relief as the Court may deem just and proper.

Respectfully submitted:

/s/ Joseph D. Wilson

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*Attorneys for Defendant
Gerber Products Co.*

Dated: March 7, 2018

CERTIFICATE OF SERVICE

I certify that on the 7th day of March, 2018, I served a true copy of the foregoing Defendant Gerber Products Co.'s Answer to the Second Amended Complaint by electronic service through the CaseFileExpress filing system for the above-captioned action on the following counsel for this case:

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