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County of San Francisco

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SUPERIOR COURT OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN FRANCISCO

MICHELLE GYORKE-TAKATRI and KATIE SILVER on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

NESTLE USA, INC. and GERBER PRODUCTS COMPANY,

Defendants

CASE NO. CGC 15-546850

CLASS ACTION COMPLAINT FOR:

1. Violation of Consumers Legal Remedies Act (Cal. Civil Code § 1750 et seq.);
2. Violation of Unfair Competition Law (Cal. Bus. & Prof. Code § 17200 et seq.);
3. Violation of False Advertising Law (Cal. Bus. & Prof. Code § 17500 et seq.);
4. Breach of Express Warranty;
5. Breach of Implied Warranty of Merchantability;
- 6) Unjust Enrichment

BY FAX

DEMAND FOR JURY TRIAL

Plaintiffs Michelle Gyorke-Takatri and Katie Silver ("Plaintiffs"), individually and on behalf of all others similarly situated, bring this action against Nestle USA, Inc. and Gerber Products Company ("Gerber" or "Defendants"), because Gerber markets Gerber Graduates Puffs as though they contain significant amounts of the fruits and vegetables vibrantly depicted on its packaging, when in fact Gerber Graduates Puffs contain only trace amounts of those ingredients, or none at all.

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NATURE OF THE ACTION

1. This is a proposed statewide class action for Gerber's false and deceptive¹ practices in deceiving consumers about the fruit and vegetable content and the nutritional and health qualities of Gerber Graduates Puffs.

2. From January 1, 2011 to the present (the "Class Period"), Gerber made false and deceptive representations that Gerber Graduates Puffs and Gerber Graduates Organic Puffs ("Puffs" or "Products") contained significant amounts of the actual fruits or vegetables shown on the label, were nutritious and healthful to consume, and better than similar products.

3. In fact, Gerber's Puffs do not contain any, or significant amounts of, the fruits or vegetables shown on the label. The closest ingredient to fruits or vegetables in the Puffs is little more than a powder ("dried apple puree"). Even then, there is less than one gram of this apple powder in each serving of the Puffs—meaning the Puffs contain much more sugar in each serving than any fruit- or vegetable-like ingredient.

4. Thus, although Gerber markets Puffs as healthful and nutritious, these Products are devoid of the health benefits of consuming fruit or vegetables, and are mostly a combination of flour and sugar.

5. In addition, Gerber violates federal law aimed at preventing consumer deception. 21 C.F.R. section 102.5 requires any company that (1) markets a food based on its fruit or vegetable content if the fruit or vegetable content affects price or consumer acceptance, or (2) chooses to make it appear that there is more fruit or vegetable in the product than is actually the case, to display the true percentage of fruits or vegetables in the product name on the front label. Gerber violates this requirement.

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¹ The terms "deceptive," "deceptively," and "deception" encompass other descriptive terms, including various forms of the words: mislead, misrepresent, untrue, unfair, false, disparage, and unlawful. All of these terms are referenced in California's Civil Code and California's Health and Safety Code.

JURISDICTION

6. This court has jurisdiction over all causes of action Plaintiffs assert, pursuant to California Constitution, Article VI, Sec. 10, because this case involves causes of action not given by statute to other trial courts.

7. Venue is proper in this district pursuant to Code of Civil Procedure section 395 because substantial acts in furtherance of the alleged improper conduct, including the dissemination of false and deceptive information about the Puffs, occurred within this County.

PARTIES

Plaintiffs

8. During the Class Period, Plaintiff Michelle Gyorke-Takatri ("Gyorke-Takatri") was a resident of California and purchased Gerber's Puffs about once a week for herself and her children.

9. During the Class Period, Plaintiff Katie Silver ("Silver") was a resident of California and purchased Gerber's Puffs about once a week for herself and her children

10. Ms. Gyorke-Takatri purchased Apple, Banana, Blueberry, Organic Green Veggies, Sweet Potato, and Vanilla Puffs. Ms. Silver purchased Blueberry Puffs. Both Plaintiffs relied on Gerber's large and prominent representations of fruits or vegetables on front of the Puffs packaging when they decided to purchase the Puffs. The prominent graphics of fresh fruits and vegetables on the front of the Puffs packages led Ms. Gyorke-Takatri and Ms. Silver to believe that the depicted fruit or vegetable was a primary ingredient in the Puffs and that the Puffs were healthy and nutritious. Had Plaintiffs known that the Puffs contained none, or only a tiny amount, of any fruit or vegetable depicted, they would not have purchased the Puffs.

11. Plaintiffs saw and relied on Gerber's deceptive depictions of the ostensibly primary ingredients on the packaging of the Puffs as well as Gerber's widespread advertising and marketing² campaign (such as print magazine and mailer coupons). Gerber's marketing

² The terms "markets" and "marketing" include all forms of advertising in all forms of media, including without limitation, print advertisements, television and radio commercials, packaging and product labels, viral marketing, incentives, and websites.

1 campaign uniformly emphasized fruits and vegetables and represented that the Puffs were nu-
2 tritious, healthful, and better than similar products. Plaintiffs relied on these misrepresentations
3 when they decided to purchase Puffs.

4 12. Gerber's representations are deceptive because Gerber's Puffs are not healthful,
5 do not contain any, or significant amounts of, the fruit or vegetables depicted on the label, and
6 lack significant amounts of any actual fruit or vegetables. Plaintiffs suffered injury because,
7 had they known that Gerber's claims were deceptive, they would not have bought the Puffs at
8 all, and certainly would not have paid a premium price for them.

9 13. Plaintiffs acted as reasonable consumers with respect to their decisions to buy
10 Gerber's Puffs.

11 **Defendants**

12 14. Defendant Nestle USA, Inc. (Nestle USA) is a subsidiary of Nestle SA, a Swiss
13 corporation that does business in this country and touts itself as the world's largest food com-
14 pany.³ Nestle USA controls the practices of Gerber Products Company in this country. Nestle
15 USA is a Delaware corporation headquartered at 800 North Brand Boulevard, Glendale, Cali-
16 fornia 91203.

17 15. Defendant Gerber Products Company is the best-known baby food company in
18 the country. Gerber does business in California and every other state in the country. Gerber is a
19 Michigan corporation headquartered at 12 Vreeland Road, Florham Park, New Jersey 07932.
20 On information and belief, Gerber does business as Nestle Nutrition, Nestle Infant Nutrition,
21 and Nestle Nutrition North America.

22 **FACTS**

23 16. Gerber engages in a widespread and uniform marketing and advertising cam-
24 paign to portray its Puffs as nutritious and healthful. Gerber engages in this deceptive cam-
25 paign to sell Puffs to consumers (who would not otherwise buy them), to charge a premium
26 price, and to take away market share from other similar companies.

27 ³Nestle website, About Us, Key Figures, [http://www.nestleusa.com/about-us/key-](http://www.nestleusa.com/about-us/key-figures)
28 [figures](http://www.nestleusa.com/about-us/key-figures) (last visited June 18, 2015).

1 17. Plaintiffs and other class members want to be sure they are feeding their young
2 children healthy snacks.

3 18. When deciding what products to buy, Plaintiffs and other class members rely on
4 the information companies choose to put on package labels.⁴

5 19. Gerber has one of the most respected and well-known names in the world when
6 it comes to infant food. On information and belief, that was a significant factor when Nestle
7 acquired Gerber in 2007—at a time when Gerber Graduates had sales of \$250 million and 91%
8 market share.⁵

9 20. Nestle describes Gerber as “One of the most trusted names in baby food and
10 baby care since 1927. Gerber baby food and baby care is committed to promoting good nutri-
11 tion and healthy eating habits for children.”⁶

12 21. In its most recent Annual Report, Nestle bragged that it “aims to support par-
13 ents with the information they need to make the most informed decisions about their children’s
14 health and eating habits, such as the importance of regular consumption of fruits and vegeta-
15 bles, and of exercise.”⁷ Also, in its corporate principles, Nestle promises that it is “[c]ommitted
16 to responsible, reliable consumer communication that empowers consumers to exercise their
17 right to informed choice and promotes healthier diets.”⁸

19 ⁴ See, e.g., Christina R. Munsell, Jennifer L. Harris, Vishnudas Sarda, and Marlene B.
20 Schwartz, *Parents’ Beliefs About the Healthfulness of Sugary Drink Options: Opportunities*
21 *to Address Misperceptions*, Pub. Health Nutrition, available on CJO2015.
doi:10.1017/S1368980015000397 (Mar. 11, 2015).

22 ⁵ Hugo Miller and Evan von Schaper, *Nestle Buys Gerber for \$5.5 Billion*, BLOOMBERG
23 NEWS Apr. 13, 2007, available at [http://www.washingtonpost.com/wp-](http://www.washingtonpost.com/wp-dyn/content/article/2007/04/12/AR2007041200372.html)
24 [dyn/content/article/2007/04/12/AR2007041200372.html](http://www.washingtonpost.com/wp-dyn/content/article/2007/04/12/AR2007041200372.html).

25 ⁶ Nestle website, Brands, Gerber <http://www.nestle.com/brands/allbrands/gerber> (last
visited June 18, 2015).

26 ⁷ Nestle Annual Report 2014, available at [http://www.nestle.com/asset-](http://www.nestle.com/asset-library/documents/library/documents/annual_reports/2014-annual-report-en.pdf)
27 [library/documents/library/documents/annual_reports/2014-annual-report-en.pdf](http://www.nestle.com/asset-library/documents/library/documents/annual_reports/2014-annual-report-en.pdf),

28 ⁸ The Nestle Corporate Business Principles June 2010, available at
<http://www.nestle.com/asset->

1 22. On its consumer website, Gerber proclaims that “we work hard to become a
2 parent’s trusted partner in fostering healthy growth and development and helping establish
3 healthy eating habits from Birth+ to Toddler 2+.”⁹

4 23. On that same website, speaking specifically about Graduates products, Gerber
5 promises that Graduates products, including Puffs, “offer a range of nutritious, delicious prod-
6 ucts designed for your Crawler.”¹⁰

7 24. Because of Gerber’s reputation, Plaintiffs and other class members trusted Ger-
8 ber to provide healthy snacks for their young children.

9 25. Gerber violated Plaintiffs’ trust, and broke its promises, because Puffs are not
10 the fruit- or vegetable-packed healthy snacks that the label and advertising make them appear
11 to be.

12 26. Specifically, although the Graduates Puffs varieties all bear the name of a fruit
13 or vegetable with prominent depictions of the fruit or vegetable (often in large quantities), in
14 truth the Puffs that Plaintiffs purchased contain none, or only miniscule amounts, of the actual
15 fruit or vegetable promised by Gerber, thus providing little more than empty calories for young
16 children.

17 27. Gerber’s Puffs provide no dietary fiber (a key substance found in fruits and
18 vegetables) and contain the vitamins emphasized in Gerber’s marketing campaign¹¹ only due
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20

21 library/documents/library/documents/corporate_governance/corporate-business-
22 principles-en.pdf.

23 ⁹ Gerber website, Why Gerber, <https://www.gerber.com/why-gerber/why-gerber> (last
24 visited June 18, 2015).

25 ¹⁰ Gerber website, Products, Snacks, <https://www.gerber.com/products/snacks> (last
26 visited June 18, 2015).

27 ¹¹ E.g., Gerber website, Products, Banana Puffs,
28 [https://www.gerber.com/products/product/gerber-graduates-puffs-banana-naturally-
flavored-with-other-natural-flavors](https://www.gerber.com/products/product/gerber-graduates-puffs-banana-naturally-flavored-with-other-natural-flavors) (“Good Source of five B Vitamins, Vitamin E, Zinc
and Iron”) (last visited June 18, 2015).

1 to synthetic fortification.¹² Reasonable consumers are likely deceived by Gerber's marketing
2 campaign into believing that these vitamins are present in the Puffs thanks to significant
3 amounts of fruits and vegetables. Unfortunately for consumers, the synthetic vitamins Gerber
4 adds to the Puffs do not provide the same health benefits as vitamins obtained by eating fruits
5 and vegetables.¹³

6 28. Each variety of Gerber's Puffs contains more sugar than fruits or vegetables.¹⁴
7 Gerber takes advantage of its trusted name to market unhealthy and even dangerous Products
8 for consumption by some of the youngest and most vulnerable consumers.

9 29. Examination of three of the Puffs varieties illustrates Gerber's deliberate and
10 uniform deceptions. The Products' images and lists of ingredients are from Gerber's website
11 (although the size of the ingredients list is considerably greater than on the actual product la-
12 bel).

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24 ¹² See Gerber Graduates Puffs' ingredients lists, Illustrations 1-3.

25 ¹³ See, e.g., Rui Hai Liu, *Health Benefits of Fruits and Vegetables are from Additive and Syn-*
26 *ergistic Combinations of Phytochemicals*, 78 AM. J. CLIN. NUTR. 517S, 517S-520S, at 518S
27 (2003); INST. OF MEDICINE, FOOD AND NUTRITION BOARD, *Dietary Reference Intakes for*
Vitamin C, Vitamin E, Selenium, and Carotenoids (Nat'l Academy Press, 2000).

28 ¹⁴ See Gerber Graduates Puffs' ingredients lists, Illustrations 1-3.

Illustration 1

Sweet Potato Puffs Packaging and Ingredients



Rice Flour, Whole Wheat Flour, Wheat Starch, **Sugar**, Whole Grain Oat Flour, **Dried Apple Puree**, Less than 2% of: Tri- and Dicalcium Phosphate, Natural Sweet Potato Flavor, (Includes Dried Sweet Potato), Mixed Tocopherols (To Maintain Freshness), Soy and Sunflower Lecithin, Annatto Extract Color. Vitamins and Minerals: Zinc Sulfate, Vitamin E (Alpha Tocopheryl Acetate), Iron (Electrolytic), Niacinamide (A B Vitamin), Vitamin B2 (Riboflavin), Vitamin B1 (Thiamine Hydrochloride), Vitamin B12 (Cyanocobalamin)¹⁵

¹⁵ Cf. Gerber website, Products, Gerber Graduates, Puffs, <https://www.gerber.com/products/product/gerber-graduates-puffs-sweet-potato-naturally-flavored-with-other-natural-flavors> (emphasis added) (last visited June 18, 2015).

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Illustration 2
Banana Puffs Packaging and Ingredients



Rice Flour, Whole Wheat Flour, Wheat Starch, **Sugar**, Whole Grain Oat Flour, **Dried Apple Puree**, Less Than 2% of: Tri- and Dicalcium Phosphate, Natural Banana Flavor, Calcium Phosphate, Mixed Tocopherols (To Maintain Freshness), Soy and Sunflower Lecithin, Caramel Color, Turmeric Extract Color. Vitamins and Minerals: Zinc Sulfate, Vitamin E (Alpha Tocopheryl Acetate), Iron (Electrolytic), Niacinamide (A B Vitamin), Vitamin B2 (Riboflavin), Vitamin B6 (Pyridoxine Hydrochloride), Vitamin B1 (Thiamine Hydrochloride), Vitamin B12 (Cyanocobalamin)¹⁶

26 ¹⁶ Cf. Gerber website, Products, Snacks, Puffs, Banana,
27 [https://www.gerber.com/products/snacks-products/product/gerber-graduates-puffs-](https://www.gerber.com/products/snacks-products/product/gerber-graduates-puffs-banana-naturally-flavored-with-other-natural-flavors/27)
28 [banana-naturally-flavored-with-other-natural-flavors/27](https://www.gerber.com/products/snacks-products/product/gerber-graduates-puffs-banana-naturally-flavored-with-other-natural-flavors/27) (emphasis added) (last visited June 18, 2015).

Illustration 3
Peach Puffs Packaging and Ingredients



Rice Flour, Whole Wheat Flour, Wheat Starch, **Sugar**, Whole Grain Oat Flour, **Dried Apple Puree**, Natural Peach Vanilla Flavor (Includes Citric Acid, Acetic Acid, **Invert Sugar**, **Peach Juice Concentrate**, Vanilla Extract) **Less Than 2%** of: Calcium Phosphate, Mixed Tocopherols (To Maintain Freshness), Soy and Sunflower Lecithin, Annatto Extract Color. Vitamins and Minerals: Zinc Sulfate, Vitamin E (Alpha Tocopheryl Acetate), Iron (Electrolytic), Niacinamide (A B Vitamin), Vitamin B2 (Riboflavin), Vitamin B6 (Pyridoxine Hydrochloride), Vitamin B1 (Thiamine Hydrochloride), Vitamin B12 (Cyanocobalamin)¹⁷

¹⁷ Cf. Gerber website, Products, Snacks, Puffs, Peach, <https://www.gerber.com/products/product/gerber-graduates-puffs-peach-naturally-flavored-with-other-natural-flavors> (emphases added) (last visited June 18, 2015).

1 30. The Sweet Potato variety, despite the name and the prominent images of whole
2 and sliced sweet potatoes, contains barely any sweet potato at all. The best Gerber can muster
3 is less than 2% (less than the amount of sugar) of natural sweet potato flavor—and a percent-
4 age of that natural sweet potato flavor is composed of “dried sweet potato.” Like the other va-
5 rieties, Sweet Potato contains “dried apple puree”—little more than apple-flavored powder.

6 31. The Banana variety, despite the name and the prominent images of a bunch of
7 bananas and sliced bananas, contains no banana at all. Like the other varieties, Banana Puffs
8 contain “dried apple puree”—little more than apple-flavored powder.

9 32. The Peach variety, despite the name and the prominent images of whole and
10 sliced ripe peaches, contains barely any peach at all. The best Gerber can muster is natural
11 peach vanilla flavor—and a percentage of that natural peach vanilla flavor is composed of
12 “peach juice concentrate.” And, as with the Sweet Potato and Banana varieties, the Peach vari-
13 ety contains a trivial amount of “dried apple puree.”

14 33. The federal Food and Drug Administration (“FDA”) requires companies to list
15 food ingredients in “descending order of predominance by weight.”¹⁸ When an ingredient is
16 present in amounts of 2 percent or less by weight, FDA allows companies to choose to lump
17 all those minor ingredients under a heading such as “Less than _ percent of ____.”¹⁹ Once a
18 company uses this heading, the following ingredients are not necessarily listed in descending
19 order of predominance by weight.²⁰ Gerber lists the ingredients list for the Puffs Products us-
20 ing the heading “Less than 2% of ____.”

21 34. Dried apple puree appears in the ingredients lists after sugar and four types of
22 flour ingredients, and immediately before the “Less than 2% of: ____” heading. Thus, it is likely
23 that barely more than 2% of this fruit-like ingredient is in the Puffs.

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26 ¹⁸ 21 C.F.R. § 101.4(a)(1).

27 ¹⁹ 21 C.F.R. § 101.4(a)(2).

28 ²⁰ 21 C.F.R. § 101.4(a)(2).

35. Despite the complete absence of any, or significant amounts of, actual fruit or vegetables, these Puffs are marketed as though they did contain fruit or vegetables, and in substantial amounts. See Illustration 4 below.

Illustration 4
Graphic from Gerber Facebook Page



36. On Amazon, the Banana and Peach varieties are described as "Puffed grains with Real Fruit."²¹ Gerber knows this statement is deceptive, and intends for consumers to rely

²¹ Amazon.com website, Gerber Graduates Puffs, Banana, <http://www.amazon.com/Gerber-Graduates-Puffs-Strawberry-1-48-Ounce/dp/B000FPM22Y> (last visited June 18, 2015); Amazon.com website, Gerber Graduates Puffs, Peach, <http://www.amazon.com/Gerber-Graduates-Puffs-Peach-1-48-Ounce/dp/B000FPM22Y>

1 on Puffs' advertising, packaging, and labels. Reliance on the information Gerber chooses to
2 provide consumers is reasonable.

3 37. Plaintiffs and other class members would never have paid the premium price
4 that Gerber commands, and in fact would not have bought the Puffs at all, had they known the
5 truth. They wanted healthy fruit- or vegetable-packed snacks for their children, not the empty
6 calories and total or practical absence of fruit or vegetables actually provided.

7 38. The Center for Science in the Public Interest has criticized this very practice:

8 Food companies aggressively market phony fruit snacks to toddlers, children, and
9 their parents, pushing them as healthy options and substitutes for real fruit. Un-
10 fortunately for parents and kids, phony fruit snacks don't always contain the
11 fruits advertised on the front of the box and never in the quantities suggested. In-
12 stead, companies use relatively cheap, nutritionally void, and highly processed
13 pear, apple, and white grape juices, making phony fruit snacks much closer to
14 gummy bears than actual fruit.

15 ...
16 The Dietary Guidelines Advisory Committee concluded that "nutrient intake
17 should come primarily from foods" and that "the more scientists learn about nu-
18 trition and the human body, the more they realize the importance of eating foods
19 in their most intact forms without added solid fats, sugars, starches, or sodium."
20 Another good reason to stay away from phony fruit snacks, which are mainly
21 sugar and small amounts of fruit that has been dehydrated, pureed, concentrated,
22 heated, and otherwise processed until it is shelf stable and largely unrecognizable,
23 requiring colors, flavors, and vitamins to be added back in.²²

24 39. Plaintiffs were therefore deceived, and spent money they would not have spent
25 as a result of Gerber's deceptive practices.

26 CLASS ALLEGATIONS

27 40. Plaintiffs bring this action as a statewide class action pursuant to section 382 of
28 the California Code of Civil Procedure on behalf of all persons who purchased Gerber Gradu-
ates during the Class Period (the "Class"). Excluded from the Class are officers and directors
of Gerber, members of the immediate families of the officers and directors of Gerber, and its

26 48-Ounce/dp/B004BCT2Jl/ref=sr_1_1?ie=UTF8&qid=1427226526&sr=8-
27 1&keywords=graduates+puffs+peach (last visited June 18, 2015).

28 ²²CSPI website, Nutrition Policy, Fruit Fraud,
<http://cspinet.org/nutritionpolicy/fruitfraud.html> (last visited June 18, 2015).

1 legal representatives, heirs, successors or assigns and any entity in which they have or have
2 had a controlling interest.

3 41. Plaintiffs presently do not know the exact number or identities of all Class
4 members, but given the nature of the claims and the number of retail stores selling Gerber's
5 Puffs, Plaintiffs believe that Class members are so numerous that joinder of all members of the
6 Class is impracticable.

7 42. There is a well-defined community of interest in the questions of law and fact
8 involved in this case. Questions of law and fact common to the members of the Class which
9 predominate over questions which may affect individual Class members include:

- 10 a. Whether Gerber labeled, marketed, advertised, or sold Puffs to Plaintiffs and
11 those similarly situated using false, misleading, or deceptive statements or rep-
12 resentations, including statements or representations concerning the nutritional
13 and health qualities of its Puffs;
- 14 b. Whether Gerber omitted or misrepresented material facts in connection with the
15 sales of its Puffs;
- 16 c. Whether Gerber participated in and pursued the common course of conduct
17 complained of; and
- 18 d. Whether Gerber's labeling, marketing, advertising, or selling of its Puffs as
19 healthful and nutritious constitutes an unfair or deceptive consumer sales prac-
20 tice.

21 43. Plaintiffs' claims are typical of those of the Class because Plaintiffs, like all
22 members of the Class, purchased Gerber's Puffs at a premium price in a typical consumer set-
23 ting and sustained damages from Gerber's wrongful conduct.

24 44. Plaintiffs will adequately protect the interests of the Class and have retained
25 counsel experienced in litigating complex class actions. Plaintiffs have no interests that conflict
26 with those of the Class.

27 45. A class action is superior to adjudication of this controversy over the other
28 available methods for the fair and efficient.

1 46. The prerequisites to maintaining a class action for injunctive or equitable relief
2 are met as Gerber has acted or refused to act on grounds generally applicable to the Class,
3 thereby making appropriate final injunctive or equitable relief with respect to the Class as a
4 whole.

5 47. The prosecution of separate actions by members of the Class would create a
6 risk of establishing inconsistent rulings and incompatible standards of conduct for Gerber. For
7 example, one court might enjoin Gerber from performing the challenged acts, whereas another
8 might not. Additionally, individual actions could be dispositive of the interests of the Class even
9 though certain Class members might not be parties to such actions.

10 48. Gerber's conduct is generally applicable to the Class as a whole and Plaintiffs
11 seek, *inter alia*, equitable remedies with respect to the Class as a whole. As such, Gerber's sys-
12 tematic policies and practices make declaratory relief with respect to the Class as a whole ap-
13 propriate.

14 CAUSES OF ACTION

15 FIRST CAUSE OF ACTION

16 Unfair and Deceptive Acts and Practices, 17 In Violation of the California Consumers Legal Remedies Act § 1750, *et seq.*

18 49. This cause of action is brought pursuant to the California Consumers Legal
19 Remedies Act, Cal. Civ. Code § 1750, *et seq.* (the "CLRA"). Plaintiffs have provided Gerber
20 with notice pursuant to California Civil Code § 1782 and Gerber failed to respond to Plaintiffs'
21 notice. Plaintiffs seek damages in accordance with the CLRA.

22 50. Plaintiffs and members of the Class are "consumers," as the term is defined by
23 California Civil Code § 1761(d), because they bought Puffs for personal, family, or household
24 purposes.

25 51. Plaintiffs, members of the Class, and Gerber have engaged in "transactions," as
26 that term is defined by California Civil Code § 1761(e).

27 52. The conduct alleged in this Complaint constitutes unfair methods of competi-
28 tion and unfair and deceptive acts and practices for the purpose of the CLRA, and the conduct

1 was undertaken by Gerber in transactions intended to result in, and which did result in, the sale
2 of goods to consumers.

3 53. As alleged more fully above, Gerber has violated the CLRA by falsely repre-
4 senting to Plaintiffs and the Class certain health qualities of its Puffs.

5 54. As a result of engaging in such conduct, Gerber has violated California Civil
6 Code §§ 1770(a)(5), (a)(7), and (a)(9).

7 55. Pursuant to California Civil Code §§ 1780(a)(2) and (a)(5), Plaintiffs seek an
8 order of this Court that requires, among other things, Gerber to remove language on Gerber's
9 labeling and advertising representing Puffs as healthful and nutritious, include the percentage
10 of the characterizing ingredient for Puffs in their statements of identity, make any other chang-
11 es in the labeling and advertising of Puffs to prevent the deception described in this Complaint,
12 and award damages, attorneys' fees, and any other relief the Court deems proper pursuant to
13 Cal. Civ. Code §§ 1780 and 1781.

14 56. Plaintiffs and members of the Class may be irreparably harmed or denied an ef-
15 fective and complete remedy if such an order is not granted.

16 57. The unfair and deceptive acts and practices of Gerber, as described above, pre-
17 sent a serious threat to Plaintiffs and members of the Class.

18 SECOND CAUSE OF ACTION

19 Unlawful Business Acts and Practices, 20 In Violation of California Business and Professions Code § 17200, *et seq.*

21 58. The acts of Gerber described above constitute unlawful business acts and prac-
22 tices.

23 59. Gerber's manufacturing, marketing, advertising, packaging, labeling, distribut-
24 ing, and selling of Puffs violate California's Sherman Food, Drug and Cosmetics Law, Cal.
25 Health & Saf. Code § 109875, *et seq.* (the "Sherman Law").

26 60. The Sherman Law defines a "person" as "any individual, firm, partnership,
27 trust, corporation, limited liability company, company, estate, public or private institution, as-
28 sociation, organization, group, city, county, city and county, political subdivision of this state,

1 other governmental agency within the state, and any representative, agent, or agency of any of
2 the foregoing." Cal. Health & Saf. Code § 109995. Gerber is a corporation and, therefore, a
3 "person" within the meaning of the Sherman Law.

4 61. In relevant part, the Sherman Law declares that food is misbranded if its label-
5 ing is false or misleading in any particular way and further provides that it is unlawful for any
6 person to misbrand any food. Cal. Health & Saf. Code §§ 110660, 110765.

7 62. The Sherman Law adopts the federal Food, Drug, and Cosmetic Act and regula-
8 tions written by FDA. Cal. Health & Safety Code §§ 109875, *et seq.* Gerber's actions violate
9 21 C.F.R. section 102.5, as discussed above.

10 63. Gerber's practices are unlawful under the California Consumers Legal Remedy
11 Act, Cal. Civ. Code § 1750, *et seq.* ("CLRA") because they violate the Sherman Law and the
12 federal Food, Drug, and Cosmetic Act.

13 64. Gerber's practices alleged above are unlawful under California Business and
14 Professions Code § 17200, *et seq.* because they violate § 17500, *et seq.*, which forbids untrue
15 advertising and misleading advertising.

16 65. As a result of the Gerber's practices described above, Plaintiffs and the Class,
17 pursuant to California Business and Professions Code § 17203, are entitled to an order enjoin-
18 ing future wrongful conduct on the part of Gerber and any other orders and judgments which
19 may be necessary to disgorge Gerber's ill-gotten gains and to restore to any person in interest
20 any money paid for Puffs as a result of the wrongful conduct of Gerber.

21 66. The above-described unlawful business acts and practices of Gerber present a
22 threat and reasonable likelihood of deception to Plaintiffs and members of the Class in that
23 Gerber has systematically perpetrated and continues to perpetrate unlawful acts or practices
24 upon members of the Class by means of its misleading manufacturing, marketing, advertising,
25 packaging, labeling, distributing, and selling of Puffs.

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THIRD CAUSE OF ACTION

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Fraudulent Business Acts and Practices, In Violation of California Business and Professions Code § 17200, *et seq.*

67. The acts of Gerber as described above constitute fraudulent business practices under California Business and Professions Code § 17200, *et seq.*

68. As more fully described above, Gerber's misleading marketing, advertising, packaging, and labeling of Puffs is likely to deceive reasonable California consumers. Indeed, Plaintiffs and other members of the Class were unquestionably deceived regarding the characteristics of Gerber's Puffs, as Gerber's marketing, advertising, packaging, and labeling of Puffs misrepresents or omits the true nutritional content and levels of fruit and vegetables in Puffs.

69. This deception caused Plaintiffs and members of the Class to purchase Products that they would not otherwise have purchased or to pay more than they would have for Puffs had they known the statements on the front of Gerber's Puffs conveying healthfulness are contrary to the actual ingredients of the Puffs.

70. As a result of the business acts and practices described above, Plaintiffs and the Class, pursuant to California Business and Professions Code § 17203, are entitled to an order enjoining future wrongful conduct on the part of Gerber and any other orders and judgments which may be necessary to disgorge Gerber's ill-gotten gains and to restore to any person in interest any money paid for Puffs as a result of the wrongful conduct of Gerber.

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FOURTH CAUSE OF ACTION

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Misleading and Deceptive Advertising, In Violation of California Business and Professions Code § 17500, *et seq.*

71. Plaintiffs assert this cause of action against Gerber for violations of California Business and Professions Code § 17500, *et seq.* for misleading and deceptive advertising.

72. At all material times, Gerber engaged in a scheme of offering its Puffs for sale to Plaintiffs and other members of the Class by way of, *inter alia*, commercial marketing and advertising, the Internet, product packaging and labeling, and other promotional materials.

1 Gerber's portrayal of its Puffs as healthful and nutritious is misleading and deceptive. Gerber's
2 advertisements and inducements were made within the State of California and come within the
3 definition of advertising as contained in Business and Professions Code § 17500, *et seq.* in that
4 such promotional materials were intended as inducements to purchase Puffs and are statements
5 disseminated by Gerber to Plaintiffs and the Class and were intended to reach members of the
6 Class. Gerber knew, or in the exercise of reasonable care should have known, that these state-
7 ments were misleading and deceptive.

8 73. In furtherance of its plan and scheme, Gerber prepared and distributed within
9 the State of California—via commercial marketing and advertising, the Internet, product pack-
10 aging and labeling, and other promotional materials—statements that misleadingly and decep-
11 tively represented Puffs as healthful and nutritional. Consumers, including Plaintiffs, necessar-
12 ily and reasonably relied on these materials concerning Puffs. Consumers, including Plaintiffs
13 and the Class members, were among the intended targets of such representations.

14 74. These acts of Gerber, in disseminating said misleading and deceptive state-
15 ments throughout the State of California to consumers, including Plaintiffs and members of the
16 Class, were and are likely to deceive reasonable consumers, including Plaintiffs and other
17 members of the Class, by obfuscating the unhealthy ingredients in Puffs and misrepresenting
18 the levels of the expected ingredients contained in Puffs, all in violation of the “misleading
19 prong” of California Business and Professions Code § 17500.

20 75. As a result of these violations of the “misleading prong” of California Business
21 and Professions Code § 17500, *et seq.*, Gerber has been unjustly enriched at the expense of
22 Plaintiffs and the other members of the Class. Plaintiffs and the Class, pursuant to California
23 Business and Professions Code § 17535, are entitled to an order of this Court enjoining wrong-
24 ful future conduct on the part of Gerber, and any other orders and judgments which may be
25 necessary to disgorge Gerber's ill-gotten gains and restore to any person in interest any money
26 paid for Puffs as a result of the wrongful conduct of Gerber.

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1 **FIFTH CAUSE OF ACTION**

2 **Breach of Express Warranty**

3 76. Gerber provided Plaintiffs and other members of the Class with written express
4 warranties, including, but not limited to, warranties that Puffs were healthful and had particular
5 healthful characteristics as set forth above.

6 77. Gerber breached these warranties, causing damage to Plaintiffs and other
7 members of the Class, who overpaid for Puffs, which were not healthful in that they contained
8 ingredients harmful to one's health that did not otherwise conform to Gerber's warranties.

9 78. As a proximate result of the breach of warranties by Gerber, Plaintiffs and
10 Class members have suffered damages in an amount to be determined at trial in that, among
11 other things, they purchased and paid a premium for Products that did not conform to what
12 was promised as promoted, marketed, advertised, packaged, and labeled by Gerber, and they
13 were deprived of the benefit of their bargain and spent money on Products that did not have
14 any value or had less value than warranted or Products that they would not have purchased at a
15 premium and used had they known the true facts about Puffs.

16 **SIXTH CAUSE OF ACTION**

17 **Breach of Implied Warranty of Merchantability**

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19 79. Plaintiffs and other Class members purchased Gerber's Puffs, which Gerber
20 promoted, marketed, advertised, packaged, and labeled as healthful and as having particular
21 healthful characteristics as set forth above. Pursuant to these sales, Gerber impliedly warranted
22 that Puffs would be merchantable and fit for the ordinary purposes for which such goods are
23 used and conform to the promises or affirmations of fact made in Puffs' promotions, market-
24 ing, advertising, packaging, and labels. As a result, Plaintiffs and other Class members relied
25 on Gerber's representations that Puffs were healthful and had particular healthful characteris-
26 tics as set forth above, and, at or about that time, Gerber sold its Puffs to Plaintiffs and other
27 Class members. By Gerber's representations regarding the reputable nature of its companies
28 and related entities, and by its promotion, marketing, advertising, packaging, and labeling of

1 Puffs, Gerber warranted that its Puffs are healthful and have particular healthful characteristics
2 as set forth above. Plaintiffs and Class members bought Puffs, relying on Gerber's representa-
3 tions that its Products were healthful and have particular healthful characteristics when, in fact,
4 they are not healthful in that they lack significant amounts of real, natural fruit and thus do not
5 conform to Gerber's warranties.

6 80. Gerber breached the warranty implied at the time of sale in that Plaintiffs and
7 Class members did not receive goods that were healthful or that have the healthful characteris-
8 tics represented and, thus, the goods were not merchantable as fit for the ordinary purposes for
9 which such goods are used or as promoted, marketed, advertised, packaged, labeled, or sold.

10 81. As a proximate result of this breach of warranty by Gerber, Plaintiffs and the
11 Class members have suffered damages in an amount to be determined at trial in that, among
12 other things, they purchased and paid a premium for Puffs that did not conform to what was
13 promised as promoted, marketed, advertised, packaged, and labeled by Gerber, and they were
14 deprived of the benefit of their bargain and spent money on Products that did not have any
15 value or have less value than warranted or Products that they would not have purchased at a
16 premium and used had they known the true facts about them.

17 SEVENTH CAUSE OF ACTION

18 Unjust Enrichment

19 82. As a result of Gerber's deceptive and misleading labeling, advertising, market-
20 ing, and sales of Puffs, Gerber was enriched at the expense of Plaintiffs and all others similarly
21 situated, through the payment of the purchase price for Gerber's Puffs.

22 83. Under the circumstances, it would be against equity and good conscience to
23 permit Gerber to retain the ill-gotten benefits that it received from Plaintiffs and the members
24 of the Class in light of the fact that Puffs purchased by Plaintiffs and the members of the Class
25 were not what Gerber purported them to be. Thus, it would be unjust or inequitable for Gerber
26 to retain the benefit without restitution to Plaintiffs and the members of the Class for the mon-
27 ies paid to Gerber for such Products.

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1 **PRAYER FOR RELIEF**

2 THEREFORE, Plaintiffs demand judgment as follows:

- 3 1. An order certifying the proposed Class, appointing Plaintiffs as representatives
4 of the Class, and appointing their undersigned counsel as class counsel;
- 5 2. A declaration that Gerber is financially responsible for notifying Class mem-
6 bers of the pendency of this suit;
- 7 3. An award of restitution, including disgorgement pursuant to California Busi-
8 ness & Professional Code §§ 17203, 17535;
- 9 4. An order enjoining Gerber's unlawful and deceptive acts and practices pursu-
10 ant to California Business & Professional Code §§ 17203, 17535.
- 11 5. Injunctive relief pursuant to California Civil Code § 1780;
- 12 6. Monetary damages, including, but not limited to any compensatory, incidental,
13 or consequential damages in an amount to be determined at trial, together with prejudgment
14 interest at the maximum rate allowable by law with respect to the common law claims alleged;
- 15 7. Punitive damages in accordance with proof and in an amount consistent with
16 applicable precedent;
- 17 8. An order awarding Plaintiffs and the Class members the reasonable costs and
18 expenses of suit, including their attorneys' fees; and
- 19 9. Any further relief that the Court may deem appropriate.

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1 **JURY TRIAL DEMANDED**

2 Plaintiffs hereby demand a trial by jury.

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4 DATED: July 13, 2015

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6 MATTHEW J. ZEVIN

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20 *Katie Silver, and the Proposed Class*
21 *[Additional Counsel Listed on Signature Page]*

22 **SUPERIOR COURT OF CALIFORNIA**

23 **IN AND FOR THE COUNTY OF SAN FRANCISCO**

24 MICHELLE GYORKE-TAKATRI and
25 KATIE SILVER, on behalf of themselves
26 and all others similarly situated,

27 Plaintiffs,

28 v.

NESTLE USA, INC. and GERBER
PRODUCTS COMPANY,

Defendants.

CASE NO.

CLASS ACTION

AFFIDAVIT OF VENUE BY PLAINTIFF
MICHELLE GYORKE-TAKATRI

1 I, Michelle Gyorke-Takatri, hereby declare that:

2 1. I have personal knowledge of the facts stated herein. If called upon, I could and
3 would competently testify to the facts contained in this Affidavit.

4 2. I am a Plaintiff in the above-entitled action.

5 3. The Complaint filed in this matter contains causes of action for violations of the
6 Consumers Legal Remedies Act against Nestle USA, Inc. and Gerber Products Company
7 ("Defendants"). These causes of action arise out of my purchases of Defendants' Gerber
8 Graduates Puffs, which were falsely marketed as healthful and containing significant amounts of
9 the fruit or vegetables depicted on the products' packaging.

10 4. I purchased the Gerber Graduates Puffs in San Francisco County.

11 I declare under penalty of perjury under the laws of the State of California that the
12 foregoing Affidavit is true and correct, and was executed by me in the City of San Francisco,
13 California, on July 7, 2015.

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16 MICHELLE GYORKE-TAKATRI