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16 **UNITED STATES DISTRICT COURT**
17 **DISTRICT OF ARIZONA**

18 CONSTANCE WERTHE, a Wisconsin
19 Resident, on Behalf of Herself and All
20 Others Similarly Situated,

21 Plaintiff,

22 -against-

23 GERBER PRODUCTS CO., a Michigan
24 corporation, d/b/a NESTLÉ
25 NUTRITION, NESTLÉ INFANT
26 NUTRITION, and NESTLÉ
NUTRITION NORTH AMERICA

Defendant.

CASE NO.

CLASS ACTION COMPLAINT

JURY TRIAL DEMANDED

Plaintiff Constance Werthe, by and through her undersigned attorneys, brings this action on behalf of herself and all other similarly situated consumers on personal knowledge as to herself and her activities, and on information and belief as to all other matters, against Defendant, Gerber Products Co. d/b/a Nestlé Nutrition, Nestlé Infant Nutrition, and Nestlé

1 Nutrition North America (“Gerber” or “Defendant”), and alleges as follows:

2 **NATURE OF THE ACTION**

3 1. This is a consumer protection class action claim brought against Defendant
4 Gerber pursuant to Arizona consumer fraud statutes and common law. This action is
5 brought by Plaintiff, on behalf of herself and Classes of persons who purchased Gerber
6 Good Start Gentle infant formula during the period from and including January 1, 2011
7 through such time as the effects of Defendants’ fraudulent conduct ceases (the “Class
8 Period”).
9

10 2. Since at least 2011, Gerber has manufactured, advertised, labeled, offered for
11 sale, distributed, and sold Gerber Good Start Gentle infant formula to the public. Gerber
12 has advertised this infant formula through television commercials, magazine ads, point-of-
13 sale displays, product packaging, online ads, and other advertising and promotional
14 materials. Gerber has represented, among other things, that Gerber Good Start Gentle
15 prevents or reduces the risk of developing allergies.
16
17

18 3. This packaging, among other things, includes labels that state “Meets FDA”
19 and “Qualified Health Claim” in spite of the fact that the FDA rejected Gerber’s requests to
20 state that a relationship existed between the Partially Hydrolyzed Whey Protein (“PHWP”)
21 in its Good Start Gentle infant formula and a reduced risk of atopic dermatitis in infants.
22

23 4. As a result of these deceptive and unfounded claims, Plaintiff and members of
24 the Classes have relied on Gerber’s claims and purchased a product that they believed would
25 help reduce the risk of allergies in infants, but in reality does no such thing. Plaintiffs and
26

1 other members of the Class have suffered an ascertainable loss. Moreover, Gerber has been
2 able to charge a significant premium for the infant formula over other, traditional infant
3 formulas.

4
5 5. Plaintiff brings this lawsuit against Defendant on behalf of herself and other
6 similarly situated consumers who purchased the infant formula in order to (a) halt the
7 dissemination of Defendant's deceptive advertising message, (b) correct the false and
8 misleading perception Defendant has created in the minds of consumers, and (c) secure
9 redress for consumers who have purchased the infant formula. Plaintiff, on behalf of herself
10 and all others similarly situated, allege violations of the Arizona Consumer Fraud Act,
11 breach of express warranty, and unjust enrichment under common law.
12

13 **JURISDICTION AND VENUE**

14
15 6. This Court has original jurisdiction pursuant to 28 U.S.C. § 1332(d)(2). The
16 aggregate claims of Plaintiff and the proposed Class members exceed \$5,000,000, exclusive
17 of interest and costs, and there is diversity of citizenship between at least one member of
18 the proposed Class and Defendant.

19
20 7. This Court has personal jurisdiction over Defendant because Defendant has
21 purposefully availed itself of the privilege of conducting business in the State of Arizona.

22 8. Venue is proper in this Court pursuant to 28 U.S.C. § 1391 because many of
23 the acts and transactions giving rise to this action occurred in this district and because
24 Defendant:
25
26

1 a. has intentionally availed itself of the laws and markets within this
2 district through the promotion, marketing, distribution and sale of its products in this
3 district;

4 b. does substantial business in this district; and

5 c. is subject to personal jurisdiction in this district.
6

7 **PARTIES**

8 ***Plaintiff***

9
10 9. Plaintiff Constance Werthe is an individual residing in LaCrosse, Wisconsin,
11 and thus is a citizen of Wisconsin. During the relevant period, Plaintiff was exposed to and
12 saw Defendant's material deceptive labeling and advertising claims, purchased the
13 premium-priced Gerber Good Start Gentle Formula and, as a result of the material deceptive
14 claims, suffered injury in fact and lost money.
15

16 10. Plaintiff purchased Gerber Good Start Gentle Formula in Bullhead City,
17 Arizona during the Class Period. If not for Gerber's deceptive representations, Plaintiff
18 would not have bought the formula, or would not have paid as much as she did for it.
19

20 ***Defendant***

21 11. Gerber Products Co. also doing business as Nestlé Nutrition, Nestlé Infant
22 Nutrition, and Nestlé Nutrition North America, is a Michigan Corporation with its principal
23 place of business at 12 Vreeland Road, #2, Florham Park, New Jersey.
24

25 12. Gerber transacts or has transacted business in this district and throughout the
26 United States. At all times material to this Complaint, acting alone or in concert with others,

1 Gerber has labeled, advertised, marketed, distributed, or sold Gerber Good Start Gentle
2 infant formula to consumers throughout the United States.

3 **FACTUAL ALLEGATIONS**

4
5 13. Gerber Good Start Gentle formula is made with partially hydrolyzed whey
6 proteins. Gerber advertises that the formula is easier to digest than formula made with intact
7 cow's milk protein. Gerber also advertises that feeding this formula to infants with a family
8 history of allergies prevents or reduces the risk that they will develop allergies.

9
10 14. Gerber Good Start Gentle is sold online and in grocery, department, and
11 specialty baby stores. It sells at various price points depending on the seller, but it
12 commonly retails for around \$24 for 23.2 ounces of powdered formula.

13
14 15. To induce consumers to purchase Gerber Good Start Gentle, Defendant has
15 disseminated or has caused to be disseminated advertisements, packaging, and promotional
16 materials for Gerber Good Start Gentle, including, but not necessarily limited to, the
17 attached Exhibits A through G.

18
19 16. For example, in Exhibit A, a television commercial depicts a smiling baby in
20 various poses. A female announcer says, "You want your Gerber baby to have your
21 imagination...Your smile...Your eyes...Not your allergies...But if you introduce formula,
22 choose the Gerber Good Start Comfort Proteins Advantage...It's what makes Good Start
23 formula easy to digest and may also provide protective benefits for your baby."

24
25 17. Exhibit B is a print advertisement depicting a baby's face on a canister of
26 Gerber Good Start Gentle. The caption reads, "I love Mommy's eyes, not her allergies. If

1 you have allergies in your family, breastfeeding your baby can help reduce their risk. And,
2 if you decide to introduce formula, research shows the formula you first provide your baby
3 may make a difference. In the case of Gerber Good Start Gentle Formula, it's the Comfort
4 Proteins Advantage that is easy to digest and may also deliver protective benefits. That's
5 why Gerber Good Start Gentle Formula is nutrition inspired by breast milk."
6

7 18. Exhibit C is a gold label sticker on a formula canister stating, "1st & Only
8 Routine Formula to Reduce the Risk of Developing Allergies."
9

10 19. Exhibit D is a print advertisement depicting a canister of Gerber Good Start
11 Gentle. It states, "The first formula fed may make a difference. Gerber Good Start is the
12 first and only infant formula that meets the criteria for a FDA Qualified Health Claim."
13

14 20. Exhibit E is a gold badge which is part of a supermarket display showing a
15 canister of Gerber Good Start Gentle and price. It states, "1st and Only/Meets FDA
16 Qualified Health Claim."
17

18 21. Exhibit F is part of a Gerber Good Start Gentle product label which states,
19 "Gerber Good Start is the first and only formula brand made from 100% whey protein
20 partially hydrolyzed, and that meets the criteria for a FDA Qualified Health Claim for atopic
21 dermatitis."
22

23 22. Exhibit G is a magazine print advertisement that shows a mother feeding an
24 infant from a bottle. The badge underneath the copy says, "1st Formula with FDA Qualified
25 Health Claim".
26

1 23. The U.S. Food and Drug Administration (“FDA”) evaluates health claims
2 before permitting their use on labels for foods or dietary supplements. Under FDA
3 regulations, a health claim explains the relationship between a substance (food or food
4 component) and the reduced risk of a disease or health-related condition, e.g., “Diets low
5 in saturated fats and cholesterol may reduce the risk of heart disease.” To receive FDA
6 approval for a health claim, a petitioner must demonstrate “significant scientific agreement
7 among qualified experts that the claim is supported by the totality of publicly available
8 scientific evidence for a substance/disease relationship.” FDA, Questions and Answers:
9 Qualified Health Claims in Food Labeling (Sept. 28, 2005), available at
10 [http://www.fda.gov/Food/IngredientsPackagingLabeling/LabelingNutrition/ucm207974.ht](http://www.fda.gov/Food/IngredientsPackagingLabeling/LabelingNutrition/ucm207974.htm)
11 [m](http://www.fda.gov/Food/IngredientsPackagingLabeling/LabelingNutrition/ucm207974.htm) (last accessed Oct. 30, 2014). Pursuant to the 1990 Nutrition Labeling and Education
12 Act, FDA can only issue a regulation authorizing a health claim in food labeling if the claim
13 meets this significant scientific agreement standard.
14

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16
17 24. If the relationship between a substance and a disease is not supported by
18 significant scientific agreement, FDA may not issue a regulation to authorize the claim. A
19 party, however, may petition the FDA to consider exercising its enforcement discretion for
20 use of the claim in food labeling. If, after evaluating the petition, FDA determines there is
21 some credible but limited evidence to support the claim, the agency will issue a letter
22 outlining the circumstances under which it intends to consider exercising its enforcement
23 discretion not to challenge the claim. The letter will specify, among other conditions, the
24
25
26

1 specific language that must be used to communicate the limited evidence supporting the
2 claim. If FDA concludes there is no credible evidence, it may deny the petition.

3 25. In June 2005, Gerber petitioned the FDA for a health claim explaining the
4 relationship between PHWP infant formula and reduced risk of food allergies in infants. In
5 May 2006, FDA rejected Gerber’s request, finding that there was “no credible” evidence to
6 support the relationship between PHWP infant formula and a reduced risk of food allergy
7 in infants. *See* Qualified Health Claims: Letter of Denial - 100 percent Partially Hydrolyzed
8 Whey Protein in Infant Formula and Reduced Risk of Food Allergy in Infants (Docket No.
9 2005Q-0298) (May 11, 2006), *available at*
10 [http://www.fda.gov/Food/IngredientsPackagingLabeling/LabelingNutrition/ucm073313.ht](http://www.fda.gov/Food/IngredientsPackagingLabeling/LabelingNutrition/ucm073313.htm)
11 [m](http://www.fda.gov/Food/IngredientsPackagingLabeling/LabelingNutrition/ucm073313.htm) (last accessed Oct. 30, 2014).

12
13
14 26. In 2009, Gerber petitioned the FDA for permission to use a qualified health
15 claim describing the relationship between PWHP infant formula and reduced risk of *atopic*
16 *dermatitis* in infants. Specifically, Gerber sought authorization for a claim stating that
17 “emerging clinical research” shows that PHWP infant formula may reduce the risk of atopic
18 dermatitis. FDA rejected the request and issued a letter indicating that it would consider
19 exercising its enforcement discretion to allow Defendant to make a highly qualified health
20 claim that “the relationship between 100% Whey-Protein Partially Hydrolyzed infant
21 formulas and the reduced risk of atopic dermatitis is uncertain, because there is little
22 scientific evidence for the relationship.” *See* 100% Whey-Protein Partially Hydrolyzed
23 Infant Formula and Reduced Risk of Atopic Dermatitis (May 24, 2011), *available at*
24
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26

1 [http://www.fda.gov/Food/IngredientsPackagingLabeling/LabelingNutrition/ucm256731.ht](http://www.fda.gov/Food/IngredientsPackagingLabeling/LabelingNutrition/ucm256731.htm)
2 [m](http://www.fda.gov/Food/IngredientsPackagingLabeling/LabelingNutrition/ucm256731.htm) (last visited Oct. 30, 2014). Notwithstanding the FDA’s letter of enforcement discretion,
3 Gerber advertises its Gerber Good Start Gentle infant formula with, among other things, a
4 circular gold seal or badge emblazoned with “1st and Only” in the center, “Meets FDA” in
5 the top perimeter, and “Qualified Health Claim” in the bottom perimeter.
6

7 CLASS DEFINITION AND ALLEGATIONS

8 27. Plaintiff brings this action on behalf of herself and members of the following
9
10 Classes defined as follows :

11 All persons who purchased one or more of Defendant’s Gerber Good Start
12 Gentle infant formula in the State of Arizona during the Class Period.
13 Excluded from the Class are Defendant and its officers, directors and
employees and those who purchased Gerber Good Start Gentle infant formula
for the purpose of resale or who assert claims for personal injury (the
“Arizona Class”); and

14 All persons who purchased one or more of Defendant’s Gerber Good Start
15 Gentle infant formula in the United States of America during the Class Period.
16 Excluded from the Class are Defendant and its officers, directors and
17 employees and those who purchased Gerber Good Start Gentle infant formula
for the purpose of resale or who assert claims for personal injury (the
“Nationwide Class”).

18 28. The Arizona Class is sometimes referred to as “the Class”

19 29. This action has been brought and may properly be maintained on behalf of the
20 Classes proposed above under the criteria of Federal Rule of Civil Procedure 23 (“Rule
21 23”), insofar as the Classes meet all the requirements of Rule 23:
22

23 a. **Numerosity:** The members of the Classes are so numerous that their
24 individual joinder is impracticable. Plaintiff is informed and believes that the proposed
25 Classes contain thousands of purchasers of the infant formula who have been damaged by
26

1 Defendant's conduct as alleged herein. The precise number of Class members is unknown
2 to Plaintiff, but records in the sole control of the Defendant will enable Plaintiff to determine
3 the size of the Classes.

4
5 b. *Existence and Predominance of Common Questions of Law and*

6 **Fact:** This action involves common questions of law and fact, which predominate over any
7 questions affecting individual Class members. Common questions of law and fact include,
8 but are not limited to, the following:

9
10 i. Whether Defendant's claims about the infant formula discussed
11 above are true, or are reasonably likely to deceive;

12 ii. Whether the alleged conduct constitutes violation of the
13 Arizona Consumer Fraud Act;

14
15 iii. Whether the alleged conduct constitutes a breach of the express
16 warranty which exists between Defendant and Plaintiff and other members of the Classes;

17 iv. Whether the alleged conduct constitutes unjust enrichment;

18 v. Whether Defendant engaged in deceptive advertising;

19
20 vi. Whether Defendant knowingly made material deceptive claims
21 regarding the its Gerber Good Start Gentle infant formula;

22 vii. Whether Plaintiff and Class members have sustained monetary
23 loss and the proper measure of that loss; and

24
25 viii. Whether Plaintiff and Class members are entitled to injunctive
26 relief.

1 c. **Typicality:** Plaintiff's claims are typical of the claims of the other
2 members of the Classes because, *inter alia*, all Class members were injured through the
3 uniform misconduct described above, and all Class members were subject to Defendant's
4 deceptive statements, including deceptive claims that accompanied each and every
5 container of infant formula sold. Plaintiff is advancing the same claims and legal theories
6 on behalf of herself and all members of the Classes.
7

8 d. **Adequacy of Representation:** Plaintiff will fairly and adequately
9 protect the interests of the members of the Classes. Plaintiff has retained counsel
10 experienced in complex consumer class action litigation, and Plaintiff intends to prosecute
11 this action vigorously. Plaintiff has no adverse or antagonistic interests to those of the
12 Classes.
13

14 e. **Superiority:** A class action is superior to all other available means for
15 the fair and efficient adjudication of this controversy. The damages or other financial
16 detriment suffered by individual Class members is relatively small compared to the burden
17 and expense that would be entailed by individual litigation of their claims against
18 Defendant. It would thus be virtually impossible for the Classes, on an individual basis, to
19 obtain effective redress for the wrongs done to them by Defendant. Furthermore,
20 individualized litigation would create the danger of inconsistent or contradictory judgments
21 arising from the same set of facts. By contrast, the class action device provides the benefits
22 of adjudication of these issues in a single proceeding and presents no unusual management
23 difficulties under the circumstances here.
24
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26

1 the result of its deceptive marketing and advertising practices. Thus, it would be unjust or
2 inequitable for Defendant to retain the benefit without restitution to Plaintiff and the Class.

3
4 **PRAYER FOR RELIEF**

5 WHEREFORE, Plaintiff prays for judgment:

6 A. Certifying the Classes as requested herein;

7 B. Appointing Plaintiff as Class representative and her undersigned counsel as
8 Class counsel;

9 C. Awarding Plaintiff and the proposed Class members damages;

10 D. Awarding statutory damages, including treble damages, to the extent
11 available;

12 E. Awarding restitution and disgorgement of Defendant's revenues to Plaintiff
13 and the proposed Class members;

14 F. Awarding injunctive relief as permitted by equity, including: enjoining
15 Defendant from continuing the unlawful practices as set forth herein, and directing
16 Defendant to identify, with Court supervision, victims of its conduct and pay them
17 restitution and disgorgement of all monies acquired by Defendant by means of any act or
18 practice declared by this Court to be wrongful;

19 G. Ordering Defendant to engage in a corrective advertising campaign;

20 H. Awarding attorneys' fees and costs; and

21 I. Providing such further relief as may be just and proper.
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26

1 **DEMAND FOR JURY TRIAL**

2 Plaintiff hereby demands a trial of her claims by jury to the extent authorized by law.

3 Dated: November 3, 2014

4 BONNETT, FAIRBOURN, FRIEDMAN &
5 BALINT, P.C.

6 /s/ Patricia N. Syverson

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