

May 11, 2015

#### **VIA UPS**

Mr. Gary Tickle Chief Executive Officer Gerber Products Company 12 Vreeland Road, Second Floor Florham Park, New Jersey 07932-0697 Mr. Paul Bulcke Chief Executive Officer Nestlé S.A. Avenue Nestlé 55 CH-1800 Vevey, Switzerland

Re: Deceptive trade practices in the marketing and sale of certain food products for babies and toddlers

Dear Messrs. Tickle and Bulcke:

The Center for Science in the Public Interest ("CSPI") and our co-counsel, Michael Reese and George Granade of Reese LLP, have identified that Gerber Products Company ("Gerber") and its parent company Nestlé S.A. ("Nestlé") are engaging in deceptive practices in the marketing, labeling, and sale of certain of their food products for babies and toddlers (the "Products," defined below). This letter details our findings and offers to discuss resolution before CSPI and Reese LLP take further legal action. Ultimately, if litigation becomes necessary, CSPI and Reese LLP will seek an injunction prohibiting Gerber and Nestlé from expressly or implicitly making deceptive representations on the labels and in the marketing of the Products. CSPI and Reese LLP may also seek corrective advertising, restitution, damages, disgorgement, and attorneys' fees.

#### The Products at issue include:

- 3rd Foods Lasagna with Meat Sauce Dinner;
- 2nd Foods Organic Banana Peach Granola;
- 2nd Foods Organic Pear Blueberry Oatmeal;
- 2nd Foods Organic Pear Strawberry Granola;
- 2nd Foods Peach Mango with Oatmeal Cereal
- Graduates Lil' Meals Mac & Cheese with Chicken & Vegetables;
- Graduates Pasta Pick-Ups Chicken & Carrot Ravioli;
- Graduates Pasta Pick-Ups Turkey & Vegetable Ravioli; and
- Graduates Pasta Pick-Ups Spinach & Cheese Ravioli.

Enclosed herein as Exhibit 1 are the labels, Nutrition Facts panels, and ingredients of the Products.

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#### **Facts Giving Rise to Liability**

Gerber and Nestlé falsely and misleadingly label many of the Products on the Principal Display Panel (PDP)<sup>1</sup> as being composed of certain healthful ingredients, when, in fact, the Products contain substantial amounts of other less healthful, less valuable ingredients, such as apple juice, that are not identified at all on the PDP. Similarly, in other cases, Gerber and Nestlé prominently identify healthful ingredients on the PDP that are, in fact, only present in the Product in negligible amounts.

Furthermore, the images on the PDPs reinforce the presence of the ingredients Gerber and Nestlé identify on the PDPs, and the images fail to identify the presence of the other predominant, less-healthful ingredients.

For these reasons, reasonable consumers who purchase the Products for their babies and toddlers fall victim to a bait and switch. The representations and images Gerber and Nestlé use on the Products are especially problematic given their context, which includes additional health-oriented language and phrases on the Products' labels like "Nutritious Dinner," "ORGANIC," "DHA helps support BRAIN & EYE DEVELOPMENT," "VITABLOCKS ESSENTIAL NUTRITION," "Made with Farm-Grown Vegetables," and "Pasta made with Whole Grain Wheat."<sup>2</sup>

While all of the Products are mislabeled for the same reasons, we have organized them into the following groupings for ease of reference: Baby Food (3rd Foods and 2nd Foods) and Graduates (Lil' Meals and Pasta Pick-Ups). We discuss the Products in each grouping below.

#### I. Baby Food (3rd Foods and 2nd Foods)

"Gerber 3rd Foods Lasagna with Meat Sauce Dinner" (Ex. 1 at 2) is a prime example of Gerber and Nestlé's bait and switch labeling tactic. Despite the label's prominent identification of meat sauce and lasagna in the Product name and the images on the PDP, the Product contains more pear juice than anything else, with the exception of tomato puree.<sup>3</sup> Moreover, beef is one

<sup>1</sup> "Principal Display Panel" and "PDP" have the same meaning as in United States Food and Drug Administration ("FDA") regulations, *i.e.*, "the part of a label that is most likely to be displayed, presented, shown, or examined under customary conditions of display for retail sale." 21 C.F.R. § 101.1.

http://www.nestle.com/asset-library/Documents/Library/Documents/Annual\_Reports/2012-Annual-Report-EN.pdf (stating that the Gerber "brand in the USA [is] the leader in early childhood nutrition amongst consumers and health care professionals" and that the brand's "success is due to the brand's aim to nourish a healthier generation, with products, education, and services to ensure children start and stay healthy").

<sup>&</sup>lt;sup>2</sup> See also Nestlé S.A., Annual Report 2012: Nutrition to enhance the quality of life 35 (2012), available at

<sup>&</sup>lt;sup>3</sup> The FDA requires ingredients to be listed in descending order of predominance in nutrition

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of the less predominant ingredients in the Product—ranking fifth on the ingredient list. (*Id.*) Not only is fruit juice a very poor substitution for meat, it is also deficient in certain nutrients generally found in fruit. Similarly, the second ingredient in "Gerber 2nd Foods Organic Banana Peach Granola" (Ex. 1 at 3), "Gerber 2nd Foods Organic Pear Blueberry Oatmeal" (*id.* at 4), and "Gerber 2nd Foods Organic Pear Strawberry Granola" (*id.* at 5) is apple juice, and the second ingredient in "Gerber 2nd Foods Peach Mango with Oatmeal Cereal" (*id.* at 6) is white grape juice, a very low-nutrition juice, despite these Products' names and the images on their labels.

#### II. Graduates (Lil' Meals and Pasta Pick-Ups)

"Graduates Lil' Meals Mac & Cheese with Chicken & Vegetables" is also falsely and misleadingly labeled. The Product prominently identifies vegetables in its name, and the images on the PDP feature carrots and corn. Exacerbating those representations, the label states that the Product is "Made with Farm-Grown Vegetables." Unfortunately for consumers and their children, squash, carrots, celery, corn, and zucchini are among the least predominant ingredients in the Product, which is primarily made of cheese sauce. The name, images, and "Made with Farm-Grown Vegetables" claim on the label deceive reasonable consumers into believing the Product contains more vegetables than is true. (Ex. 1 at 7.)

Similarly, "Graduates Pasta Pick-Ups Chicken & Carrot Ravioli" lists dehydrated carrots as one of the last ingredients in a long ingredients list, in spite of the Product's name and the conspicuous images of carrots on the front label. (Ex. 1 at 8.)

Despite Gerber's inclusion of the word "vegetable" in the Product name and the pictures of vegetables on the PDP, "Graduates Pasta Pick-Ups Turkey & Vegetable Ravioli" contains only a small amount of dehydrated carrots, dehydrated onion, and celery seed. (*Id.* at 9.)

And, finally, there is an insubstantial amount of dehydrated spinach flakes in "Graduates Pasta Pick-Ups Spinach & Cheese Ravioli." (*Id.* at 10.)

In sum, for many Products, the Product names and illustrations on the PDPs feature certain healthful ingredients without disclosing that the actual percentages of those ingredients in the Products are low or even negligible, misleading consumers. Additionally, many of the Products similarly mislead consumers by failing to disclose on the PDP the predominant presence of cheaper, less healthy ingredients.

#### **Violations of State and Federal Law**

Gerber and Nestlé's representations about the Products discussed above are false, misleading, and deceptive. Consequently, the representations give rise to violations of numerous consumer protection statutes, such as the District of Columbia's Consumer Protection Procedures Act, D.C. Code § 28-3901 *et seq.*, California's False Advertising Law, Cal. Bus. & Prof. Code § 17500 *et seq.*, Unfair Competition Law, Cal. Bus. & Prof. Code § 17200 *et seq.*, and Consumers

labeling. 21 C.F.R. § 101.4(a).

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Legal Remedies Act, Cal. Civ. Code § 1750 et seq., and New York's Consumer Protection from Deceptive Acts and Practices Law, N.Y. Gen. Bus. Law § 349 et seq., as well as the prohibition on breach of express warranty in force in states throughout the country. Alternatively, the misrepresentations give rise to liability for breach of quasi-contract under numerous state laws.

Gerber and Nestlé's representations also render the Products "misbranded" under the Federal Food, Drug and Cosmetic Act, 21 U.S.C. § 301 *et seq.* (the "FDCA"), and the regulations the FDA has promulgated to implement it, as well as under state food and drug laws, such as California's Sherman Food, Drug, and Cosmetic Law, Cal. Health & Safety Code § 109875 *et seq.* Gerber and Nestlé's violations of the FDCA and its attendant regulations parallel their violations of state law we identified above.

The FDCA provides that a food is "misbranded," among other reasons, if:

- "its labeling is false or misleading in any particular," 21 U.S.C. § 343(a)(1), including if the labeling or advertising fails to reveal facts material in the light of representations made or suggested by statement, word, design, device, or any combination thereof, 21 U.S.C. § 321(n); or
- its label does not bear "the common or usual name of the food, if any there be," § 343(i)(1).

Further, the "common or usual name" of a food must include the percentage of an ingredient where the percentage of the ingredient in the food is material to the consumer's decision to purchase or where the consumer may otherwise be misled into believing the ingredient is more prevalent in the food than it actually is. Specifically, under 21 C.F.R. § 102.5:

The common or usual name of a food *shall include* the percentage(s) of any characterizing ingredient(s) or component(s) when the proportion of such ingredient(s) or component(s) in the food has a *material bearing on price or consumer acceptance or when the labeling or the appearance of the food may otherwise create an erroneous impression that such ingredient(s) or component(s) is present in an amount greater than is actually the case.* 

21 C.F.R. § 102.5(b) (emphasis supplied); *see also id.* § 102.5(c) (requiring labeling in the common or usual name of the presence of characterizing ingredients that have a material bearing on price or consumer acceptance). In promulgating § 102.5(b) and (c), the FDA stated that the "[d]isclosure of this fact is often necessary for the consumer to choose between two competing products when the amount of the ingredient is important to the value of the food."<sup>4</sup>

<sup>&</sup>lt;sup>4</sup> Common or Usual Names for Nonstandardized Foods, 38 Fed. Reg. 6964, 6964 (Mar. 14, 1973); *see also* Reorganization and Republication, 42 Fed. Reg. 14,302, 14,303, 14,322–23 (Mar. 15, 1977) (renumbering former 21 C.F.R. § 102.1 as current 21 C.F.R. § 102.5).

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Here, the Products violate the FDCA and FDA regulations by mislabeling characterizing ingredients, as detailed above.

#### **Settlement Demand**

In light of the foregoing, CSPI and Reese LLP invite Gerber and Nestlé to resolve their illegal and deceptive advertising to avoid further legal action. CSPI and Reese LLP seek to prevent Gerber and Nestlé from deceptively labeling and marketing the Products by misrepresenting the presence and proportions of the Products' ingredients on their PDPs. Adhering to honest marketing practices would benefit Gerber and Nestlé, as well as consumers.

Should Gerber and Nestlé choose not to respond to the foregoing findings, CSPI and Reese LLP will pursue litigation seeking, among other things, the following:

- Entry of a permanent injunction prohibiting Gerber and Nestlé from expressly or implicitly making deceptive representations on the labels and in the marketing of the Products.
- Disgorgement of Gerber and Nestlé's profits from the sale of the food Products at issue.

If Gerber and Nestlé are willing to discuss a settlement or require additional information about the claims documented here, we welcome contact from counsel.

Yours truly,

By:

Maia Kats Director of Litigation

Enclosure

Cc: Michael F. Jacobson, Ph.D., Executive Director
Michael Reese, Reese LLP, via email to mreese@reeserichman.com
George Granade, Reese LLP, via email to ggranade@reeserichman.com

# Ехнівіт 1

# Product Label, Nutrition Facts, and Ingredients for Gerber 3rd Foods Lasagna with Meat Sauce Dinner



Nutrition	Amount Per Serving			
Facts	Total Fat	4g	Total Carb	229
	Trans Fat	0g	Fiber	29
Serv Size 1 jar	Sodium	65mg	Sugars	69
Calories 150	Potassium	340mg	Protein	50
% Daily Value	• Protein			100%
Vitamin C 0% •	Calcium 4%	6 • Iri	on 8% • Zin	c 15%

INGREDIENTS: TOMATO PUREE (WATER, TOMATO PASTE), PEAR JUICE (WATER, PEAR JUICE CONCENTRATE), COOKED ENRICHED MACARONI PRODUCT (WATER, IDURUM WHEAT SEMOLINA, EGG WHITES, NIACIN, FERROUS SULFATE, THIAMIN MONONITRATE, RIBOFLAVIN, FOLIC ACID]), CARROTS, BEEF, WATER, RICE FLOUR, DRIED CHEDDAR CHEESE ([CULTURED MILK, SALT, ENZYMES], DISODIUM PHOSPHATE, ANNATTO EXTRACT COLOR), BALSAMIC VINEGAR

Product Label, Nutrition Facts, and Ingredients for Gerber 2nd Foods Organic Banana Peach Granola





## Product Label, Nutrition Facts, and Ingredients for Gerber 2nd Foods Organic Pear Blueberry Oatmeal



Nutrition	Amount Per Serving			
Facts	<b>Total Fat</b>	1g	<b>Total Carb</b>	18g
Serv Size 1 pack	Trans Fat	0g	Fiber	1g
Servings Per Container 2 packs	Sodium	10mg	Sugars	11g
Calories 90	Potassium	130mg	Protein	1g
% Daily Value • Protein 3% • Vitamin A 0% • Vitamin C 45%				
Calcium 0% • Iron	2% • Vitamir	n E 30%		

Ingredients: ORGANIC PEARS, ORGANIC APPLE
JUICE (WATER, ORGANIC APPLE JUICE
CONCENTRATE), ORGANIC BLUEBERRIES,
ORGANIC WHOLE GRAIN OAT FLOUR
(CONTAINS ORGANIC WHEAT), ORGANIC APPLE
JUICE CONCENTRATE, TUNA OIL (SOURCE OF
DHA), CHOLINE BITARTRATE, VITAMIN C
(ASCORBIC ACID), CITRIC ACID, GELATIN,
VITAMIN E (ALPHA TOCOPHERYL ACETATE)

Always refer to the product packaging for the most accurate and up-to-date product information.

# Product Label, Nutrition Facts, and Ingredients for Gerber 2nd Foods Organic Pear Strawberry Granola





Product Label, Nutrition Facts, and Ingredients for Gerber 2nd Foods Peach Mango with Oatmeal Cereal



Nutrition	Amount Per Serving			
Facts	<b>Total Fat</b>	1g	<b>Total Carb</b>	15g
Serving Size 1 pack Servings Per	Trans Fat	0g	Dietary Fiber	1g
Container 2 packs	Sodium	10mg	Sugars	12g
Calories 80	Potassium	150mg	Protein	1g
% Daily Value (DV)	• Pro	tein 3%	<ul> <li>Vitamin</li> </ul>	A 8%
Vitamin C 45% • C	alcium 15%	<ul> <li>Iron 40</li> </ul>	% • Vitamin	E 20%
Thiamin 25% • Ribot	flavin 25% •	Niacin 25	5% • Vitamin B	6 25%
Folate 25% •	Vitamin	B12 25%	<ul> <li>Zino</li> </ul>	20%

INGREDIENTS: PEACH PUREE (WATER, PEACH PUREE CONCENTRATE), WHITE GRAPE JUICE (WATER, WHITE GRAPE JUICE CONCENTRATE), MANGOES (MANGO PUREE CONCENTRATE, WATER), WATER, WHOLE GRAIN OAT FLOUR (CONTAINS WHEAT), TRICALCIUM PHOSPHATE, ASCORBIC ACID (VITAMIN C), CITRIC ACID, FERROUS SULFATE (IRON), ZINC SULFATE, NIACINAMIDE\*, ALPHA TOCOPHERYL ACETATE (VITAMIN E), THIAMIN MONONITRATE\*, RIBOFLAVIN\*, PYRIDOXINE HYDROCHLORIDE\*, VITAMIN B12\*, FOLIC ACID\*. \*A B VITAMIN.

# Product Label, Nutrition Facts, and Ingredients for Gerber Graduates Lil' Meals Mac & Cheese with Chicken & Vegetables



Nutrition	Amount Per Serving
Facts	Total Fat 6g Potassium 180m
Serving Size	Sat Fat 2.5g Total Carb 16
1 tray (170g)	Trans Fat Og Dietary Fiber 2
Calories 140	Cholest 20mg Sugars 20
Fat Cal 50	Sodium 450mg Protein 60
CHEESE [CULTURI EXTRACT COLOR	Calcium 10% • Iron 6% • Zinc 10% CHEESE SAUCE (WATER, CHEDDA ED MILK, SALT, ENZYMES, ANNATT RI, MODIFIED CORNSTARCH, LES
CHEESE [CULTURI EXTRACT COLOP THAN 1% 0F: CHI PHATE, SALT, SOY AND ANNATTO EX SODIUM CITRATE PRODUCT (WATE WHITES, NIACIN, F TRATE, RIBOFLAV COOKED CHICKEY	HEECE CALLOE ALLE

## Product Label, Nutrition Facts, and Ingredients for Gerber Graduates Pasta Pick-Ups Chicken & Carrot Ravioli



<b>Nutrition Facts</b>
Serving Size 1 tray, drained (85g)
Amount Per Serving
Calories 70 Calories from Fat 10
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Total Fat 1g
Saturated Fat 0g
Trans Fat 0g
Cholesterol 10mg
Sodium 240mg
Potassium 40mg
Total Carbohydrate 12g
Dietary Fiber 1g
Sugars <1g
Protein 3g
% Daily Value (DV)
Protein 15% • Vitamin A 0%
Vitamin C 0% • Calcium 0%
Iron 6%
11011 070

RAVIOLI INGREDIENTS: COOKED CHICKEN AND CARROT RAVIOLI (WATER, WHOLE WHEAT FLOUR AND ENRICHED FLOUR BLEND IWHOLE WHEAT FLOUR, ENRICHED DURUM WHEAT FLOUR (WHEAT FLOUR, NIACIN, FERROUS SULFATE THIAMIN MONONITRATE, RIBOFLAVIN, FOLIC ACIDI), DARK CHICKEN MEAT IDARK CHICKEN MEAT, WATER, POTATO STARCH, SALT, SODIUM PHOSPHATE, BLEACHED WHEAT FLOUR, EGG, RICOTTA CHEESE IWHEY (FROM MILK), CREAM DISTILLED VINEGAR, CARRAGEENAN], SALT, CHICKEN FLAVOR ISALT, AUTOLYZED YEAST EXTRACT, DEXTROSE, SUGAR MALTODEXTRIN, CHICKEN FLAVOR, FLAVOR, MODIFIED CORNSTARCH, GUAR GUM, XANTHAN GUM, PARTIALLY HYDROGENATED SOYBEAN OIL, ONION POWDER, TAPIOCA DEXTRIN, CHICKEN STOCK, VINEGAR SOLIDS], DEHYDRATED CARROTS, SOYBEAN OIL, EGG WHITE, DEHYDRATED ONION CELERY SEED, ANNATTO EXTRACT COLOR). PACKED IN: CHICKEN BROTH (WATER, LESS THAN 1% OF: CHICKEN BROTH SALT, FLAVORING, AUTOLYZED YEAST EXTRACT; CELERY, CARROT AND ONION JUICE CONCENTRATES, SOY LECITHIN).

## Product Label, Nutrition Facts, and Ingredients for Gerber Pasta Pick-Ups Turkey & Vegetable Ravioli



Nutrition Facts Serving Size 1 tray, drained (85g)
Amount Per Serving Calories 70 Calories from Fat 10
Total Fat 1g
Saturated Fat 0g
Trans Fat 0g
Cholesterol 10mg
Sodium 200mg
Potassium 40mg
Total Carbohydrate 12g
Dietary Fiber 1g
Sugars <1g
Protein 3g
% Daily Value (DV)
Protein 14% • Vitamin A 0%
Vitamin C 0% • Calcium 2%
Iron 6%

RAVIOLI INGREDIENTS: COOKED TURKEY VEGETABLE RAVIOLI (WATER, WHOLE WHEAT FLOUR AND ENRICHED FLOUR BLEND [WHOLE WHEAT FLOUR, ENRICHED DURUM WHEAT FLOUR (WHEAT FLOUR, NIACIN, FERROUS SULFATE, THIAMIN MONONITRATE, RIBOFLAVIN, FOLIC ACID)], RICOTTA CHEESE [WHEY (FROM MILK), CREAM, DISTILLED VINEGAR, CARRAGEENAN], COOKED GROUND WHITE TURKEY MEAT [TURKEY WHITE MEAT, TURKEY BROTH, SALT, MODIFIED CORNSTARCH, TAPIOCA STARCH], EGG, BREAD CRUMBS [BLEACHED WHEAT FLOUR, YEAST, SUGAR, SALTI, SALT, SOYBEAN OIL, EGG WHITES, DEHYDRATED CARROTS, DEHYDRATED ONION BUTTER FLAVOR [DEHYDRATED BUTTER, BUTTERMILK POWDER. NATURAL FLAVOR, MALTODEXTRIN, MODIFIED CORNSTARCH], ANNATTO EXTRACT COLOR, SPICES, CELERY SEED). PACKED IN: CHICKEN BROTH (WATER, LESS THAN 1% OF: CHICKEN BROTH, SALT, FLAVORING, AUTOLYZED YEAST EXTRACT, TOMATOES, TOMATO PASTE, SUGAR; CELERY, CARROT AND ONION JUICE CONCENTRATES, NATURAL FLAVOR, GARLIC AND ONION POWDERS. CILANTRO EXTRACT, SOY LECITHIN).

## Product Label, Nutrition Facts, and Ingredients for Gerber Graduates Pasta Pick-Ups Spinach & Cheese Ravioli



	n Facts ay, drained (85g)
Amount Per Serv	ing
Calories 70 Ca	lories from Fat 15
Total Fat	1.5g
Saturated Fat	0g
Trans Fat	0g
Cholesterol	10mg
Sodium	240mg
Potassium	40mg
<b>Total Carboh</b>	ydrate 11g
Dietary Fiber	1g
Sugars	<1g
Protein	<b>3</b> g
% Daily Value (D)	
	Vitamin A 0%
Vitamin C 0% •	Calcium 4%
Iron 6%	

INGREDIENTS: COOKED SPINACH AND CHEESE RAVIOLI (WATER WHOLE WHEAT FLOUR AND ENRICHED FLOUR BLEND (WHOLE WHEAT FLOUR, ENRICHED DURUM WHEAT FLOUR (WHEAT FLOUR NIACIN, FERROUS SULFATE, THIAMIN MONONITRATE, RIBOFLAVIN FOLIC ACID)], RICOTTA CHEESE [WHEY, CREAM, DISTILLED VINEGAR CARRAGEEÑAN], BREAD CRUMBS [BLEACHED WHEAT FLOUR, YEAST SUGAR, SALT], EGG, LOW MOISTURE PART SKIM MOZZARELLA CHEESE [CULTURED MILK, SALT, ENZYMES], SALT, DEHYDRATED SPINACH FLAKES, SOYBEAN OIL, EGG WHITES, ROMANO CHEESE MADE FROM COW'S MILK [CULTURED MILK, SALT, ENZYMES] NATURAL CHEESE FLAVORS [CHEDDAR CHEESE (CULTURED MILK SALT, ENZYMES), WHEY, NATURAL FLAVOR, BUTTERMILK, LACTIC ACID, CALCIUM LACTATE, SALT, LIPOLYZED BUTTERFAT, SODIUM CASEINATE, BUTTERFAT, SOY LECITHIN], ANNATTO EXTRACT COLOR) WATER, LESS THAN 1% OF: CHEESE BLEND (CHEDDAR AND BLUE CHEESES [CULTURED MILK, SALT, ENZYMES], WHEY, WATER, SALT) SALT, TOMATOES, TOMATO PASTE, CORN OIL, AUTOLYZED YEAST EXTRACT, SUGAR, CREAM POWDER (CREAM, FAT FREE MILK). NATURAL FLAVOR, BUTTER (CREAM), DRY MUSTARD, GARLIC AND ONION POWDERS, CILANTRO EXTRACT.