

BEFORE THE FEDERAL TRADE COMMISSION  
UNITED STATES OF AMERICA

In Re: The Gerber Products Company

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Docket No. \_\_\_\_

PETITION TO PROHIBIT FALSE AND MISLEADING ADVERTISING

\* \* \*

Submitted by the

Center for Science in the Public Interest

February 14, 1996

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## Executive Summary

For the last four decades, the Gerber Products Company, maker of Gerber baby foods, has run false and misleading advertisements that grossly exaggerate the nutritional quality of its products.

Gerber has long dominated the jarred baby-food industry, where it now maintains about a 70% market share. In 1995, the Center for Science in the Public Interest published a report entitled *Cheating Babies*, which documented that many of Gerber's products were adulterated by the addition of water, chemically modified starch, and sugar. For instance, Gerber's best-selling product, Bananas with Tapioca, contains half the banana content of Beech-Nut's Bananas. CSPI called on the Food and Drug Administration and U.S. Department of Agriculture to require that the percentages of major ingredients be listed on the front labels of baby foods.

In the past two years, Gerber has mounted a publicity and marketing campaign in a wide variety of media -- including television, magazines, the Internet, coupons, brochures, telephone messages, a letter to doctors, and trade publications -- that makes a multitude of deceptive claims (some in response to CSPI's past criticisms of Gerber's products). This petition cites fifteen recent Gerber ads that make deceptive, misleading, or false claims. Those claims include:

- \* "Four out of five pediatricians recommend Gerber." In fact, according to the survey that Gerber uses, most pediatricians don't recommend any baby food, and only about 16 percent recommend Gerber. Other ads qualify the claim to cover only "pediatricians who recommend baby food," but those ads are also misleading.
- \* Gerber adds modified starch and sugar to its products "without sacrificing nutrition." In fact, it is precisely the use of modified starch and sugar, together with water, that replaces as much as half of the nutritious ingredients in some of Gerber's products.
- \* "Nutritionally You Can't Buy A Better Baby Food Than Gerber." In fact, many of Gerber's products are nutritionally inferior to products made by Beech-Nut, Earth's Best, and Growing Healthy.

Those messages have helped create in the public's mind the erroneous impression that

Gerber markets the most healthful baby foods. It is that impression that has helped the company maintain such dominance in its industry over many years. This petition provides sixteen examples of magazine advertisements that ran between 1950 and 1990 that made deceptive nutritional claims, such as that Gerber baby foods provided the “utmost in nutrition,” that a “touch of tapioca” was used in some foods, that sugar was added to only a few foods, and that Gerber “sets the standard for quality.”

This petition asks the Federal Trade Commission (FTC) to halt the dissemination of Gerber’s deceptive advertising materials, to bar similar claims in the future, and to penalize Gerber financially. Because of Gerber’s long history of deceptive advertising, the petition also calls on the FTC to require Gerber to sponsor corrective advertising to correct consumers’ misconceptions about the nutritional quality and composition of Gerber baby foods.

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February 14, 1996

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Pursuant to Section 4(d) of the Administrative Procedure Act, 5 U.S.C. § 553(e), and 16 C.F.R. § 2.1, the Center for Science in the Public Interest (CSPI) requests that the Federal Trade Commission (FTC) prohibit false and misleading advertising by the Gerber Products Company.

CSPI is a non-profit consumer organization, supported by 800,000 members, that has worked since 1971 to improve national health policies. We have been especially concerned about the effect of food advertising on consumer health. We contend that advertising by the Gerber Products Company is false and misleading, as defined by Sections 12 and 15 of the Federal Trade Commission Act (FTC Act),<sup>1</sup> and is therefore deceptive under Section 5 of the FTC Act.

## **I. INTRODUCTION**

New parents want to provide their infants with the best possible start in life. They are faced with many important decisions: whether to breast feed; which soaps, lotions, and diapers to buy; and, when the time for solid food comes, which foods to feed their babies. Parents want to feel secure that the foods they choose for their babies are as healthful as possible, providing their babies with all the nutrients they need. While it is easy to make nutritious baby foods at home, commercially-prepared foods are convenient for busy parents. Over the years, tens of millions of parents have trusted food manufacturers -- Gerber first among them -- to provide their babies with much of the solid food they will eat during the first year of life.

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<sup>1</sup> 15 U.S.C. §41 *et seq.*

Baby food is a \$1.25 billion a year industry in the United States.<sup>2</sup> By the time the average American baby has reached twelve months of age, he or she will have consumed, smeared around, or spit out an average of 600 jars of baby food.<sup>3</sup> Gerber, which jarred its first strained peas in 1928, is far and away the industry leader, with over 70% of the market. Gerber makes 182 different food and juice items for babies and toddlers and sells over 1.2 billion units of baby food per year.

The handful of baby-food companies compete for new parents' loyalty and business. Through brochures, direct mail, ad campaigns, labeling, and pricing, each tries to convince parents that its products are the best. For example, in 1994 Gerber launched a \$30 million TV, print, and direct-mail campaign using the slogan "[f]or learning to eat smart, right from the start."<sup>4</sup> The advertisements assure parents that Gerber foods are "specially formulated to help your baby develop a variety of tastes for healthier foods" and that "[t]he longer you can keep your baby on these smart [Gerber] foods now, the better her chances are for eating healthy -- and being healthy -- for a long time to come."

It is difficult, if not impossible, for most consumers to verify Gerber's promises to provide the most nutritious foods made of the finest ingredients. Almost all of Gerber's foods are pureed, strained, or blended to the extent that they bear little resemblance to their whole-food

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<sup>2</sup> *Consumer Expenditures Survey*, Supermarket Business, Sept. 1994, at 66.

<sup>3</sup> David Woodruff et al., *Strained Peas, Strained Profits?*, Business Week, June 6, 1994, at 30.

<sup>4</sup> Betsy Spethman, *Gerber to Set \$30 M on Food Line*, Brandweek, Apr. 11, 1994, at 6. In 1994 Gerber actually spent \$16.7 million on media advertising. Advertising Age, Sept. 27, 1995, at 57.

components. It's impossible to ascertain the quantities of the ingredients by visual examination. Since the percentages of ingredients are not listed on the label, the ingredient information on the labels themselves is not always useful for informed purchasing. One almost needs to be a trained nutritionist to compare different brands of similar products by carefully integrating the nutrition and ingredient information.

Because of inadequate ingredient labeling, CSPI published a report, *Cheating Babies: Nutritional Quality and Cost of Commercial Baby Food*,<sup>5</sup> that disclosed the nutritional composition of baby foods, and has also asked the FDA to mandate percentage-ingredient labeling of baby foods.<sup>6</sup>

In the absence of truly informative and easily understood labeling, consumers may rely to a significant extent on advertising for information about the nutritional quality of baby food. Unfortunately, in the case of Gerber's advertising, that reliance is often seriously misplaced. Gerber's recent, and ongoing, advertising campaign claims that Gerber's baby foods provide "optimum nutrition" and are "the most wholesome, nutritious, safe foods." Claiming that it is "the world leader in, and advocate for, infant nutrition," Gerber tells parents that "nutritionally you can't buy a better baby food than Gerber," and that "four out of five pediatricians recommend Gerber." Those claims fly in the face of sound nutritional advice and the truth.

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<sup>5</sup> Daryth Stallone & Michael Jacobson, Center for Science in the Public Interest, *Cheating Babies: Nutritional Quality and Cost of Commercial Baby Food* (1995) (hereinafter, *Cheating Babies*) (attached as Exhibit 1).

<sup>6</sup> Letter from Michael Jacobson, Executive Director and Daryth Stallone, Nutrition Action Fellow, Center for Science in the Public Interest, to David Kessler, Commissioner, Food and Drug Administration, April 20, 1995 (attached as Exhibit 2). The FDA is still considering that request. Dkt. No. 95P-0246.

By its ongoing and deliberate campaign of false and misleading advertising, Gerber continues cheating babies, deceiving parents, and stealing business from honest competitors that sell nutritionally superior products, sometimes for less money.<sup>7</sup>

## **II. BACKGROUND**

### **A. Nutritional Composition of Gerber Baby Food**

Gerber markets three categories of baby food: first-stage, second-stage, and third-stage foods.<sup>8</sup> Foods in the three stages vary in variety, portion size, and, in some cases, texture, to match the needs of growing infants.

- **First-stage foods**

First-stage foods are single fruits, vegetables, and dry cereals intended to be the first solid foods that an infant ingests, usually sometime after four months of age. Gerber's first-stage foods are generally sold in 2.5-ounce jars and packages. Gerber sells thirteen different first-stage foods, which comprise 12% of Gerber baby foods sold in 1994.<sup>9</sup> Five of Gerber's first-stage foods are among its fifteen top-selling foods.

The ingredients of first-stage fruits and vegetables vary little from company to company.

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<sup>7</sup> Deceptive advertising is not Gerber's only means of maintaining its dominance of the baby-food industry. We discuss in Appendix 1 the marketing practices that may be unfair and, therefore, illegal. We urge the FTC, as a matter separate from this Petition regarding advertising, to open an investigation into whether the cited and other marketing practices are in violation of the law.

<sup>8</sup> Gerber baby foods are labeled as first-, second-, and third-foods, referred to throughout this Petition as first-, second-, and third-stage foods.

<sup>9</sup> Nielsen Marketing Research, *Nielsen Scantrack-UPC Ranking Report* (1995) (data for the 52-week period ending February 18, 1995) (attached as Exhibit 3).

All are composed of a single fruit or vegetable, usually mixed with water, with or without the addition of vitamin C and citric acid. However, the amount of fruit or vegetable in a given amount of food varies moderately from brand to brand due to the addition of different amounts of water and perhaps the use of different varieties of ingredients.

The carbohydrate content of single fruit or vegetable products is a good indicator of the amount of fruit or vegetable that a product contains. Among the ten most popular first-stage foods, the brand with the highest carbohydrate content, and hence the most fruit or vegetable, contains 21% to 79% more carbohydrate per ounce than the brand with the least amount.<sup>10</sup> Those differences are not revealed by casual examinations of labels.

- **Second-stage and third-stage foods**

Second-stage and third-stage solid foods are cereals, fruits, vegetables, meats, dinners, and desserts for infants from approximately six months and nine months of age, respectively. Sixty percent of the leading brands of baby foods sold are second-stage foods and 21% are third-stage foods. Gerber sells 60 different second-stage and 46 different third-stage solid jarred foods. Most second-stage foods are sold in 4- to 4.5-ounce jars and packages. Third-stage foods are sold in a 6-ounce size.

Gerber adds sugars and/or starchy fillers to over half of its second- and third-stage fruits and several second-stage vegetables. Gerber adds sugar to 55% (12 of 22) and chemically modified tapioca starch to 50% (11 of 22) of its second- and third-stage fruits (products labeled “with tapioca”). Gerber also adds flour to mixed and creamed vegetables. Beech-Nut, Earth’s

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<sup>10</sup> All nutritional data cited in *Cheating Babies* were provided by the manufacturers. All calculations were done with the actual analytical data, which are much more accurate than the rounded-off information on food labels.

Best, and Growing Healthy do not add sugar or starchy fillers to any single or mixed fruit or vegetable baby food.

The addition of water, sugars, and starchy fillers often greatly dilutes the nutrient content of the foods, compared with (a) the first-stage version of the same brand, (b) comparable second- or third-stage products that do not contain added fillers, or (c) equivalent weights of fresh produce. The examples below illustrate the degree to which adulteration with water, starches, and sugars dilute the nutrient density of second-stage fruits and vegetables.<sup>11</sup>

- **Chemically modified tapioca starch**

About half of Gerber's second- and third-stage fruits are "fruits with tapioca." Gerber sells over 100 million jars of fruits with tapioca per year. Bananas with Tapioca is Gerber's top selling baby food -- over 40 million jars were sold in 1994.<sup>12</sup>

All varieties of fruit with tapioca contain water, fruit, chemically modified tapioca starch, and sugar or high-fructose corn syrup. Although these products are labeled "fruit with tapioca," the name of the fruit(s), such as "Bananas," is written in large letters, while "with tapioca" is

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<sup>11</sup> We use the term "adulterated" in both its dictionary and legal definitions. According to *Webster's New World Dictionary*, adulterate means "to make inferior, impure, not genuine, etc. by adding a harmful, *less valuable*, or prohibited substance" (emphasis added). 19 (2d ed. 1986). According to the U.S. Food, Drug and Cosmetic Act, a food is adulterated:

(b)(1) If any valuable constituent has been in whole or in part omitted or abstracted therefrom; or (2) if any substance has been substituted wholly or in part thereof; or (3) if any substance has been added thereto or mixed or packed therewith so as to increase its bulk or weight, or reduce its quality or strength, or make it appear better or of greater value than it is.

21 U.S.C. § 342(b)(1). It is clear that many baby foods, including several discussed in our report, are adulterated under both of those definitions.

<sup>12</sup> Nielsen Marketing Research (Exhibit 3).

written in smaller letters below.<sup>13</sup> This labeling likely leads consumers to assume that the products are largely fruit, with all the nutritional benefits of full-fruit products. (Some people might think that healthy-sounding tapioca is actually a bonus that is provided *in addition to* the usual amount of fruit.) However, the fruit-with-tapioca products that CSPI examined contain half or less as much fruit as the products made only from fruit and water. In other words, a 2.5-ounce jar of Gerber's first-stage bananas or first-stage prunes actually contains more fruit than the 4-ounce jars of second-stage products that are adulterated with water and chemically modified starch.<sup>14</sup>

Compared to its own first-stage products, Gerber's Bananas with Tapioca and Prunes with Tapioca provide, on average, half or less the amount of key nutrients compared to fresh bananas and prunes (potassium, riboflavin, and vitamin B-6).

Beech-Nut's reformulation experience demonstrates our point. In 1983, Beech-Nut stopped making fruit-with-tapioca products. To replace the starch and water with fruit, Beech-Nut had to increase the amount of bananas in the product from 20%-30% to 80%-90% of the

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<sup>13</sup> Stating "tapioca" on the front label is inaccurate inasmuch as the actual ingredient is chemically modified tapioca starch, a substance that is physically, chemically, and physiologically different from native tapioca. CSPI has brought this inaccuracy to the attention of the FDA.

<sup>14</sup> A Gerber spokeswoman stated that the bananas used in Gerber's Bananas with Tapioca are not as ripe as the first-stage bananas and have to be diluted with water, thickened, and then sweetened to be palatable (telephone conversation, Gerber's 1-800 consumer-information service, Apr. 17, 1995).

product's weight.<sup>15</sup> Since that time, Beech-Nut has run advertisements that attempted to point out the differences between the amount of fruit in its products and Gerber's fruits with tapioca. Unfortunately, Beech-Nut's modest level of comparative advertising has not been sufficiently effective to overcome Gerber's relatively large-scale misleading advertising and misleading and inadequate labeling.

- **Flour and Other Starch Thickeners and Fillers**

Gerber prepares several of its second- and third-stage vegetables with starch thickeners. The nutritional quality of a vegetable dish with added flour or starch is inferior to that of unadulterated dishes. For example, Gerber's Mixed Vegetables contains three kinds of starch thickeners (wheat and oat flours, and potato solids or potato flour) and a relatively small amount of vegetables.

The ingredients in Gerber's Mixed Vegetables in order by weight, are: water, carrots, wheat flour, oat flour, potato solids, tomato paste, and onion powder. By contrast, Beech-Nut makes a mixed vegetable product that is not adulterated with starchy filler. Gerber's Mixed Vegetables is so diluted with water and starchy fillers that it provides relatively small amounts of nutrients.

Gerber adulterates two varieties of "creamed vegetables" (corn and spinach) with fillers. For example, Gerber's Creamed Corn is made with water, corn, nonfat dry milk, and rice flour. Growing Healthy's Creamed Corn contains only corn and water. Compared to Gerber, Growing Healthy's Creamed Corn provides at least 73% more calories, 75% more riboflavin, two times as

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<sup>15</sup> Letter with enclosures from Nancy Wall, Public Relations for Beech-Nut Nutrition Corporation, to Bonnie Liebman, Director of Nutrition, Center for Science in the Public Interest (July 28, 1985).

much niacin, three times as much thiamin, and significantly more protein per ounce.

Since 1994, Gerber has added modest amounts of sugar and or salt to some of its third-stage fruits and vegetables (and other products). Two third-stage vegetables -- carrots and squash -- now contain added sugar. It appears that the sugar does not replace any vegetable, but is added to it, thereby increasing calories without also increasing the nutrient content. Although the American Academy of Pediatrics recommends that salt not be added to baby foods,<sup>16</sup> six of Gerber's seven third-stage vegetables now contain small amounts of added salt. The sugar and salt may serve to mask off-flavors and/or enhance desired flavors in the heavily processed foods.

Baby food dinners are strained combination foods that typically contain meat, vegetables, and sometimes noodles or rice. Gerber markets ten different second-stage and eleven different third-stage dinners. Gerber adds at least two types of flours to all its standard dinners -- some meals contain four different flour ingredients.

The use of starchy thickening agents can accompany and mask the addition of a significant amount of water. As any cook knows, a little bit of flour or starch can thicken a lot of liquid. The presence in a baby food of one or more fillers, such as rice flour, wheat flour, or modified starch, is a good indicator that the food is a diluted and nutritionally inferior product. Consider, for example, Chicken and Noodles, the top-selling second-stage dinner.<sup>17</sup> Gerber's Chicken and Noodles contains two types of flour. The Chicken and Noodles products made by Growing Healthy and Beech-Nut, by contrast, gain thickness from the use of real food. Not

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<sup>16</sup> American Academy of Pediatrics, *Caring for Your Baby and Young Child: Birth to Age 5*, at 205-06 (1993) (in a discussion of baby-food preparation, advises against adding salt).

<sup>17</sup> Nielsen Marketing Research (Exhibit 3).

surprisingly, Growing Healthy and Beech-Nut's dinners are more nutritious than Gerber's. The Growing Healthy meal is especially high in nutrients. It provides 44% more calories and at least twice as much protein, vitamin A, and B-vitamins (thiamin, riboflavin, niacin, and vitamin B-6) as Gerber's. The differences are due both to Gerber's use of water and fillers and to Growing Healthy's use of concentrated nutrient-rich broths. While the comparable Beech-Nut product contains about the same amount of calories and protein as Gerber's, it provides at least 40% more potassium and six times more vitamin A, indicating the use of more food and no fillers. Earth's Best's dinner, which is a third-stage dinner, contains at least 50% more protein than the leading brands and twice as much vitamin A as Gerber's dinner.

- **Starch and Sugar Added to Desserts**

Gerber markets 17 second- and third-stage desserts. Every one of those desserts contains added sugars and chemically modified starch. According to a Gerber spokesperson, Gerber's desserts contain up to 11% sugar by weight.<sup>18</sup> That means a 6-ounce dessert item may contain up to 18 grams, or four and a half teaspoons of sugar. Some might consider such products a child's first junk foods.

Sugar-added desserts dilute the nutrient density of babies' diets and serve no nutritional purpose. Plain fruit provides the sweetness children like, as well as higher levels of essential nutrients. By contrast, the fruit content in baby food desserts is diluted by the added water, sugar, and chemically modified starch. The added sugars and chemically modified starch provide calories, but no other nutrients. Consider the following products:

- Gerber's Peach Cobbler provides only 44% of the vitamin A and 53% of the potassium that is present in Gerber's plain first-stage Peaches.

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<sup>18</sup> Gerber's 1-800 consumer-information service (Apr. 17, 1995).

- Gerber's Banana-Apple Dessert contains only 47% of the potassium and 26% of the dietary fiber that is present in Gerber's plain third-stage Apple Banana.
- Gerber's third-stage Fruit Dessert has only 64% of the potassium and 18% of the fiber that is present in Gerber's plain third-stage Fruit Salad.

The wide variety of desserts offered by Gerber appears to be more a strategy to capture as much shelf space as possible than a means of providing babies with the most nutritious foods.

### **B. Industry Position on Baby Food Nutrition**

Gerber, Heinz, and Beech-Nut have all taken positions in the debate on baby food nutrition and labeling as part of the FDA's consideration of CSPI's request for improved labeling of baby foods.<sup>19</sup>

Gerber, not surprisingly, insists that there is no problem and that the use of chemically modified tapioca starch as an additive to its banana product is suitable. "Desserts are a cultural feeding issue, not a nutrition one. The purpose of feeding either homemade or commercial dessert products is to introduce infants and children to the tastes and foods of their culture."<sup>20</sup> Apparently, Gerber has concluded that our culture is a junk food culture and that the company's role is to contribute empty calories to baby foods, while telling parents that Gerber makes "the most wholesome, nutritious, safe foods" with "optimum nutrition." Heinz takes a similar

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<sup>19</sup> Letters filed by each company with the FDA are instructive. Letter from Richard Cotter, Vice President, Research and Development, Gerber Products Company, to David Kessler, Commissioner, Food and Drug Administration (Sept. 6, 1995) (attached as Exhibits 4); letter from Dennis Kolsun, Manager, Government and Consumer Affairs, Heinz U.S.A., to David Kessler, Commissioner, Food and Drug Administration (Sept. 7, 1995) (attached as Exhibit 5); letter from Richard Theuer, Vice President, Research and Development, Beech-Nut Nutrition Corporation, to David Kessler, Commissioner, Food and Drug Administration (Aug. 28, 1995) (attached as Exhibit 6).

<sup>20</sup> See Exhibit 4, at 2.

position.<sup>21</sup> Gerber’s cavalier attitude toward baby food nutrition carries over to its advertising.<sup>22</sup>

Beech-Nut, on the other hand, concludes that “the labeling of baby food should provide the consumer with the information needed to make an informed and intelligent purchasing decision about which foods to feed to his or her baby.”<sup>23</sup> Beech-Nut’s position is generally supportive of CSPI’s. Beech-Nut also concurs with CSPI’s position that “tapioca” and “modified tapioca starch” are not the same thing and that claiming that a baby food has “tapioca” when it actually has chemically modified tapioca starch can mislead the consumer.<sup>24</sup>

The difference of opinion between Beech-Nut and Gerber and Heinz is reflected in Beech-Nut’s products -- they do not contain chemically modified starches. But Beech-Nut must compete against Gerber, the industry leader, which has chosen to adulterate its products.

### **III. FACTUAL GROUNDS**

CSPI has reviewed Gerber’s recent advertising materials, as well as a small sample of Gerber’s past advertising between 1950 and 1990 in two magazines (*Baby Talk and Parents*). This review reveals that Gerber has intentionally engaged in a campaign of false and misleading advertising that stretches over several decades.

#### **A. Historic Overview of Gerber’s Advertising**

Since at least 1950, the earliest year in which CSPI examined magazines, Gerber has

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<sup>21</sup> See Exhibit 5.

<sup>22</sup> See *infra* pp. 13-31.

<sup>23</sup> See Exhibit 6, at 1.

<sup>24</sup> *Id.*

frequently emphasized in its advertising the high nutritional quality of its products and the company's concern for nutrition. That advertising cultivated in the public's mind the notion that Gerber cares deeply about the health and welfare of babies and that Gerber's products have always been highly nutritious. Following are typical claims made in advertisements over the years, followed by CSPI's comments.

**“How Soon After Mealtime is Naptime?”**<sup>25</sup>

**Gerber's Claim:** “We've been making nothing but Baby Foods so long, we've learned how to keep the True-Flavor of fruits and vegetables. And -- how to retain precious nutrients. When Baby graduates to Junior Foods, you'll want to continue with Gerber's. Same high quality, same low price.”

**The Truth:** While CSPI does not have ingredient listings from this period, judging from foods made in 1977-1995, many Gerber products probably contained added sugars and starches that reduced the levels of “precious nutrients.”

**“The ‘Basic 7’ for a Well-Balanced Diet”**<sup>26</sup>

**Gerber's Claim:** “Gerber's delectable new Strained Fruit Dessert . . . a delicately-balanced blend of 3 popular fruits: mild orange, mellow pineapple, mouth-watering apricot. Add to this a touch of tapioca for a velvety texture, and you've a dish to delight your darling.”

**The Truth:** Judging from foods produced in the past twenty years, the “touch of tapioca” probably replaced a substantial portion of actual fruit in the advertised dessert. Furthermore, inasmuch as modified starches were first used in baby foods in 1952, the “touch of tapioca” was actually probably chemically modified, not natural, tapioca starch.<sup>27</sup> Also, judging from Gerber's 1977 ingredient listing,<sup>28</sup> some of the “fruit” was probably fruit juice.

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<sup>25</sup> Magazine advertisement, *Baby Talk*, Feb. 1950 (attached as Exhibit 7A).

<sup>26</sup> Magazine advertisement, *Baby Talk*, May 1955 (attached as Exhibit 7B).

<sup>27</sup> Subcommittee on Safety and Suitability of MSG and Other Substances in Baby Foods, Food Protection Committee, Food and Nutrition Board, National Research Council, National Academy of Sciences, *Safety and Suitability of Modified Starches for Use in Baby Foods*, at 1 (Sept. 1970).

<sup>28</sup> Strained Fruit Dessert contained “water, apricots from concentrate, pineapple juice

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from concentrate, sugar, orange juice from concentrate and modified corn starch.” *Ingredients*, Gerber Baby Foods (Apr. 1977) (attached as Exhibit 8).

**“Aids to Baby’s Athletic Program”**<sup>29</sup>

**Gerber’s Claim:** “It might interest you to know that one of our major projects is a constant search to find methods that will promote the preservation of natural food values. As a result of this continuing study, we have developed special cooking and processing methods to provide the utmost in nourishment so important to your baby.”

**The Truth:** Judging from the quality of Gerber’s products made between 1977 and 1995, Gerber has made a “constant search” of ways not to “provide the utmost in nourishment,” but to save money by using modified starches, flour thickeners, water, and sugar to replace real (and more expensive) ingredients. Gerber’s products have not always contained “the utmost in nourishment,” because of the company’s heavy reliance on water, sugar, and chemically modified starch.

**“From Formula to Three Squares”**<sup>30</sup>

**Gerber’s Claim:** “Developing new and nutritious foods for your baby is a never-ending project with us.”

**The Truth:** Many of the products that Gerber has developed have much lower nutritional value than competing brands.

**“A Place in the Sun for Your Little One”**<sup>31</sup>

**Gerber’s Claim:** “According to nutritionists, your baby needs all the essential amino acids (among the substances that make up protein) to maintain a normal growth pattern. Gerber High Protein Cereal is a good example of a single food which provides these amino acids.”

**The Truth:** This ad touted one nourishing product, presumably undiluted with modified starch and water, with the implication that *all* Gerber’s products are just as healthful; they were not.

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<sup>29</sup> Magazine advertisement, *Baby Talk*, Jan. 1960 (attached as Exhibit 7C).

<sup>30</sup> Magazine advertisement, *Baby Talk*, Mar. 1960 (attached as Exhibit 7D).

<sup>31</sup> Magazine advertisement, *Baby Talk*, June 1960 (attached as Exhibit 7E).

### **“Cooling Systems for Small Fry”**<sup>32</sup>

**Gerber’s Claim:** “More good news for summer appetites: Gerber Strained or Junior Ham with Vegetables -- newest High Meat Dinner to make its delicious debut. Lots of tender, tasty ham teams up with garden-good vegetables for flavor galore and nutritional benefits by the score: body-building protein, blood-building iron and niacin, an important B-vitamin.”

**The Truth:** The ad failed to disclose the presence of modified-starch thickeners. While CSPI does not have the Gerber’s 1960 ingredient list, Gerber’s 1977 ingredient listing indicates that the Strained Ham with Vegetables included modified corn starch as the third major ingredient;<sup>33</sup> we suspect that the product included that ingredient in 1960. The Junior Ham with Vegetables contained modified corn starch as the fourth ingredient. That thickener, together with water (the first ingredient in each of the High Meat Ham with Vegetables Dinners), replaces real food and results in smaller “nutritional benefits.”

### **“Social Life from a Small-Fry Viewpoint”**<sup>34</sup>

**Gerber’s Claim:** “Your baby’s nutrition is usually bettered through use of a variety of foods. In addition to the meats, Gerber offers over 50 strained foods so you can select the foods that give him the nutrients he needs”; also, “Nutrition notation from Dan Gerber. ‘May I tell you how we work in the interest of better nutrition for your baby?’”

**The Truth:** While CSPI does not have ingredient listings from this period, the composition of many Gerber’s products produced between 1977 and 1995 shows that Gerber was not always working “in the interest of better nutrition for your baby.”

### **“What Your Baby Sees”**<sup>35</sup>

**Gerber’s Claim:** “What’s the secret behind the success of Gerber Fruits for babies? . . . What’s more, flash-cooking also protects the precious vitamins so important to your baby.” “Gerber prepares over 100 baby foods -- infant formulas, cereals, strained and junior foods -- to meet your baby’s nutritional needs.”

**The Truth:** While flash-cooking might protect vitamins, many Gerber products were diluted

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<sup>32</sup> Magazine advertisement, *Baby Talk*, July 1960 (attached as Exhibit 7F).

<sup>33</sup> Exhibit 8.

<sup>34</sup> Magazine advertisement, *Baby Talk*, Nov. 1960 (attached as Exhibit 7G).

<sup>35</sup> Magazine advertisement, *Baby Talk*, Feb. 1965 (attached as Exhibit 7H).

through the use of added sugar, modified starches, and water. Many of Gerber's products contained chemically modified starch, sugar, and water and did less than they should have to "to meet your baby's nutritional needs."

**"The Most Precious Gift of All"**<sup>36</sup>

**Gerber's Claim:** "[Gerber fruit products are] flash-cooked in a matter of seconds to preserve pleasing-to-the-eye colors and mouth-watering flavors. Most important, flash-cooking helps retain the utmost in nutritive values so important to your baby."

**The Truth:** Judging from Gerber's frequent use of added sugar and modified starches in products made in 1977 and later, we presume that those same ingredients were used when this ad was published and that Gerber's recipes did not ensure that the final products contained "the utmost in nutritive values."

**"Gerber Helps Surround Your Baby With Love"**<sup>37</sup>

**Gerber's Claim:** "Gerber has been helping to feed babies since you were a baby. Today Gerber offers over 170 different foods -- cereals, juices, strained and junior foods, meats, high meat dinners, even toddler meals. All prepared with one thought in mind: to help provide your baby with proper nourishment for a healthier future."

**The Truth:** Not "all" of Gerber's products were formulated to provide "proper nourishment." According to Gerber's April 1977 listing of ingredients,<sup>38</sup> numerous products contained:

(1) **added sugar**, which adds empty calories to products ("strained foods," including Apple Blueberry, Apple Raspberry, Applesauce & Apricots, Apricots with Tapioca, Bananas with Tapioca, Bananas with Pineapple and Tapioca, Peaches, Plums with Tapioca, Prunes with Tapioca, Cereal & Egg Yolk, High Protein Cereal with Applesauce & Bananas, Mixed Cereal with Applesauce & Bananas, Oatmeal with Applesauce & Bananas, Rice Cereal with Applesauce & Bananas, Cottage Cheese with Pineapple, all nine different strained desserts; "junior foods" including Apple Blueberry, Apple Raspberry, Applesauce & Apricots, Apricots with Tapioca, Bananas with Tapioca, Peaches, Plums with Tapioca, Prunes with Tapioca, and seven out of eight desserts) and

(2) **modified starches**, which is used to replace valuable ingredients ("strained foods,"

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<sup>36</sup> Magazine advertisement, *Baby Talk*, July 1965 (attached as Exhibit 7I).

<sup>37</sup> Magazine advertisement, *Baby Talk*, Mar. 1975 (attached as Exhibit 7J).

<sup>38</sup> Exhibit 8.

including all six “high meat dinners and cheese foods,” Apricots with Tapioca, Bananas with Tapioca, Bananas with Pineapple and Tapioca, Plums with Tapioca, Prunes with Tapioca, eleven out of twelve “vegetables & meat combinations,” all nine desserts; Junior Foods including Creamed Corn, Creamed Green Beans, all five “high meat dinners,” and many other products).<sup>39</sup>

Parents feed their babies food for its nutritional value. They would not, knowingly, choose products whose nutritional value had been diluted through the use of added sugar and starch.

**“A Mother’s Confidence is Earned With Quality and Concern”**<sup>40</sup>

**Gerber’s Claim:** “Gerber baby foods contain only wholesome ingredients. Selected and prepared under Gerber’s high standards. And that’s just the beginning. Gerber pioneered the reduction of sugar and in 1977 stopped adding salt to baby foods. Sugar is an important source of energy for your baby. And in most cases, the natural sugars found in many foods are sufficient to meet your baby’s needs. That’s why Gerber adds sugar (in carefully controlled amounts) to only those few foods that require additional sweetening, like tart fruits and desserts. We started this program to minimize the use of added sugar in 1972, becoming the first baby company to do so. In 1977, all baby-food companies, including Gerber, stopped adding salt to baby foods. We did this because the pediatric experts are unable to specify the ideal salt intake and some parents expressed a desire for baby foods without added salt. . . .”

**The Truth:** Gerber claims to have “pioneered” the reduced use of salt and sugar in baby foods, implying that the change was initiated by the company. In fact, those changes were in response to CSPI-generated publicity and the threat of FDA-mandated percentage-ingredient labeling. “Carefully controlled amounts” implies, but does not mean, small amounts. Some products, such as desserts, contained substantial amounts of sugar. Also, while Gerber states that sugar is added “to only those few foods that require additional sweetening, like tart fruits and desserts,” according to Gerber’s 1977 ingredient listing,<sup>41</sup> sugar was also added to:

- Ready to Serve Cereals and Baked Goods: High Protein Cereal with Apple and Orange, Mixed Cereal with Banana, Oatmeal with Banana, Rice Cereal with Banana, Arrowroot Cookies [corn syrup], Cookies (Animal Shaped), Pretzels, Teething Biscuits, Zwieback Toast
- Strained Vegetables: Creamed Corn

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<sup>39</sup> See Citizen’s Committee on Infant Nutrition, Center for Science in the Public Interest, *White Paper on Infant Feeding Practices* (1974) (attached as Exhibit 9).

<sup>40</sup> Magazine advertisement, *Parents*, Jan. 1979 (attached as Exhibit 7K).

<sup>41</sup> Exhibit 8.

- Strained High Meat Dinners & Cheese Foods: Cottage Cheese with Pineapple
- Strained Fruits: Many fruits and fruits with tapioca contained sugar, including ones that would not appear to be “tart,” such as Bananas with Tapioca, Peaches, Plums with Tapioca, and Prunes with Tapioca
- Strained Jarred Cereals: Cereal & Egg Yolk, High Protein Cereal with Applesauce & Bananas, Mixed Cereal with Applesauce & Bananas, Oatmeal with Applesauce & Bananas, Rice Cereal with Applesauce & Bananas
- Junior Meats: Chicken Sticks, Meat Sticks, Meat & Vegetable Sticks, Turkey Sticks
- Junior Vegetables: Creamed Corn
- Junior Fruits: Many fruits and fruits with tapioca contained sugar, including ones that would not appear to be “tart,” such as Bananas with Tapioca, Peaches, Plums with Tapioca, and Prunes with Tapioca
- Junior Jarred Cereals: Cereal & Egg Yolk, Mixed Cereal with Applesauce and Bananas, Oatmeal with Applesauce and Bananas, Rice Cereal with Mixed Fruit
- Junior Vegetables & Meat Combinations: Spaghetti, Tomato Sauce & Beef
- Toddler Meals: Beef & Rice with Tomato Sauce; Chicken Stew; Green Beans, Potatoes & Ham Casserole; Spaghetti & Meatballs; Vegetable & Turkey Casserole

**“Jamie’s a Gerber Baby Because I Want Jamie to Be, Not Because I Was”<sup>42</sup>**

**Gerber’s Claim:** “After finding that out, it didn’t surprise me to learn that Gerber sets the standard for quality in baby food. That they were first to provide nutritional information about baby foods. Or that Gerber is one source pediatricians come to when they have questions. So the way I see it, with Gerber I’m not only getting the oldest name in baby food, I’m also getting the very latest in nutrition.”

**The Truth:** “The very latest in nutrition” implies “highly nutritious.” In fact, Gerber’s sugar-added fruits, sugary desserts, and widespread use of modified starches and flours as fillers did not represent the “very latest in nutrition.” CSPI criticized those practices years earlier. Again, Gerber seeks to demonstrate the superior nutritional quality of its products by associating itself

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<sup>42</sup> Magazine advertisement, *Baby Talk*, Feb. 1985 (attached as Exhibit 7L).

with the medical community (“pediatricians come to [Gerber]”). The ad says that pediatricians turn to the company for information. While the ad does say that Gerber is “one source” of information, the implication is that Gerber is a major source of information, a claim of which we are skeptical. In 1985, Gerber did not set “the standard for quality” among baby-food companies. By then, Beech-Nut had dropped the use of modified-starch in many products.<sup>43</sup>

**“Bewildered. It’s Only Natural”**<sup>44</sup>

**Gerber’s Claim:** “With all Gerber baby foods, you can be sure your baby is getting up-to-date, wholesome goodness with no artificial colors, flavors, or preservatives.”

**The Truth:** Not “all Gerber baby foods” provided unadulterated “wholesome goodness.” According to Gerber’s April 1984 ingredient listing,<sup>45</sup> many products got their “wholesome goodness” from modified starches, added sugar, and rice flour and wheat flour thickeners.

**“Delight. It’s Only Natural”**<sup>46</sup>

**Gerber’s Claim:** “Caring About Nutrition -- A Natural With Gerber.”

**The Truth:** The frequent use of modified starches, rice flour and wheat flour thickeners, and added sugar (according to Gerber’s April 1984 ingredient listing)<sup>47</sup> indicates Gerber’s limited concern about nutrition.

**“The Complete Recipe for Gerber Applesauce: Tree-Ripened Apples. Water. Vitamin C”**<sup>48</sup>

**Gerber’s Claim:** “All Gerber baby foods are perfectly prepared for your baby’s nutritional needs, without added salt, artificial colors, flavors, or preservatives. These are the facts...Pure and Simple.”

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<sup>43</sup> *Supra* note 15 and accompanying text.

<sup>44</sup> Magazine advertisement, *Baby Talk*, Oct. 1985 (attached as Exhibit 7M).

<sup>45</sup> *Ingredients*, Gerber Baby Foods (Apr. 1984) (attached as Exhibit 10).

<sup>46</sup> Magazine advertisement, *Baby Talk*, Nov. 1985 (attached as Exhibit 7N).

<sup>47</sup> Exhibit 10.

<sup>48</sup> Magazine advertisement, *Baby Talk*, Mar. 1990 (attached as Exhibit 7O).

**The Truth:** The frequent use of added sugars, modified starches, and rice flour and wheat flour thickeners demonstrates that “all Gerber baby foods” are not “perfectly prepared for your baby’s nutritional needs.” Emphasizing the absence of certain questionable ingredients implies the absence of others. At the very least, emphasizing the lack of certain ingredients should have triggered positive disclosure of other ingredients that parents might be concerned about, such as chemically modified starches and sugar.

**“The Complete Recipe for Gerber Peas: Fresh, Tender Peas. Water”**<sup>49</sup>

**Gerber’s Claim:** “All Gerber baby foods are perfectly prepared for your baby’s nutritional needs, without added salt, artificial colors, flavors, or preservatives. These are the facts. . . Pure and Simple.”

**The Truth:** The frequent use of added sugars, modified starches, and rice flour and wheat flour thickeners demonstrates that “all Gerber baby foods” are not “perfectly prepared for your baby’s nutritional needs.” Emphasizing the absence of certain questionable ingredients implies the absence of others. At the very least, emphasizing the lack of certain ingredients should have triggered positive disclosure of other ingredients that parents might be concerned about, such as chemically modified starches and sugar.

Some of the older claims are almost identical to recent ones, such as Gerber’s assertion in 1955 that it adds “a touch of tapioca for a velvety texture,” whereas in reality the tapioca was at least sometimes chemically modified tapioca starch, not native tapioca, just like the “tapioca” noted on the front labels of many current Gerber products.<sup>50</sup> In addition to affecting the food’s texture, chemically modified tapioca starch reduces the food’s nutritional value.

A number of the advertisements refer to the American Medical Association,<sup>51</sup>

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<sup>49</sup> Magazine advertisement, *Baby Talk*, Apr. 1990 (attached as Exhibit 7P).

<sup>50</sup> Without knowing the ingredients of Gerber’s products at the time the various advertisements ran, it is not always possible to know exactly which of the early advertisements were misleading or deceptive. We urge the FTC to obtain that ingredient information from Gerber.

<sup>51</sup> One ad stated: “Next--more doctor-approved Gerber’s. . . . All 45 Gerber’s are approved by the Council on Foods and Nutrition of the American Medical Association.” *Baby*

pediatricians, and nutritionists. That was clearly an attempt to transfer the prestige and authority of those professionals to Gerber and its baby foods.

Gerber's advertising practices, spanning four decades, sought to create and reinforce in the minds of several generations of parents an unwarranted confidence in the superb quality of Gerber's products and the superiority of Gerber's products to those of other manufacturers, which contributed to Gerber's dominant position in the marketplace. That conclusion is further substantiated by Gerber's current advertisements, many of which are misleading or untruthful.

### **B. Gerber's Current Advertising**

CSPI reviewed advertisements placed by Gerber in a variety of outlets, from consumer publications and direct mail pieces to trade journals, television, and the Internet. Taken together, they demonstrate that Gerber continues its successful -- though fraudulent -- efforts to position itself as the industry leader for nutritional baby foods. Following is a summary of advertising claims in recent advertisements for Gerber baby foods, with CSPI's comments.

#### **"Nutritionally You Can't Buy A Better Baby Food Than Gerber"**<sup>52</sup>

**Gerber's Claim:** "Nutritionally you can't buy a better baby food than Gerber."

**The Truth:** In fact, consumers *can* buy other brands of baby food that are nutritionally superior to comparable Gerber products. *Cheating Babies* provides numerous examples of fruits, vegetables, and dinners where Gerber's product is far inferior to ones made by Beech-Nut, Growing Healthy, and Earth's Best. For instance, on average, Gerber's second-stage dinners provide about half the levels of several nutrients as dinners made by Growing Healthy.

**Gerber's Claim:** "The use of [modified food starch and sugar] provides *better product taste and texture without sacrificing nutrition!*" [emphasis in original]

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*Talk*, Mar. 1995.

<sup>52</sup> 1995 promotional flyer (attached as Exhibit 11).

**The Truth:** In fact, the use of modified food starch and sugar *does* sacrifice nutrition. *Cheating Babies* demonstrates clearly that the starch is accompanied by a relatively large amount of water that replaces real food in many of Gerber's products. (Whether the use of starch, water, and

sugar “provides better product taste and texture” is unclear. For instance, other companies market foods comparable to Gerber’s that are *not* diluted with those ingredients, and their products are clearly commercially viable.)

**Gerber’s Claim:** “Only 2 of the top 20 selling Gerber baby foods contain added sugar and/or modified food starch.”

**The Truth:** In fact, five of the top 20 selling products,<sup>53</sup> including the best-selling Bananas with Tapioca, contain added sugar or starch. Two others contain rice flour and wheat flour, which are also thickening agents that can reduce the proportion of more nutritious ingredients.<sup>54</sup>

**Gerber’s Claim:** “Nutritionally . . . these products [Gerber’s and Beech-Nuts bananas products] are equivalent.”

**The Truth:** Gerber misleadingly implies that the two products depicted in the ad are nutritionally comparable. First, the ad compares two unlike products: one contains only bananas (and modified starch, sugar, and water), while the other contains bananas, apples, and pears, three products with different nutritional profiles. A more appropriate comparison would have been Gerber’s (second or third stage) Bananas with Tapioca and Beech-Nut’s (first or third stage) Bananas. That comparison shows that the calorie and carbohydrate contents are similar, because the sugar and modified starch in Gerber’s product compensate for the lower content of bananas. Such a comparison also shows that Beech-Nut’s Bananas, based on 100 gram quantities, provides 40% more potassium (244 mg vs. 145 mg), twice as much dietary fiber (1.5 g vs. 0.7 g), three times as much vitamin A (68.5 IU vs. 20 IU), twice as much protein (0.9 g vs. 0.5 g), and three times as much iron (0.29 mg vs. 0.1 mg) as Gerber’s Bananas with Tapioca.<sup>55</sup> Those differences reflect the higher banana content in Beech-Nut’s Bananas.

Second, even comparing Gerber’s Bananas with Tapioca to Beech-Nut’s Bananas with Pears and Apples, the Beech-Nut product contains more food and food value. According to Beech-Nut’s ingredient list (and recipe), Beech-Nut’s Bananas with Pears and Apples is made entirely from those three fruits, while Gerber’s Bananas with Tapioca consists of only about 46% fruit.<sup>56</sup> Thus, the Beech-Nut product would similarly contain about twice as much of many nutrients, such as phytochemicals, including ones that were not analyzed by either company.

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<sup>53</sup> Nielsen Marketing Research (Exhibit 3).

<sup>54</sup> CSPI ascertained the presence of added sugar, modified starch, and flours from Gerber’s *Product Ingredients* booklet, received in February 1995. Gerber Products Company, *Product Ingredients* (1994) (attached as Exhibit 12).

<sup>55</sup> Analytical data provided by Gerber and Beech-Nut.

<sup>56</sup> Robert A. Harvey & Richard C. Theuer, *Potassium as an Index of Fruit Content in Baby Food Products. Part I. Banana-Containing and Apricot-Containing Products.* 74 J. Assoc. Off. Anal. Chem. 929-932 (1991).

Potassium is one good indicator of food content, and the Beech-Nut product -- even though it contains substantial amounts of bananas, which are low in potassium relative to apples and pears -- still contains (according to Gerber's ad) 41% more potassium than Gerber's Bananas with Tapioca (but only 9% more according to analytical data).

**“Why do four out of five pediatricians recommend Gerber?”**<sup>57</sup>

**Gerber's Claim:** “Four out of five pediatricians recommend Gerber.”

**The Truth:** Four out of five pediatricians do *not* recommend Gerber. In fact, only 76 (19%) of 408 physicians surveyed recommended any brand at all.<sup>58</sup> Of that small number who so recommended, 67 (88%) recommended Gerber, 14 (18%) recommended Beech-Nut, 6 (8%) recommended Heinz, and 4 (5%) recommend Earth's Best or another brand. Thus, because the total percentage exceeds 100%, even among the small minority who do make a recommendation, some recommend Gerber as one option of among two or more brands. Only 16% of all the responding pediatricians actually recommended Gerber, not “four out of five,” as Gerber advertises, and some of those recommended Gerber as one of two or more brands.

**Gerber's Claim:** “In a few of our foods, we add controlled amounts of sugar and tapioca . . . as nutritious as any baby food you can buy.”

**The Truth:** “Controlled amounts of sugar and tapioca” implies minor amounts, but sugar and tapioca, together with water, replace up to half the actual food in some Gerber products. Also, Gerber does not add “tapioca,” but chemically modified tapioca starch. And, of course, Gerber's foods are *not* “as nutritious as any baby food you can buy”; competing brands often have more nutritious products.

**Gerber's Claim:** “Tapioca, or modified starch, is not a filler. It is a carbohydrate with many benefits and is found in many of the foods you eat.”

**The Truth:** That statement can be read to equate tapioca with modified starch, but they are not nutritionally identical. The antecedent of “it” in the second sentence is unclear. It could refer to tapioca or to modified starch, or probably the merged two. If “it” refers to modified starch, it does not have “many” benefits to the consumer, but of course serves a valuable economic function for Gerber, namely replacing more valuable and nutritious ingredients. Also, the fact that “it,” be it natural tapioca or modified starch, may be found in foods adults eat doesn't mean that “it” should be considered a “benefit” in baby foods.

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<sup>57</sup> 1995 promotional brochure (attached as Exhibit 13).

<sup>58</sup> Medical Examiners Research Group, Contemporary Pediatrics, *Pediatricians Recommendation Study 1994*, at 1-3 & 60 (attached as Exhibit 14).

**“Giving baby the best”**<sup>59</sup>

**Gerber’s Claim:** Gerber’s foods provide “optimum nutrition” and are “the most wholesome, nutritious, safe foods.”

**The Truth:** As demonstrated in *Cheating Babies*, many of Gerber’s products are highly diluted with chemically modified starch and water. The addition of those ingredients means that the baby foods have lower levels of protein, vitamins, and minerals than undiluted products. For instance, Gerber makes both first-stage and second-stage banana products. Gerber’s second-stage Bananas with Tapioca provides on average less than half the amount of potassium, riboflavin, and vitamin B-6 as is present in the first-stage Bananas. Thus, the 4-ounce second-stage product actually contains a smaller amount of bananas than the 2.5-ounce first-stage product! Gerber’s Bananas with Tapioca has about half of the banana content of Beech-Nut’s third-stage undiluted banana product.<sup>60</sup>

**Gerber’s Claim:** “Pure and natural is the way we make our food.”

**The Truth:** Calling the use of a chemically modified starch “pure and natural” is both false and deceptive. If this ingredient were found in nature, there would be no need to alter it chemically. It is unclear what “pure” refers to. If pure means the complete absence of pesticide residues, this statement is false. In fact, Gerber foods contain residues of pesticide, including carcinogenic ones.<sup>61</sup>

**Gerber’s Claim:** “Just nutritious, wholesome food.”

**The Truth:** Gerber’s baby food often contains chemically modified starch, and is therefore not “just nutritious, wholesome food.” Added sugar also does not enhance the products’ nutritional quality.

**“She’s developing a lifelong taste for eating smart”**<sup>62</sup>

**Gerber’s Claim:** The ad emphasizes that eating Gerber products is “eating smart” and emphasizes “learning to eat smart, right from the start.” The ad states that “[t]he first 24 months

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<sup>59</sup> 1994 promotional brochure (attached as Exhibit 15).

<sup>60</sup> Harvey and Theuer, *supra* note 56, at 929-932.

<sup>61</sup> Telephone conversation between Leila Farzan, staff attorney, Center for Science in the Public Interest and Richard Wiles, Vice President for Research, Environmental Working Group (Feb. 7, 1996).

<sup>62</sup> Magazine advertisement, *Baby Talk*, Feb. 1995 (attached as Exhibit 16).

are the most important months in developing tastes for a variety of healthy foods. That's why it's important for your baby to start and stay on the nutritious Gerber Feeding Plan to help develop smart, healthy eating habits that can last a lifetime."

**The Truth:** The implication is that it is "smart" to feed babies Gerber foods because Gerber's foods are particularly nutritious and healthful. In fact, it is *not* smart to use those Gerber foods that are nutritionally inferior to ones made by other companies. It would often be *smarter* to choose a more nutritious brand of a particular product and often more economical to buy comparable "adult" foods (e.g., applesauce, apple juice, squashed bananas) instead of using commercial baby foods. It would be *smarter* to begin feeding children foods that are of the highest nutritional value, be they homemade or packaged. Gerber's diluted foods are not the smartest foods to buy from a nutritional point of view. They are also not the smartest to buy from an economic point of view inasmuch as it does not make sense to pay real-food prices for those products that are diluted by the use of substantial amounts of added modified starch and water.

**Gerber's Claim:** Gerber's foods "are specifically formulated to help your baby develop a variety of tastes for healthier foods. The longer you can keep your baby on these smart foods now, the better her chances are for eating healthy -- and being healthy -- for a long, long time to come."

**The Truth:** The "specifically formulated" claim in the same sentence as the words "healthier foods" implies that Gerber takes great care to make its products particularly healthful. That is clearly not the case, as evidenced by the use in many products of chemically modified food starch, sugar, and water, which replace real food and make the food *less*, not *more* nutritious and healthful. In fact, as is documented in *Cheating Babies*, many of Gerber's second- and third-stage foods are formulated not so much to help babies develop a variety of tastes, but for Gerber to shortchange babies on nutrients through the replacement of real fruit, vegetable, chicken, or other ingredients with modified starch and water. Inasmuch as many Gerber products are nutritionally inferior to other brands, eating Gerber foods hardly helps a baby develop a taste for "healthier" food. While the modified starch does provide some carbohydrate, it does not carry with it any of the vitamins, minerals, phytochemicals, dietary fiber, or protein that are found in traditional ingredients.

The ad also says that eating such foods means "eating healthy -- and being healthy. . . ." However, eating Gerber's products, which are often less nutritious than competing products, would not be expected to lead to optimal health. Many of Gerber's foods contain smaller quantities of vitamins, minerals, protein, dietary fiber, and phytochemicals than competing brands.

**"An expert shares her thoughts on adding tapioca to bananas"**<sup>63</sup>

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<sup>63</sup> Trade magazine advertisement, *Supermarket News*, Nov. 13, 1995, at 51 (attached as Exhibit 17).

**Gerber’s Claim:** “An expert [the baby depicted in the ad] shares her thoughts on adding tapioca to bananas.”

**The Truth:** This full-page color advertisement defends the use of tapioca starch in Gerber’s Bananas with Tapioca,<sup>64</sup> which, according to the ad, is the number-one selling baby food. The ingredient, however, is not tapioca, but chemically modified tapioca starch. Smaller print in the ad acknowledges that the tapioca is really “modified food starch.” The use of the term “tapioca” conveys an image of the tapioca starch that many people have consumed in the form of tapioca pudding. Chemically modifying it alters its physicochemical properties.

**Gerber’s Claim:** “[A] select few of our recipes are blended with sugar or tapioca (modified food starch).”

**The Truth:** The term “select few” suggests just perhaps four or five such products. In fact, dozens of Gerber baby foods contain added sugar or starches (modified or not), and others contain added rice flour or wheat flour thickeners.

**Gerber’s Claim:** “Use of these FDA-approved ingredients provide added value -- without sacrificing nutrition.”

**The Truth:** *Cheating Babies* demonstrates how sugar and modified or unmodified starches *do* sacrifice nutrition. The “without sacrificing nutrition” claim is an egregious lie. The “added value” should really refer to Gerber’s profit, not some unspecified value to consumers.

**Gerber’s Claim:** “Four out of five pediatricians who recommend baby food recommend Gerber.”<sup>65</sup>

**The Truth:** This statement implies that most pediatricians recommend Gerber and not other baby foods, which is not the case. While this ad specifies that the claim is limited to “pediatricians who recommend baby food,” the average reader probably assumes that all or most pediatricians do recommend baby food and that four out of five of *all* pediatricians recommend Gerber. Readers are certainly not apprised that more than four out of five (81%) pediatricians do not recommend *any* brand of baby food, according to the survey Gerber relies upon.<sup>66</sup>

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<sup>64</sup> CSPI also petitioned the FDA to investigate the labeling of baby food as “tapioca” when it actually contains chemically modified tapioca starch; *see supra* note 6 and accompanying text (Exhibit 2).

<sup>65</sup> This same claim has been made in a recorded message that greets callers to Gerber’s toll-free consumer-assistance telephone line (1-800-4-GERBER). We urge the FTC to halt this deceptive claim wherever it is made.

<sup>66</sup> *See supra* note 58 and accompanying text (Exhibit 14).

### **“The Gerber Trust”**<sup>67</sup>

**Gerber’s Claim:** Gerber “is the world leader in, and advocate for, infant nutrition...”

**The Truth:** In fact, judging from its products, Gerber is *not* the leader in infant nutrition. As documented in *Cheating Babies*, many Gerber products are nutritionally inferior to products made by Beech-Nut, Earth’s Best, and Growing Healthy. As far as being an advocate for infant nutrition, Gerber has consistently opposed the FDA’s efforts to require more informative labeling of baby food. In 1976 the FDA proposed regulations to require ingredient labeling of baby foods to enable shoppers to choose more intelligently. Gerber opposed that effort.<sup>68</sup> As can be seen from its response to the current FDA review of baby-food labeling,<sup>69</sup> Gerber appears firm in this position. Gerber has also lobbied Congress to forbid competitive bidding by state WIC agencies for infant formula and cereal.<sup>70</sup> Gerber’s proposal would have cost the government over one billion dollars each year and resulted in fewer babies participating in the WIC program.<sup>71</sup>

### **Catalina in-store marketing and “free” telephone call.**<sup>72</sup>

**Gerber’s Claim:** “Pediatricians who recommend baby food choose Gerber 4 of 5 times.”  
“Four out of five pediatricians who recommend baby food, recommend Gerber.”

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<sup>67</sup> Four-page 1994 promotional brochure received by mail from Gerber in 1995 (attached as Exhibit 18).

<sup>68</sup> Letter from Lyle Littlefield, Government Relations Manager, Gerber Products Company, to Hearing Clerk, Food and Drug Administration (Jan. 4, 1977).

<sup>69</sup> *See supra* notes 19-20 and accompanying text (Exhibit 3).

<sup>70</sup> David Maraniss & Michael Weisskopf, *Food Program Defender Becomes a Dismantler*, Wash. Post., Apr. 4, 1995, at A1, A8.

<sup>71</sup> *Id.*

<sup>72</sup> Transcript of Gerber advertising message (attached as Exhibit 19a) using the personal identification number provided by a coupon generated by the Catalina coupon system and given to individuals purchasing other brands of baby food (1-800-507-8807, Dec. 21, 1995) (attached as Exhibit 19b). Purchasers of competing brands of baby food receive a Gerber coupon that includes the “pediatricians who recommend . . .” claim and offers a free, five-minute, long-distance telephone call. Consumers are given an 800-number to call, along with a personal identification number. People who call that number must listen to a one-minute Gerber baby food advertisement that contains those claims before being able to make their call.

**The Truth:** This claim implies that most pediatricians recommend Gerber and not other baby foods, which is not the case.<sup>73</sup> While this ad specifies that the claim is limited to “pediatricians who recommend baby food,” the average reader probably assumes that all or most pediatricians do recommend baby food and that four out of five of *all* pediatricians recommend Gerber. Readers are certainly not apprised that more than four out of five (81%) pediatricians do not recommend *any* brand of baby food, according to Gerber’s survey.

**Gerber’s Claim:** “In a few of those foods we add a controlled amount of sugar or tapioca, because research has proven it enhances the taste without compromising the nutritional composition. No other baby food in the world does all that. . . .”

**The Truth:** Adding sugar and tapioca *does* compromise nutrition.<sup>74</sup> Moreover, Gerber does not add “tapioca,” but chemically modified tapioca starch. Additionally, “controlled amounts” of sugar and tapioca imply minor amounts, but sugar and tapioca, together with water, replace up to half the actual food in some Gerber products.

### **Letter to pediatricians**<sup>75</sup>

**Gerber’s Claims:** Gerber stated in a letter to pediatricians that “an independent survey of pediatricians conducted in 1994 concluded that 4 out of 5 pediatricians who recommend a baby food brand to their patients recommend Gerber, a fact of which we are proud.” The letter also stated: “We are committed to providing the most nutritious, best tasting products we can. . . .”

**The Truth:** The “4 out of 5” claim implies that most pediatricians recommend Gerber and not other baby foods, which is not the case.<sup>76</sup> While this ad specifies that the claim is limited to “pediatricians who recommend baby food,” the average reader probably assumes that all or most pediatricians do recommend baby food and that four out of five of *all* pediatricians recommend

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<sup>73</sup> See *supra* note 58 and accompanying text (Exhibit 14).

<sup>74</sup> See *supra* pp. 6-8.

<sup>75</sup> Letter to pediatricians (November 3, 1995) (made available at Gerber’s World Wide Web site on the Internet, <http://www.gerber.com> (January 20, 1996)) (attached as Exhibit 20).

Other statements at that Web site include: “Developing quality baby foods . . . has been the driving force at Gerber since the company’s start. . . . The company maintains the world’s largest private research facility dedicated to infant nutrition. Over the past 60 years studies have been conducted on a continual basis to better understand infant and toddler nutrition and development.” A reasonable person could well (but mistakenly) conclude that because of that abundant attention to nutrition, Gerber would market the highest-quality baby foods.

<sup>76</sup> See *supra* note 58 and accompanying text (Exhibit 14).

Gerber. Readers are certainly not apprised that more than four out of five (81%) pediatricians do not recommend *any* brand of baby food, according to Gerber’s survey. Moreover, Gerber has failed to provide the “most nutritious” baby foods.<sup>77</sup>

**“Introducing Table Teaching Foods”**<sup>78</sup>

**Gerber’s Claim:** “Teaching him to enjoy a variety of nutritious tastes and textures can help him learn to accept a variety of healthy foods.”

**The Truth:** The words “nutritious” and “healthy” deceptive imply that Gerber’s third-stage foods are particularly nutritious. In fact, many of those foods are made with modified and/or natural starches (e.g., wheat flour, oat flour) that, together with water, render the foods of lower nutritional value than they otherwise would be.

**“What’s the Easiest Way to Develop a Lifelong Taste for Eating Smart?”**<sup>79</sup>

**Gerber’s Claim:** “Developing a taste for a variety of healthy foods right now is the first step in learning how to eat smart as an adult. And no one can help you teach that lesson better than Gerber.”

**The Truth:** The ad implies that feeding babies Gerber foods is a uniquely effective way to inculcate a taste for healthy foods and teach babies good (“smart”) eating habits. Obviously, Gerber has no evidence that its products are particularly effective in teaching good eating habits. Feeding babies Gerber products, which are often less healthful than competing products (or homemade foods), is not the best way to introduce babies to “healthy foods.” In light of Gerber’s inferior products, it is false and misleading of Gerber to claim that “no one can help you teach that lesson better than Gerber.”

**Gerber’s Claim:** “Our carefully designed Feeding Plan includes America’s most complete and trusted line of baby and toddler food.”

**The Truth:** Considering the inferior nutritional quality of many Gerber products, it would seem that the Feeding Plan was “carefully designed” more to maximize profits than to maximize nutritional quality. While Gerber’s is arguably the most “trusted” line of baby foods, the company’s deceptive labeling, deceptive advertising, and adulterated products prove that the

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<sup>77</sup> See *supra* pp. 4-11.

<sup>78</sup> Magazine advertisement, *Baby Talk*, Mar. 1995 (attached as Exhibit 21a); magazine advertisement, *Baby Talk*, May 1995 (attached as Exhibit 21b).

<sup>79</sup> Magazine advertisement, *Baby Talk*, June/July 1995 (attached as Exhibit 22).

trust is misplaced.

**“There’s Only One Baby Like Yours”**<sup>80</sup>

**Gerber’s Claim:** The ad is part of a television campaign that emphasizes that eating Gerber baby foods is eating “smart.” The ad depicts several jars of Gerber baby food, including Gerber’s Mixed Vegetables. The announcer explicitly states that “no one knows more about...nutrition [than Gerber]” and concludes with the phrase, “...for learning to eat smart, right from the start.”

**The Truth:** The implication is that it is “smart” to feed babies Gerber foods because Gerber’s foods are particularly nutritious and healthful. In fact, it is not “smart” to feed babies Gerber foods because many Gerber foods are nutritionally inferior to foods made by other companies and are diluted by the use of substantial amounts of added modified starch, sugar, and water. The claim that no one knows more about nutrition than Gerber implies that Gerber baby foods are the most nutritious, a claim that is entirely unsupported by the facts.<sup>81</sup> Moreover, it is ironic that Gerber depicted Mixed Vegetables as an example of a purportedly nutritious food because it contains three kinds of starch thickeners (wheat and oat flours, and potato solids or potato flour) and relatively little vegetable.<sup>82</sup>

**Gerber’s Claim:** “To learn more, why four out of five pediatricians who recommend baby food recommend Gerber, call us...”

**The Truth:** This statement implies that most pediatricians recommend Gerber and not other baby foods, which is not the case.<sup>83</sup> While this ad specifies that the claim is limited to “pediatricians who recommend baby food,” the average viewer probably assumes that all or most pediatricians do recommend baby food and that four out of five of *all* pediatricians recommend Gerber. Readers are certainly not apprised that more than four out of five (81%) pediatricians do not recommend *any* brand of baby food, according to the survey that Gerber cites.

**“Teaching Him to Enjoy”**<sup>84</sup>

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<sup>80</sup> Television advertisement, aired on WABC, New York, Oct. 12, 1995 (storyboard attached as Exhibit 23a). A videotape of this ad is included as Exhibit 23b.

<sup>81</sup> See *supra* pp. 4-11.

<sup>82</sup> *Cheating Babies*, at 11.

<sup>83</sup> See *supra* note 58 and accompanying text (Exhibit 14).

<sup>84</sup> Television advertisement, aired on WNYW, New York, Aug. 18, 1994 (storyboard attached as Exhibit 24a). A videotape of this ad is included as Exhibit 24b.

**Gerber's Claim:** The ad claims that “teaching him to enjoy nutritious foods today is the first step in learning to enjoy healthy foods tomorrow” and depicts several Gerber baby foods, including Gerber's Bananas with Tapioca and Plums with Tapioca. The ad ends with the phrase, “Gerber, for learning to eat smart right from the start.”

**The Truth:** This ad falsely claims that all Gerber foods are highly nutritious and can help babies learn to eat “smart” and “healthy.” The fact is that many Gerber baby foods contain substantial amounts of added modified starch, sugar, and water, and therefore, as little as half as much fruit as is in products made only from fruit and (sometimes) water. Babies cannot learn to eat “smart” or “healthy” by eating nutritionally inferior Gerber baby foods. This ad is particularly egregious since it makes these false nutrition claims while depicting jars of Gerber's Bananas with Tapioca and Plums with Tapioca, which contain substantial amounts of added modified starch, sugar, and water -- and as little as half as much fruit as is in products made only from fruit and (sometimes) water.<sup>85</sup>

**“It's Easier to Get Her to Eat”**<sup>86</sup>

**Gerber's Claim:** The ad states that “the first 24 months is the easiest time to start learning to eat smart. A lesson that can last a lifetime. The longer your child stays with Gerber now, the better her chances are for eating healthy for a long, long time to come.” The ad features several jars of Gerber baby food, including Bananas with Tapioca, uses the words “nutritious Gerber baby foods,” and ends with the phrase, “Gerber, for learning to eat smart right from the start.”

**The Truth:** This ad implies that it is “smart” to feed babies Gerber foods because Gerber's foods are particularly “nutritious” and healthful. However, it is not necessarily “smart” to feed babies Gerber foods because many are nutritionally inferior and diluted by the use of substantial amounts of added modified starch, sugar, and water. The ad depicts Bananas with Tapioca, Gerber's best-selling baby food that contains only about half as much fruit as Beech-Nut's plain Bananas.<sup>87</sup>

Those advertisements demonstrate Gerber's current pattern of false and misleading claims, all directed at convincing consumers (and health professionals) that (1) Gerber is the

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<sup>85</sup> *Cheating Babies*, at 10.

<sup>86</sup> Television advertisement, aired on WNYW, New York, Apr. 28, 1994 (storyboard attached as Exhibit 25a). A videotape of this ad is included as Exhibit 25b.

<sup>87</sup> *Cheating Babies*, at 10.

industry leader in providing nutritious foods and (2) Gerber's foods are as good as, and often better than, equivalent competitors' products. In fact, in each case the contrary is true.

#### **IV. LEGAL GROUNDS**

Pursuant to the FTC Act, it is unlawful to disseminate any advertisement that is deceptive.<sup>88</sup> An advertisement is deceptive if it is likely to mislead consumers, acting reasonably under the circumstances, in a material respect.<sup>89</sup>

Current advertisements for Gerber baby food, as discussed *supra* pp. 21-31, contain material representations that are likely to mislead reasonable consumers. Accordingly, such advertisements are deceptive and unlawful under Sections 5, 12, and 15 of the FTC Act.<sup>90</sup>

##### **A. Gerber's Advertising Claims are Deceptive.**

###### **1. Gerber's advertisements are likely to mislead reasonable consumers.**

An advertisement may be deemed deceptive if it contains any representation that is likely to mislead consumers who are "acting reasonably under the circumstances."<sup>91</sup> Gerber's advertisements contain many statements and representations that are likely to mislead reasonable consumers.

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<sup>88</sup> Sections 5, 12 and 15 (15 U.S.C. §§ 45, 52, and 55).

<sup>89</sup> *In re Thompson Medical Co.*, 104 F.T.C. 648, 788 (1984), *aff'd*, 791 F.2d 189 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1086 (1987); *In re Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 164-66 (1984). This test for deception originated in a letter from three members of the Commission to Congress regarding the Commission's apparent decision to establish a new definition of deceptive trade practices. *Federal Trade Commission Policy Statement on Deception*, 103 F.T.C. 174 (1984) (appended to *Cliffdale Assocs.*).

<sup>90</sup> 15 U.S.C. § 41 *et seq.*

<sup>91</sup> *Supra* note 89.

Many Gerber advertisements contain false statements. For example, Gerber improperly claims that its baby food is nutritionally equivalent,<sup>92</sup> or even superior,<sup>93</sup> to other brands and describes itself as “the world leader in, and advocate for, infant nutrition.”<sup>94</sup> Gerber falsely describes its baby food as “pure and natural,”<sup>95</sup> “nutritious,”<sup>96</sup> “wholesome,”<sup>97</sup> “smart,”<sup>98</sup> and “healthy.”<sup>99</sup> Gerber wrongly asserts that modified food starch and sugar do not sacrifice nutrition,<sup>100</sup> are used only in controlled amounts,<sup>101</sup> and in very few of its brands.<sup>102</sup> Furthermore, Gerber falsely states that four out of five pediatricians recommend Gerber baby food.<sup>103</sup>

Gerber’s advertisements also contain many implied claims and representations that are likely to mislead reasonable consumers. Gerber’s advertising claims imply that modified food

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<sup>92</sup> See Exhibit 11 and discussion, *supra* p. 22.

<sup>93</sup> See Exhibits 11, 15, and 20 and discussion, *supra* pp. 21, 24, and 28.

<sup>94</sup> See Exhibit 18 and discussion, *supra* p. 27.

<sup>95</sup> See Exhibit 15 and discussion, *supra* p. 24.

<sup>96</sup> See Exhibit 15 and 25 and discussion, *supra* p. 24 and 31.

<sup>97</sup> See Exhibit 15 and discussion, *supra* p. 24.

<sup>98</sup> See Exhibits 16, 23a, 23b, 24a, 24b, 25a, and 25b and discussion, *supra* pp. 24-25, 30, and 31.

<sup>99</sup> See Exhibits 16, 21a, and 21b and discussion, *supra* p. 25 and 29.

<sup>100</sup> See Exhibits 11, 17, and 19a and discussion, *supra* pp. 21, 26, and 28.

<sup>101</sup> See Exhibits 13 and 19a and discussion, *supra* pp. 23 and 28.

<sup>102</sup> See Exhibits 11 and 17 and discussion, *supra* pp. 22 and 26.

<sup>103</sup> See Exhibit 13 and discussion, *supra* p. 23.

starch is the nutritional equivalent of tapioca<sup>104</sup> and that Gerber uses tapioca (rather than chemically modified tapioca starch) in its baby food.<sup>105</sup> Gerber's ads also misleadingly imply that most pediatricians recommend Gerber baby food<sup>106</sup> and that Gerber baby foods are particularly nutritious.<sup>107</sup>

All of those claims are likely to mislead reasonable consumers. As the Commission observed in *Thompson Medical Co.*:

Absent reason to conclude differently, we presume that advertisements are directed at ordinary members of the adult population who, as such, have a range of abilities. We look at how such individuals actually interpret advertisements in real-life situation [sic] not at how they would if they had sufficient time and incentives attentively to review the ads so as to come up with the most semantically correct interpretation of them.<sup>108</sup>

Thus, Gerber's advertisements are not acceptable even if a particularly vigilant consumer could actually analyze the nutritional composition of Gerber baby food and compare it to other

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<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> See Exhibits 17, 19a, 19b, 20, 23a, and 23b and discussion, *supra* pp. 26, 27, 28, and 30.

<sup>107</sup> See Exhibits 21a, 21b, 22, 23a, and 23b, and discussion, *supra* pp. 29 and 30.

<sup>108</sup> 104 F.T.C. at 792 (emphasis added). See also *Giant Food, Inc.*, 61 F.T.C. 326, 345 (1962), *aff'd*, 322 F.2d 977 (D.C. Cir. 1963), *cert. denied*, 376 U.S. 967 (1964):

In attempting to ascertain the impression which advertising makes on the general public, the Commission does not sit in an ivory tower, perusing dictionaries and encyclopedias for literal or technical definitions. We try to put ourselves, as much as possible, in the position of those to whom the advertising is addressed. Some may read the advertisements carefully; others may give it no more than a glance, reading as they run. \* \* \* The likely impact on those who view the advertising even casually or distracted by other activities must be taken into account.

brands and to homemade food to avoid being misled<sup>109</sup> or “merely because one possible interpretation of [the ad] is not untrue.”<sup>110</sup>

The potential to mislead consumers is great when consumers have difficulty in evaluating claims independently.<sup>111</sup> As the Court of Appeals for the Third Circuit stated: “Because consumers cannot accurately rate the products for themselves, advertising, and the expectations which it engenders, becomes a significantly more influential source of consumer beliefs than it would otherwise be.”<sup>112</sup>

A recent CSPI survey suggests that Gerber’s advertising claims cannot be evaluated by consumers -- even by reading the baby food labels.<sup>113</sup> For example, few consumers could tell from reading a label that a baby food with tapioca contained fillers, or that a bananas-only product was healthier than a bananas-with-tapioca product.<sup>114</sup> Similarly, when comparing the front labels of Gerber’s Mixed Vegetables and Gerber’s Garden Vegetables, consumers primarily noted the types of vegetables and the color of the food as points of difference. No consumer surveyed stated that Mixed Vegetables in fact contained several non-nutritive starch thickeners

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<sup>109</sup> *Thompson Medical Co.*, 104 F.T.C. 648, 792.

<sup>110</sup> *Nat’l Comm’n on Egg Nutrition v. FTC*, 570 F.2d 157, 161 n. 4 (7th Cir. 1977), *cert. denied*, 439 U.S. 821 (1978).

<sup>111</sup> *American Home Products Corp. v. FTC*, 695 F.2d 681, 698 (3rd Cir. 1982).

<sup>112</sup> *Id.*

<sup>113</sup> See letter from Michael Jacobson, Center for Science in the Public Interest, to David Kessler, Commissioner, Food and Drug Administration (Nov. 7, 1995) (summarizing CSPI survey of 75 parents of young babies regarding perceptions about baby food nutrition) (attached as Exhibit 26).

<sup>114</sup> *Id.* at 1.

and a far lower content of vegetables and nutrients.

Since consumers have great difficulty in understanding and evaluating the nutritional content of baby foods by examining the food labels, or the food themselves, they would have even greater difficulty in judging the validity of Gerber's advertising claims, as virtually no nutrition or other factual information is provided in the advertisements.

It is also deceptive for companies to make an advertising claim without possessing a reasonable basis for that claim, as it is inherently deceptive to represent the existence of a certain product attribute which has not been substantiated.<sup>115</sup> Similarly, if the substantiating evidence is subject to some limitation or qualification, the claim may only be allowed if it can be appropriately -- and we believe, prominently -- qualified so that the limited nature of the substantiation is readily apparent to consumers and the ad does not imply that a higher level of substantiation exists.<sup>116</sup>

Many of Gerber's claims are not substantiated. For example, Gerber claims that "four out of five pediatricians recommend Gerber."<sup>117</sup> This claim is not substantiated nor appropriately qualified,<sup>118</sup> and is therefore deceptive.

Moreover, a particularly high level of substantiation is required of claims involving foods.<sup>119</sup> Health claims must be supported by competent and reliable scientific evidence

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<sup>115</sup> *FTC Policy Statement Regarding Advertising Substantiation Program*, 104 F.T.C. 839 (1984); *Thompson Medical Co.*, 104 F.T.C. 648, 818-19.

<sup>116</sup> *See, e.g., Nat'l Comm'n on Egg Nutrition*, 570 F.2d 157.

<sup>117</sup> *See* Exhibit 13.

<sup>118</sup> *Supra* note 58 and accompanying text.

<sup>119</sup> *See, e.g., National Comm'n on Egg Nutrition*, 570 F.2d 157, 160-61 (claim that "no scientific evidence that eating eggs increases the risk of heart disease" could not be substantiated if there were any "competent and reliable scientific studies from which well-qualified experts

because the consequences of false or exaggerated claims may be serious. However, Gerber's health claims, such as the statement that adding sugar and modified or unmodified starches to baby food does not sacrifice nutrition, are not supported by scientific evidence<sup>120</sup> and are therefore deceptive.

## 2. Gerber's advertising claims are material.

To satisfy a finding of deception, the representation must be "material" to the consuming public.<sup>121</sup> A material representation is one that is likely to affect the consumer's conduct or decision with regard to a product or service because it involves some characteristic of that product or service that is important to consumers.<sup>122</sup>

Evidence of materiality may be established by determining whether the representation would be considered important by reasonable consumers and whether the representation interferes with the consumer's right to make an informed choice.<sup>123</sup> The Commission and the courts assume that matters that advertisers consider important enough to highlight are also material to consumers: "In the absence of factors that would distort the decision to advertise, we may assume the willingness of a business to promote its products reflects a belief that

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could reasonably hypothesize that eating eggs increases the risk of heart disease"). *See also In re Egghland's Best, Inc.* 59 Fed. Reg. 46,437 (1994) (FTC Consent Dkt. C-3520), 59 Fed. Reg. 8,638 (1994) (proposed consent) (company agreed to cease making claims that their eggs would not increase serum cholesterol as much as eating other eggs unless they could be adequately substantiated by competent and reliable scientific evidence); *Porter v. Dietsch, Inc.*, 90 F.T.C. 770, 885 (1977), *aff'd*, 605 F.2d 294 (7th Cir. 1979), *cert. denied*, 445 U.S. 950 (1980) ("claims that any food, drug, or device can help a user achieve a result...must be substantiated by 'competent and reliable' scientific or medical tests or studies").

<sup>120</sup> *See, e.g., supra* pp. 22-23.

<sup>121</sup> *Supra* note 89.

<sup>122</sup> *Cliffdale Associates*, 103 F.T.C. 110, 169.

<sup>123</sup> *Id.* at 168.

consumers are interested in the advertising.”<sup>124</sup>

The large majority of consumers acknowledge the importance of nutrition on long-term health<sup>125</sup> and more than half have changed their diet specifically because of health concerns.<sup>126</sup> Many consumers rely on advertising as a source of information about what to eat and the majority believe that advertising that promotes the health benefits of different food products to be at least somewhat believable.<sup>127</sup>

When claims involve such important matters as health, materiality should be presumed.<sup>128</sup> For example, a claim regarding the calcium content of cheese was presumed material by the Commission, as consumers have a significant health concern with regard to calcium consumption.<sup>129</sup>

Accordingly, Gerber’s misrepresentations should be presumed material because Gerber

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<sup>124</sup> *Central Hudson Gas & Elect. Corp. v. Public Serv. Comm’n*, 447 U.S. 557, 567-68 (1980).

<sup>125</sup> American Dietetic Association, *1995 Nutrition Trends Survey*, Executive Summary, at 4 (1995 survey shows that 94% of American consumers surveyed acknowledge the impact of nutrition on long-term health).

<sup>126</sup> Food Marketing Institute and Prevention Magazine, *Shopping for Health 1995 - New Food Labels, Same Eating Habits?*, at 17 (1995 survey shows that 53% of shoppers report making major changes in diet or eating habits within the past three years specifically because of health concerns).

<sup>127</sup> *Id.* at 9 (53% of shoppers strongly (21%) or mostly (32%) agree that advertising provides a lot of information about the health benefits of different foods; 64% of shoppers agree that ads that promote health benefits of food products are at least somewhat believable).

<sup>128</sup> *Thompson Medical*, 104 F.T.C. 648, 816-17 (claims that involve health, safety, or other areas with which reasonable consumers would be concerned may be presumed material).

<sup>129</sup> *Kraft, Inc. v. FTC*, 970 F.2d 311 (7th Cir. 1992), *cert. denied*, 113 S.Ct 1254 (1993).

baby foods' implied effect on the nutrition and health of babies is of great concern to consumers.

Furthermore, Gerber's claims interfere with consumers' decisions to purchase the most nutritious food for their babies and therefore constitute information that is likely to affect reasonable consumers' choices to their detriment.<sup>130</sup> Gerber thus violates Section 5 of the FTC Act<sup>131</sup> by misrepresenting matters that materially affect consumers' decisions about what foods to buy.

**B. Gerber's Advertising Claims are not Protected by the First Amendment.**

Gerber's advertising claims are not protected by the First Amendment. Although commercial speech has been brought within the sphere of constitutional protection,<sup>132</sup> it is entitled to less protection than other constitutionally protected expression. As the Supreme Court has stated: "The States and the Federal Government are free to prevent the dissemination of commercial speech that is false, deceptive, or misleading"<sup>133</sup> and may restrict commercial speech "when the particular content or method of the advertising suggests that it is inherently misleading or when experience has proved that in fact such advertising is subject to abuse, misleading advertising may be prohibited entirely."<sup>134</sup> The Constitution, therefore, does not

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<sup>130</sup> See *Thompson Medical Co.*, 104 F.T.C. 648, 816; *Cliffdale Associates*, 103 F.T.C. 110, 183.

<sup>131</sup> 15 U.S.C. § 41 *et seq.*

<sup>132</sup> *Va. State Board of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 770 (1976).

<sup>133</sup> *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 638 (1982).

<sup>134</sup> *In Re R.M.J.*, 455 U.S. 191, 203 (1982); *Central Hudson*, 447 U.S. 557, 563 ("The government may ban forms of communication more likely to deceive the public than to inform it").

protect false, misleading, or deceptive commercial speech.<sup>135</sup>

The courts have repeatedly upheld government prohibitions on deceptive advertising and labeling of foods against First Amendment challenges.<sup>136</sup> Thus, the government may prohibit or restrict it. The First Amendment does not protect the rights of Gerber to deceive consumers with false statements and half-truths about its baby food. Hence, Gerber’s false and misleading advertisements are certainly not constitutionally protected speech.

### **C. Conclusion**

Many Gerber advertisements contain false statements: that Gerber baby food is nutritionally equivalent, or even superior, to other brands; that Gerber is “the world leader in, and advocate for, infant nutrition”; that Gerber baby food is “pure and natural,” “nutritious,” “wholesome,” “smart,” and “healthy”; that modified food starch and sugar do not sacrifice nutrition, are used only in controlled amounts, and in very few of its brands; and that four out of five pediatricians recommend Gerber baby food.<sup>137</sup>

Gerber’s advertisements also contain many implied claims and representations: that modified food starch is the nutritional equivalent of tapioca; that Gerber uses tapioca (rather than chemically modified tapioca starch) in its baby food; that most pediatricians recommend Gerber

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<sup>135</sup> *Central Hudson*, 447 U.S. 557, 566; *Friedman v. Rogers*, 440 U.S. 1, 9-10 (1979); *Kraft v. FTC*, 970 F.2d 311, 320.

<sup>136</sup> *See, e.g., Kraft v. FTC*, 970 F.2d 311, 324-26 (upholding FTC ban on deceptive calcium claims for processed cheese products); *United States v. General Nutrition, Inc.*, 638 F. Supp. 556, 562 (W.D. N.Y. 1986) (upholding FDA prohibition of certain nutritional claims on the product label); *United States v. Articles of Food, Etc.*, 67 F.R.D. 419, 424 (D. Idaho 1975) (sustaining FDA prohibition on certain language on labeling of potato chip package).

<sup>137</sup> *See supra* notes 92-103 and accompanying text.

baby food; and that Gerber baby foods are particularly nutritious.<sup>138</sup> All of those express and implied claims are likely to mislead reasonable consumers, are material to the consuming public, and are therefore deceptive. Such advertising is misleading pursuant to Sections 12 and 15 of the FTC Act,<sup>139</sup> and deceptive and unlawful under Section 5.

## V. REQUESTED ACTION

The Commission should take enforcement action to: (1) stop Gerber's illegal advertising; (2) prohibit future advertising of Gerber's products in a false or misleading manner; (3) penalize Gerber financially for its conduct to the extent permitted by law; and (4) require Gerber to run corrective advertising for an appropriate period of time.

The Commission should not rely on comparative advertising to correct misconceptions created by the ads. Consumers should not be burdened with separating truth from fiction among conflicting, confusing commercial claims in such a vital and important area as the nutrition and health of babies. Moreover, Gerber's claims are unlikely to be effectively countered by competitors. Although Beech-Nut has run advertisements in an attempt to illustrate the difference between the amount of fruit in its baby food and in Gerber's baby food, its modest level of advertising has not been sufficient to remedy the problems created by the large volume, over many decades, of Gerber's misleading advertisements.<sup>140</sup>

A successful comparative advertising campaign would carry higher costs and be less

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<sup>138</sup> See *supra* notes 104-107, and accompanying text.

<sup>139</sup> 15 U.S.C. § 41 *et seq.*

<sup>140</sup> See *supra* pp. 12-31.

fairly distributed than a Commission enforcement action. In contrast, a Commission enforcement action would represent only a fraction of the cost of a nationwide comparative advertising campaign. Thus, the most economically efficient, equitable solution would be for the Commission to formally prohibit the offending claims and require Gerber to run corrective advertising for an appropriate period of time.

The Commission may impose corrective advertising if a deceptive advertisement “has played a substantial role in creating or reinforcing in the public’s mind a false and material belief which lives on after the false advertising ceases,” and “there is clear and continuing injury to competition and to the consuming public as consumers continue to make purchasing decisions based on the false belief.”<sup>141</sup>

Gerber’s advertising has played a substantial role in creating a false belief about Gerber baby food. Gerber has been running numerous advertisements for an extensive period of time as part of a forty-year old ongoing campaign of promoting Gerber baby foods as nutritionally superior to other foods. It is clear from CSPI’s review of both Gerber’s decades-old advertising practices and its current campaign that this advertising has played a substantial role in creating and reinforcing in the public’s mind a false confidence in the nutritional adequacy of Gerber’s baby foods and the superiority of its products to competing brands.<sup>142</sup> In fact, Gerber’s assertions in the past year have been bolder and more dishonest than earlier ad campaigns.

Furthermore, consumer misconceptions about Gerber’s baby food will linger after the

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<sup>141</sup> *Warner-Lambert Co. v. FTC*, 562 F.2d 749, 762 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 950 (1978).

<sup>142</sup> *Supra* pp. 12-31. Certainly it must have been Gerber’s intent to create this impression; if not, Gerber has been wasting a massive advertising budget. *See Warner-Lambert*, 562 F.2d 749, 762.

advertising stops. Since Gerber's misleading advertisements span nearly half a century, the misperceptions created have been reinforced in the consciousness of several generations of Americans over time and through current advertising. A review of Gerber's advertisements and the lingering effect of Gerber's long-time deceptions mandate corrective advertising, a determination which is within the Commission's own special expertise and authority.<sup>143</sup>

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<sup>143</sup> *Warner-Lambert* 562 F.2d 749, 762 (noting that in some instances it may be appropriate to *presume* the existence of both prongs of this test) (referring to Pitofsky, *Beyond Nader: Consumer Protection and the Regulation of Advertising*, 90 *Harv. L. Rev.* 661 (1977)).

## **VI. CONCLUSION**

Accordingly, for the reasons stated above, CSPI requests that the FTC initiate an investigation of the practices of Gerber that are described above and, upon conclusion of the investigation, take enforcement action to: (1) stop its illegal advertising; (2) prohibit future advertising of Gerber's products in a false or misleading manner; (3) penalize Gerber financially for its conduct to the extent permitted by law; and (4) require Gerber to run corrective advertising for an appropriate period of time.

Respectfully submitted,

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Dallas, Texas

## APPENDIX: UNFAIR METHODS OF COMPETITION

Gerber has long dominated the baby-food industry. It now controls about 70 percent of the market and may have used anti-competitive methods (in addition to deceptive advertising) to obtain and retain that share of the market in the face of competition with Beech-Nut, Heinz, and smaller companies, all to the detriment of consumers and its competitors.

We urge the FTC to investigate the following practices as unfair and in violation of the FTC Act:

- In some parts of the country, Gerber has used the Catalina supermarket coupon system to give a coupon for a free jar of Gerber baby food to anyone who buys a competing brand.
- Gerber markets almost 200 different baby foods. One reason for marketing so many foods is to capture as much shelf space as possible and keep competitors out of supermarkets (*e.g.*, some Giant and Safeway supermarkets in Washington, D.C. carry Gerber foods almost exclusively).
- To encourage stores to carry as many varieties as possible, Gerber gives extra rebates or discounts for carrying a larger variety of Gerber products. Because of limited shelf space, carrying more Gerber products may mean carrying fewer or no baby foods made by other companies. In addition, smaller grocery stores, which carry fewer varieties, might find it difficult to take advantage of the rebates.

In addition to Gerber's share of the market, a further indication of imperfect competition in the baby-food industry is that the retail prices of certain Gerber products are clearly higher than similar foods prepared for the adult market and sold in other store locations.<sup>144</sup> For instance, quarts of Gerber fruit juices cost 54% more than Mott's and 78% more than Safeway's house brand in the Washington, D.C. area. A 4-ounce container of Gerber's applesauce costs

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<sup>144</sup> *Cheating Babies*, at 16.

40% more than the same size container of Mott's applesauce. There are no significant differences between the products that would account for the higher price of Gerber's products.

Another indication of imperfect competition is high profit margins for the market leader.<sup>145</sup>

- *Business Week* (June 6, 1994): "Gerber dominates the U.S. baby-food market, generating after-tax profit margins of 11%—nearly tops for the food industry."
- *Financial World* (May 10, 1994): "Gerber should have at least a 27% return on total capital this year. That's triple the return it showed in 1986 and nearly double the industry average."

Furthermore, according to the Bureau of Labor Statistics, between July 1991 and August 1995 the wholesale cost of "canned baby foods" rose 25.5% faster than "canned specialties" and 218% faster than "food and kindred products."<sup>146</sup>

Clearly, there has been insufficient competition among the baby-food companies to reduce prices. Using the advertising practices detailed in this Petition, Gerber over the years

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<sup>145</sup> Additionally, Gerber has also expanded its business by selling life insurance for babies. See Exhibit 27 (promotional brochure for Gerber Life Insurance, enclosed in *Baby Talk*, May 1995). Gerber's Life insurance coverage for babies is not only unnecessary -- life insurance is to protect against the economic consequences of premature death -- but is also priced quite high. (\$15,000 worth of insurance at age ten costs \$158.76 each year). Letter from Bob Hunter, Consumer Federation of America, to Michael Jacobson, Executive Director, Center for Science in the Public Interest, Feb. 4, 1996.

<sup>146</sup> Bureau of Labor Statistics, U.S. Department of Labor. Producer Price Indexes (PPI) of canned baby foods were 161.1 in July 1991, and 194.5 in November 1995, a 20.7 percent increase (Series Id WPU02840101). By contrast, the PPI of canned specialties were 133.7 in July 1991, and 155.8 in November 1995, a 16.5 percent increase (Series Id WPU0284). Similarly, the PPI of food and kindred products were 116.3 in July 1991, and 123.9 in November 1995, a 6.5 percent increase (Series Id PCU20).

may have persuaded parents that they should feed their infants only products made specifically for babies, even though there is little difference between several baby food and other products, except for price and sometimes container size. Some of that persuasion may be subtle, such as the depiction of babies on product labels, while no such illustrations appear on standard grocery products.

Gerber's dominance of the baby-food industry may be one reason why many of Gerber's baby foods are less nutritious than those made by Beech-Nut, Earth's Best, and Growing Healthy. Gerber's dominant position allows it to cut nutritional corners -- such as replacing half of the valuable ingredients with chemically modified starch, sugar, and water -- without fear of significant or effective retaliation by its competitors. In those stores where Gerber is the only baby food on the shelves, it is impossible for consumers to compare the label information of one brand to another. Gerber's use of cheap fillers, which saves the company millions of dollars annually, and its dominance in the industry contribute to its hefty profits and result in consumers paying more at the checkout counter.

Those concerns militate strongly for a thorough FTC review of Gerber's marketing practices.