

**UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION**

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In the Matter of	*	FILE NO. 962 3175
	*	
GERBER PRODUCTS COMPANY,	*	
a corporation.	*	AGREEMENT CONTAINING
	*	CONSENT ORDER

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The Federal Trade Commission has conducted an investigation of certain acts and practices of Gerber Products Company, a corporation ("proposed respondent"). Proposed respondent, having been represented by counsel, is willing to enter into an agreement containing a consent order resolving the allegations contained in the attached draft complaint. Therefore,

IT IS HEREBY AGREED by and between Gerber Products Company, by its duly authorized officer, and counsel for the Federal Trade Commission that:

1. Proposed respondent Gerber Products Company is a Michigan corporation with its principal office or place of business at 445 State Street, Fremont, Michigan 49413-0001.
2. Proposed respondent admits all the jurisdictional facts set forth in the draft complaint.
3. Proposed respondent waives:
 - a. Any further procedural steps;
 - b. The requirement that the Commission's decision contain a statement of findings of fact and conclusions of law; and
 - c. All rights to seek judicial review or otherwise to challenge or contest the validity of the order entered pursuant to this agreement.
4. This agreement shall not become a part of the public record of the proceeding unless and until it is accepted by the Commission. If this agreement is accepted by the Commission, it, together with the draft complaint, will be placed on the public record for a period of sixty (60) days and information about it publicly released. The Commission thereafter may either withdraw its acceptance of this agreement and so notify proposed respondent, in which event it will take such action as it may consider appropriate, or issue and serve its complaint (in such form as the circumstances may require) and decision, in disposition of the proceeding.

5. This agreement is for settlement purposes only and does not constitute an admission by proposed respondent that the law has been violated as alleged in the draft complaint, or that the facts as alleged in the draft complaint, other than the jurisdictional facts, are true.

6. This agreement contemplates that, if it is accepted by the Commission, and if such acceptance is not subsequently withdrawn by the Commission pursuant to the provisions of Section 2.34 of the Commission's Rules, the Commission may, without further notice to proposed respondent, (1) issue its complaint corresponding in form and substance with the attached draft complaint and its decision containing the following order in disposition of the proceeding, and (2) make information about it public. When so entered, the order shall have the same force and effect and may be altered, modified or set aside in the same manner and within the same time provided by statute for other orders. The order shall become final upon service. Delivery of the complaint and the decision and order to proposed respondent by any means specified in Section 4.4 of the Commission's Rules shall constitute service. Proposed respondent waives any right it may have to any other manner of service. The complaint may be used in construing the terms of the order. No agreement, understanding, representation, or interpretation not contained in the order or in the agreement may be used to vary or contradict the terms of the order.

7. Proposed respondent has read the draft complaint and consent order. It understands that it may be liable for civil penalties in the amount provided by law and other appropriate relief for each violation of the order after it becomes final.

ORDER

DEFINITIONS

For purposes of this order, the following definitions shall apply:

1. "Competent and reliable scientific evidence" shall mean tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.
2. Unless otherwise specified, "respondent" shall mean Gerber Products Company, a corporation, its successors and assigns, and its officers, agents, representatives and employees.
3. "In or affecting commerce" shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

4. "Baby or toddler food" shall mean any food or juice manufactured, labeled, advertised, promoted, offered for sale, sold, or distributed by respondent for consumption by infants and children up to 4 years of age.

I.

IT IS ORDERED that respondent, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of baby or toddler food shall not make any representation, in any manner, expressly or by implication, about:

- A. The extent to which doctors or other health, nutrition, child care, or medical professionals recommend such product; or
- B. The recommendation, approval, or endorsement of such product by any health, nutrition, child care, or medical professional, profession, group, or other such entity,

unless, at the time it is made, respondent possesses and relies upon competent and reliable evidence, which when appropriate must be competent and reliable scientific evidence, that substantiates the representation.

II.

IT IS FURTHER ORDERED that respondent, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any baby or toddler food, in or affecting commerce, shall not misrepresent, in any manner, expressly or by implication, the existence, contents, validity, results, conclusions or interpretations of any survey, test, study, or research.

III.

Nothing in this Order shall prohibit respondent from making any representation that is specifically permitted in labeling for any baby or toddler food by regulations promulgated by the Food and Drug Administration pursuant to the Nutrition Labeling and Education Act of 1990, or by nutrition labeling regulations promulgated by the Department of Agriculture pursuant to the Federal Meat Inspection Act or the Poultry Products Inspection Act.

IV.

IT IS FURTHER ORDERED that respondent, and its successors and assigns, shall for three (3) years after the last date of dissemination of any representation covered by this order, maintain and upon request make available to the Federal Trade Commission for inspection and copying:

- A. All advertisements and promotional materials containing the representation;
- B. All materials that were relied upon in disseminating the representation; and
- C. All tests, reports, studies, surveys, demonstrations, or other evidence in its possession or control that contradict, qualify, or call into question the representation, or the basis relied upon for the representation, including written consumer complaints or any communications with governmental or consumer protection organizations.

V.

IT IS FURTHER ORDERED that respondent, and its successors and assigns, shall:

- A. Within thirty (30) days after the date of service of this order, deliver a copy of this order to all current principals, officers, directors, and sales, advertising, and marketing managers, and to all current employees, agents, and representatives having responsibilities with respect to the subject matter of this order; and
- B. For a period of five (5) years after the date of service of this order, deliver a copy of this order to all future principals, officers, directors, and sales, advertising, and marketing managers, and to all employees, agents, and representatives having responsibilities with respect to the subject matter of this order, within thirty (30) days after the person assumes such position or responsibilities.

VI.

IT IS FURTHER ORDERED that respondent, and its successors and assigns, shall notify the Commission at least thirty (30) days prior to any change in the corporation(s) that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. Provided, however, that, with respect to any proposed change in the corporation about which respondent learns less than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580.

VII.

IT IS FURTHER ORDERED that respondent, and its successors and assigns, shall, within sixty (60) days after the date of service of this order, and at such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

VIII.

This order will terminate twenty (20) years from the date of its issuance, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

- A. Any Part in this order that terminates in less than twenty (20) years;
- B. This order's application to any respondent that is not named as a defendant in such complaint; and
- C. This order if such complaint is filed after the order has terminated pursuant to this Part.

Provided, further, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Part as though the complaint had never been filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

Signed this _____ day of _____, 199__.

Gerber Products Company,

By:

JOHN J. JAMES
Vice President and General Counsel
Gerber Products Company

ROSEMARY ROSSO
Counsel for the Federal Trade
Commission

JILL E. SAMUELS
Counsel for the Federal Trade
Commission

APPROVED:

C. LEE PEELER
Associate Director
Division of Advertising Practices

JOAN Z. BERNSTEIN
Director
Bureau of Consumer Protection

**UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION**

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In the Matter of	*	
	*	DOCKET NO.
GERBER PRODUCTS COMPANY,	*	
a corporation.	*	
	*	

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COMPLAINT

The Federal Trade Commission, having reason to believe that Gerber Products Company, a corporation ("respondent"), has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Gerber Products Company ("Gerber") is a Michigan corporation with its principal office or place of business at 445 State Street, Fremont, Michigan 49413-0001.
2. Respondent has manufactured, advertised, labeled, offered for sale, sold, and distributed products to the public, including Gerber baby and toddler foods. Gerber baby and toddler foods are "foods" within the meaning of Sections 12 and 15 of the Federal Trade Commission Act.
3. The acts and practices of respondent alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act.
4. Respondent has disseminated or has caused to be disseminated advertisements for Gerber baby and toddler foods, including but not necessarily limited to the attached Exhibits A through D. These advertisements contain the following statements and depictions:

A. [Depiction: Smiling baby]

VOICEOVER: "There's only one baby like yours."

[Depiction: Jar of Gerber baby food]

VOICEOVER: "And only one baby food like ours. Gerber."

[Depiction: Fresh apples]

VOICEOVER: "No one knows more about purity, . . ."

[Depiction: Fresh carrots]

VOICEOVER: “. . . safety and nutrition . . .”

[Depiction: Toddler being fed]

VOICEOVER: “. . . (*and* how to make sure baby likes it!) . . .”

[Depiction: Jars of Gerber baby and toddler food]

VOICEOVER: “. . . than Gerber. To learn more why four out of five pediatricians who recommend baby food recommend Gerber, . . .”

[Depiction: Baby being fed]

“1-800-4-GERBER”

VOICEOVER: “. . . call us, anytime, day or night. You know you can trust Gerber . . .”

[Depiction: Woman eating an apple]

“For learning to eat smart, right from the start.”

VOICEOVER: “. . . for learning to eat smart, right from the start.”

[Exhibit A, television advertisement]

B. [Ad translated from Spanish]

[SFX: Baby crying]

WOMAN: “Oh! Mom could you hand me the baby food from the kitchen. The baby is hungry!”

MOM: “Hey, but not all of them are Gerber.”

WOMAN: “But those are less expensive. Aren’t they all the same?”

MOM: “Of course not. Gerber is the most recommended by pediatricians.”

VOICEOVER: “She knows that there is nothing more nutritious and reliable for babies. As a matter of fact, four out of every five pediatricians that recommend baby food recommend Gerber.”

WOMAN: "Now that I know I will always buy Gerber. My baby's health is priceless."

[SFX: Baby laughing]

VOICEOVER: "For a better start in life, give him only Gerber."

[Exhibit B, radio advertisement]

- C. [Gerber ran a promotion in which consumers who purchased a jar of Beech-Nut baby food were given a checkout coupon for Gerber baby food that offered five minutes of free long-distance telephone time upon calling an 800-number and listening to the following recording]

"Congratulations on your free five minutes of long distance, compliments of Gerber. Gerber feels there are a few things you should know. For one, *nobody* makes a safer baby food than Gerber. Plus, four out of five pediatricians who recommend baby food recommend Gerber. And nobody else knows more about purity, safety, nutrition, and of course, taste. And Gerber offers more variety than any other brand -- more than 180 kinds! 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. Give Gerber a try and find out why it's the baby food more pediatricians recommend. To begin your call, use your key pad to enter your personal identification number found on your store receipt."

[Exhibit C, script of recorded message]

- D. **"4 OUT OF 5
PEDIATRICIANS*
RECOMMEND
Gerber**

*A 1994 CONTEMPORARY PEDIATRICS RECOMMENDATION STUDY FOUND THAT 88% OF PEDIATRICIANS WHO RECOMMEND BABY FOOD RECOMMEND GERBER."

[Exhibit D, display case sticker]

5. Through the means described in Paragraph 4, respondent has represented, expressly or by implication, that competent and reliable studies or surveys show that four out of five pediatricians who recommend baby food recommend Gerber.

6. In truth and in fact, competent and reliable studies or surveys do not show that four out of five pediatricians who recommend baby food recommend Gerber. In the survey relied upon by respondent, 562 of the surveyed doctors responded to the questions concerning baby food. Of these 562 pediatricians, 408 responded that they recommend baby food to their patients at least once per week. Of the 408 pediatricians who recommend baby food to their patients at least once per week, 332, or approximately 82%, responded that they did not recommend any specific brands of baby food. Of the 76 pediatricians who did recommend specific brands, 67 recommended Gerber. Thus, only 67 of the 408 pediatricians who recommend baby food, or approximately 16%, recommend Gerber to their patients. Therefore, the representation set forth in Paragraph 5 was, and is, false or misleading.

7. Through the means described in Paragraph 4, respondent has represented, expressly or by implication, that approximately four out of five pediatricians recommend Gerber.

8. Through the means described in Paragraph 4, respondent has represented, expressly or by implication, that it possessed and relied upon a reasonable basis that substantiated the representations set forth in Paragraphs 5 and 7, at the time the representations were made.

9. In truth and in fact, respondent did not possess and rely upon a reasonable basis that substantiated the representations set forth in Paragraphs 5 and 7, at the time the representations were made. In the survey relied upon by respondent, 67, or approximately 12%, of the 562 pediatricians surveyed recommended Gerber. Therefore, the representations set forth in Paragraphs 5 and 8 were, and are, false or misleading.

10. The acts and practices of respondent as alleged in this complaint constitute unfair or deceptive acts or practices, and the making of false advertisements, in or affecting commerce in violation of Sections 5(a) and 12 of the Federal Trade Commission Act.

THEREFORE, the Federal Trade Commission this _____ day of _____, _____, has issued this complaint against respondent.

By the Commission.

Donald S. Clark
Secretary

SEAL:

[Exhibits A-D attached to paper copies of complaint, but not available in electronic format.]

Analysis of Proposed Consent Order to Aid Public Comment

The Federal Trade Commission has accepted an agreement to a proposed consent order from Gerber Products Company ("Gerber").

The proposed consent order has been placed on the public record for sixty (60) days for reception of comments by interested persons. Comments received during this period will become part of the public record. After sixty (60) days, the Commission will again review the agreement and the comments received and will decide whether it should withdraw from the agreement or make final the agreement's proposed order.

The Commission's complaint in this matter charges Gerber with engaging in deceptive practices in connection with the advertising of Gerber baby and toddler foods. The television, radio and print advertisements at issue expressly represented that "4 out of 5 pediatricians who recommend baby food recommend Gerber." According to the complaint, the advertisements falsely represented that competent and reliable studies or surveys supported that claim. The complaint explains that, in the survey relied upon by Gerber, 562 of the surveyed doctors responded to the questions concerning baby food. Of these 562 pediatricians, 408 responded that they recommend baby food to their patients at least once per week. Of the 408 pediatricians who recommend baby food, only 76 recommend specific brands, and 67 of those recommended Gerber. Thus, only 67 of the 408 pediatricians who recommend baby food, or approximately 16 percent, recommend Gerber to their patients.

The complaint also alleges that the advertising at issue made an implied claim that approximately 4 out of 5 pediatricians recommend Gerber. Because this claim is broader than the claim alleged above, the base is 562, the total number of pediatricians surveyed who answered the relevant questions. Of these 562 pediatricians, 67, or approximately 12 percent, recommended Gerber. Therefore, according to the complaint, this claim is unsubstantiated.

The proposed consent order contains provisions designed to remedy the violations charged and to prevent Gerber from engaging in similar acts and practices in the future.

Part I of the order requires Gerber not to make any representation about the extent to which doctors or other health, nutrition, child care, or medical professionals recommend baby or toddler food, or about the recommendation, approval, or endorsement of such products by any health, nutrition, child care, or medical professional, profession, group or other such entity, unless it possesses competent and reliable evidence, which when appropriate must be competent and reliable scientific evidence, that substantiates the representation.

Part II prohibits Gerber, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale or distribution of any baby or toddler food, from misrepresenting the existence, contents, validity, results, conclusions or interpretations of any survey, test, study, or

research. The order does not prohibit Gerber from making truthful, non-misleading statements about survey results.

Part III provides that representations that would be specifically permitted in food labeling, under regulations issued by the Food and Drug Administration pursuant to the Nutrition Labeling and Education Act of 1990, or by nutrition labeling regulations promulgated by the Department of Agriculture pursuant to the Federal Meat Inspection Act or the Poultry Products Inspection Act, are not prohibited by the order.

Part IV requires Gerber to maintain copies of certain materials relating to advertisements covered by the order and documents relating to substantiation of advertisements covered by the order. Part V requires Gerber to distribute copies of the order to certain current and future officers and employees of the company. Part VI requires Gerber to notify the Commission of any changes in the corporate structure that might affect compliance with the order. Part VII requires Gerber to file with the Commission one or more reports detailing compliance with the order. Part VIII provides that the order will terminate after 20 years under certain circumstances.

The purpose of this analysis is to facilitate public comment on the proposed order, and it is not intended to constitute an official interpretation of the agreement and proposed order or to modify in any way their terms.