

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
FT. LAUDERDALE DIVISION**

**JOHANNA R. SAVALLI on behalf of
herself and all others similarly situated,**)

Plaintiff,)

v.)

**NESTLE USA, INC. and GERBER
PRODUCTS COMPANY,**)

Defendants.)

CASE NO.: _____

JURY TRIAL DEMANDED

CLASS ACTION COMPLAINT

COMES NOW the Plaintiff, JOHANNA R. SAVALLI (“Plaintiff” or “Savalli”), on behalf of herself and all others similarly situated, by and through her undersigned counsel, and hereby files his Class Action Complaint against Defendants NESTLE USA, INC. and GERBER PRODUCTS COMPANY (collectively “the Defendants”), and alleges as follows:

JURISDICTION AND VENUE

1. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1332(d) because the amount in controversy exceeds \$5,000,000 exclusive of interest and costs, there are more than one hundred Class members, and minimal diversity exists because Plaintiff and numerous members of the Class are citizens of different states than Defendants. This Court

also has subject matter jurisdiction pursuant to 28 USC 1332(a) because the amount in controversy exceeds \$75,000 and the lawsuit is between citizens of different states.

2. This Court has personal jurisdiction over Defendants because Defendants have sufficient minimum contacts with Florida, and/or Defendants have otherwise purposely availed themselves of the markets in Florida through the promotion, marketing, and sale of their products and services in Florida to render the exercise of jurisdiction by this Court permissible under traditional notions of fair play and substantial justice.

3. Venue is proper under 28 U.S.C. § 1391(a) because (1) Defendants are subject to personal jurisdiction in this District, and (2) a substantial part of the events or omissions giving rise to Plaintiffs' claims occurred in this District and Division. Defendants engaged in the extensive promotion, marketing, distribution, and sales of the products at issue in this District and Division, and Plaintiff is a resident of this District and Division and purchased the product at issue in this District and Division.

NATURE OF THE ACTION

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

5. From January 1, 2011 to the present (the "Class Period"), Gerber made false and deceptive representations that Gerber Graduates Puffs and Gerber Graduates Organic Puffs ("Puffs" or "Products") contained significant amounts of the actual fruits or vegetables

shown on the label, were nutritious and healthful to consume, and better than similar products.

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

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

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

9. Thus, all reasonable Florida consumers were subjected to and relied on Defendants' marketing scheme and paid a premium price for the Gerber Products with no material increase in healthful or nutritional value over other products on the market. Plaintiff and the class she seeks to represent suffered actual damage as a result. As such, this is an action for injunctive relief, damages, attorney's fees and costs and other statutory relief

brought pursuant to the Florida Deceptive and Unfair Trade Practices Act (“FDUTPA”), Sections 501.201, *et seq.*, Florida Statutes (2005).

PARTIES

10. Plaintiff is a citizen of Florida and resides in Fort Lauderdale, Broward County, Florida. Plaintiff purchased Gerber Puffs and Products in Florida for consumption by her infant son during the below defined class period. More specifically, Plaintiff purchased 2 or 3 of the products on a weekly basis for more than the past year. She usually purchased these products from her local Publix and Target stores. Plaintiff relied upon the product representations made by Defendants at the point of sale and purchased the Gerber Products. She has purchased each variety of the products identified herein. She paid a premium price for them because the Products were marketed as being healthy and nutritious and containing significant amounts of fruits and vegetables. Thus, she believed the products were superior in nutrition and health to other similar baby food on the market. She would not have purchased the products had she known the truth regarding the actual contents of the products.

11. Defendant Nestle USA, Inc. (Nestle USA) is a subsidiary of Nestle SA, a Swiss corporation that does business in this country and touts itself as the world’s largest food company.¹ Nestle USA controls the practices of Gerber Products Company in this country. Nestle USA is a Delaware corporation headquartered at 800 North Brand Boulevard, Glendale, California 91203.

¹ Nestle website, About Us, Key Figures, <http://www.nestleusa.com/about-us/key-figures>.

12. Defendant Gerber Products is the best-known baby food company in the country. Gerber does business in Florida and every other state in the country. Gerber is a corporation organized and existing under the laws of the State of Michigan, headquartered at 12 Vreeland Road, Florham Park, New Jersey 07932. Upon information and belief, this Defendant does business as Nestle Nutrition, Nestle Infant Nutrition, and Nestle Nutrition North America, shipping its products to direct purchasers and distributors in Florida, maintains a direct sales force in Florida, sells its products in retail stores in Florida, and advertises its products in Florida.

FACTS

13. Gerber engages in a widespread and uniform marketing and advertising campaign to portray its Puffs as nutritious and healthful. Gerber engages in this deceptive campaign to sell Puffs to consumers (who would not otherwise buy them), to sell the products, to charge a premium price, and to take away market share from other similar companies.

14. Plaintiff and other class members want to be sure they are feeding their young children healthy snacks.

15. When deciding what products to buy, Plaintiff and other class members rely on the information companies choose to put on package labels.²

16. Gerber has one of the most respected and well-known names in the world when it comes to infant food. On information and belief, that was a significant factor when

² See, eg., Christina R. Munsell, Jennifer L. Harris, Vishundas Sarda, and Marlene B. Schwartz, *Parents' Beliefs About the Healthfulness of Sugary Drink Options: Opportunities to Address Misperceptions*, Pub. Health Nutrition, available on CJO2015. doi:10.1017/S1368980015000397 (Mar. 11, 2015).

Nestle acquired Gerber in 2007—at a time when Gerber Graduates had sales of \$250 million and 91% market share.³

17. Nestle describes Gerber as “One of the most trusted names in baby food and baby care since 1927. Gerber baby food and baby care is committed to promoting good nutrition and healthy eating habits for children.”⁴

18. In its most recent Annual Report, Nestle bragged that it “aims to support parents with the information they need to make the most informed decision about their children’s health and eating habits, such as the importance of regular consumption of fruits and vegetables, and of exercise.”⁵ Also, in its corporate principles, Nestle promises that it is “[c]ommitted to responsible, reliable consumer communication that empowers consumers to exercise their right to informed choice and promotes healthier diets.”⁶

19. On its consumer website, Gerber proclaims that “we work hard to become a parent’s trusted partner in fostering healthy growth and development and helping establish healthy eating habits from Birth+ to Toddler 2+.”⁷

20. On the same website, speaking specifically about Graduates products, Gerber promises that Graduates products, including Puffs, “offer a range of nutritious, delicious products designed for your Crawler.”⁸

³ Hugo Miller and Evan von Schaper, *Nestle Buys Gerber for \$5.5 Billion*, BLOOMBERG NEWS Apr. 13, 2007, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/04/12/AR2007041200372.html>.

⁴ Nestle website, Brands, Gerber <http://www.nestle.com/brands/allbrands/gerber>.

⁵ Nestle Annual Report 2014, available at http://www.nestle.com/asset-library/documents/library/documents/annual_reports/2014-annual-report-en.pdf.

⁶ The Nestle Corporate Business Principles June 2010, available at http://www.nestle.com/asset-library/documents/library/documents/corporate_governance/corporate-business-principles-en.pdf.

⁷ Gerber website, Why Gerber, <https://www.gerber.com/why-gerber/why-gerber>.

⁸ Gerber website, Products, Snacks, <https://www.gerber.com/products/snacks>.

21. Because of Gerber's reputation, Plaintiff and other class members trusted Gerber to provide healthy snacks for their young children.

22. Gerber violated Plaintiff's trust, and broke its promises, because Puffs are not the fruit-or-vegetable-packed healthy snacks that the label and advertising make them appear to be.

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

24. Gerber's Puffs provide no dietary fiber (a key substance found in fruits and vegetables) and contain the vitamins emphasized in Gerber's marketing campaign⁹ only due to synthetic fortification.¹⁰ Reasonable consumer are likely deceived by Gerber's marketing campaign into believing that these vitamins are present in the Puffs thanks to significant amounts of fruits and vegetables. Unfortunately for consumers, the synthetic vitamins Gerber adds to the Puffs do not provide the same health benefits as vitamins obtained by eating fruits and vegetables.¹¹

⁹ *Eg.*, Gerber website, Products, Banana Puffs, <https://www.gerber.com/products/product/gerber-graduates-puffs-banana-naturally-flavored-with-other-natural-flavors> ("Good Source of five B Vitamins, Vitamin E, Zinc and Iron").

¹⁰ *See* Gerber Graduates Puffs' ingredients lists, Illustrations 1-3.

¹¹ *See, eg.*, Rui Hai Lui, health benefits of Fruits and Vegetables are from Additive and Synergistic Combinations of Phytochemicals, 78. *AM. J. CLIN. NUTR.* 517S, 517S-520S, at 518S (2003); INST. OF MEDICINE, FOOD AND NUTRITION BOARD, *Dietary Reference Intakes for Vitamin C, Vitamin E, Selenium, and Carotenoids* (Nat'l Academy Press, 2000).

25. Each variety of Gerber's Puffs contains more sugar than fruits or vegetables.¹² Gerber takes advantage of its trusted name to market unhealthy and even dangerous Products for consumption by some of the youngest and most vulnerable consumers.

26. Examination of three of the Puffs varieties illustrates Gerber's deliberate and uniform deceptions. The Products' images and lists of ingredients are from Gerber's website (although the size of the ingredients list is considerable greater than on the actual product label).

Illustration 1

Sweet Potato Puffs Packaging and Ingredients



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

Rice Flour, Whole Wheat Flour, Wheat Starch, **Sugar**, Whole Grain Oat Flour, **Dried Apple Puree**, Less Than 2% of: Tri- And Dicalcium Phosphate, Natural Flavor, Mixed Tocopherols (For Freshness), Soy And Sunflower Lecithin, Zinc Sulfate, Alpha Tocopheryl Acetate (Vitamin E), Electrolytic Iron, Niacinamide (A B Vitamin), Annatto Extract Color, Pyridoxine Hydrochloride (Vitamin B6), Riboflavin (Vitamin B2), Thiamine Hydrochloride (Vitamin B1), Vitamin B12 (Cyanocobalamin)¹³

Illustration 2
Banana Puffs Packaging and Ingredients



Rice Flour, Whole Wheat Flour, Wheat Starch, **Sugar**, Whole Grain Oat Flour, **Dried Apple Puree**, Less Than 2% of: Tri- And Dicalcium Phosphate, Natural Banana Flavor, Mixed Tocopherols (For Freshness), Soy And Sunflower Lecithin, Zinc Sulfate, Alpha Tocopheryl Acetate

¹³ Cf. Gerber website, Products, Gerber Graduates, Puffs, <https://www.gerber.com/products/products/gerber-graduates-puffs-sweet-potato-naturally-flavored-with-other-natural-flavors> (emphasis added).

(Vitamin E), Electrolytic Iron, Caramel Color, Turmeric Extract Color, Niacinamide (A B Vitamin), Pyridoxine Hydrochloride (Vitamin B6), Riboflavin (Vitamin B2), Thiamine Hydrochloride (Vitamin B1), Vitamin B12 (Cyanocobalamin)¹⁴

Illustration 3
Peach Puffs Packaging and Ingredients



Rice Flour, Whole Wheat Flour, Wheat Starch, **Sugar**, Whole Grain Oat Flour, **Dried Apple Puree**, **Less Than 2% of:** Tri- And Dicalcium Phosphate, **Peach Juice Concentrate**, Natural Peach And Vanilla Flavors, Mixed Tocopherols (For Freshness), Soy And Sunflower Lecithin, Zinc Sulfate, Alpha Tocopheryl Acetate (Vitamin E), Electrolytic Iron,

¹⁴ Cf. Gerber website, Products, Gerber Graduates, Puffs, <https://www.gerber.com/products/products/gerber-graduates-puffs-banana-naturally-flavored-with-other-natural-flavors/27> (emphasis added).

Niacinamide (A B Vitamin), Pyridoxine Hydrochloride (Vitamin B6), Riboflavin (Vitamin B2), Thiamine Hydrochloride (Vitamin B1), Annatto Extract Color, Vitamin B12 (Cyanocobalamin)¹⁵

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

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

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

30. The federal Food and Drug Administration (“FDA”) requires companies to list food ingredients in descending order of predominance by weight.”¹⁶ When an ingredient is present in amount of 2 percent or less by weight, FDA allows companies to choose to lump

¹⁵ Cf. Gerber website, Products, Gerber Graduates, Puffs, <https://www.gerber.com/products/products/gerber-graduates-puffs-peach-naturally-flavored-with-other-natural-flavors> (emphasis added).

¹⁶ 21 C.F.R. § 101.4(a)(1).

all those minor ingredients under a heading such as “Less than _ percent of ___.”¹⁷ Once a company uses this heading, the following ingredients are not necessarily listed in descending order of predominance by weight.¹⁸ Gerber lists the ingredients list for the Puffs Products using the heading “Less than 2% of ___.”

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

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

33. On Amazon, the Banana and Peach varieties are described as “Puffed grains with Real Fruit.”¹⁹ Gerber knows this statement is deceptive, and intends for consumers to rely on Puffs’ advertising, packaging, and labels. Reliance on the information Gerber chooses to provide consumers is reasonable.

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

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

¹⁷ 21 C.F.R. § 101.4(a)(2).

¹⁸ 21 C.F.R. § 101.4(a)(2).

¹⁹ Amazon.com website, Gerber Graduates Puffs, Banana, <http://www.amazon.com/Gerber-Graduates-Puffs-Strawberry-1-48-Ounce/dp/B000FPM22Y>; Amazon.com website, Gerber Graduates Puffs, Peach, http://www.amazon.com/Gerber-Graduates-Puffs-Peach-1-48-Ounce/dp/B004BCT2J1/ref=sr_1_1?ie=UTF8&qid=1427226526&sr=8-1&keywords=graduates+puffs+peach .

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

...

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

36. As a result of the Defendants' deceptive marketing scheme, the consumer class members were exposed to Defendants' misleading representations and purchased Gerber Products based on the false belief that the Products would increase health and nutrition. These consumer class members spent money they would not have spent as a result of Gerber's deceptive practices.

37. Plaintiff, and each class member, has been injured and suffered actual damages by paying more for the Gerber Products than she would have absent Defendants' deceptive, unfair and misleading practices.

CLASS ACTION ALLEGATIONS

38. Plaintiff brings this class action on behalf of himself and all others similarly situated in Florida as members of a proposed Class defined as follows:

²⁰ CSPI website, Nutrition Policy, Fruit Fraud, <http://cspinet.org/nutritionpolicy/fruitfraud.html> .

All Florida residents who purchased Gerber Graduates Puffs and/or Gerber Graduates Organic Puffs at retail in the State of Florida during the period beginning January 1, 2011 to the date of filing of this Class Action Complaint through the present (the “Class Period”).

Excluded from the Class are the following:

- (a) All judicial officers in the United States and their families through the third degree of relationship;
- (b) Defendants and any of their officers, directors, and employees, and any person or entities who has already settled or otherwise compromised similar claims against the defendant;
- (c) Plaintiff’s counsel, anyone working at the direction of Plaintiff’s counsel, and/or any of their immediate family members; and
- (d) Anyone who has pending against a named defendant on the date of the Court’s final certification order any individual action wherein the recovery sought is based in whole or in part on the type of claims asserted herein.

39. This action is brought and may properly be maintained as a class action pursuant to Federal Rules of Civil Procedure 23(b)(2) and 23(b)(3). This action satisfies the numerosity, commonality, typicality, adequacy, predominance, and superiority requirements of these rules.

40. The Class is so numerous that the individual joinder of all members is impracticable. While the exact number of class members is currently unknown and can only be ascertained through appropriate discovery, Plaintiff alleges that the Class includes at least tens of thousands of individuals.

41. Common legal and factual questions exist and predominate over any questions affecting only individual Class members. These common questions, which do not vary among Class members and which may be determined without reference to any Class member's individual circumstances, include, but are not limited to:

- a. Whether Defendants' representations regarding the Products were false and misleading or reasonably likely to deceive;
- b. Whether Defendants had adequate substantiation for their claims prior to making them;
- c. Whether Gerber labeled, marketed, advertised, or sold Puffs to Plaintiff and those similarly situated using false, misleading, or deceptive statements or representations, including statements or representations concerning the nutritional and health qualities of its Puffs;
- d. Whether Gerber omitted or misrepresented material facts in connection with the sales of its Puffs;
- e. Whether Gerber participated in and pursued the common course of conduct complained of;

- f. Whether Gerber's labeling, marketing, advertising, or selling of its Puffs as healthful and nutritious constitutes an unfair or deceptive consumer sales practice.
- g. Whether Defendants' failure to disclose that the Products do not contain the represented ingredients would mislead a reasonable consumer;
- h. Whether Defendants charged a price premium for the Products;
- i. Whether Defendants engaged in unfair, unlawful, and/or deceptive business practices regarding their Products in violation of the FDUTPA;
- j. Whether Defendants' conduct alleged herein constitutes false advertising in violation the FDUTPA;
- k. Whether Defendants represented, through their words or conduct, that the Products had characteristics, uses, or health benefits that it did not actually have in violation of the FDUTPA;
- l. Whether Defendants' conduct alleged herein violates public policy;
- m. Whether Defendants advertised their Products with the intent not to sell them as advertised in violation of the FDUTPA; and
- n. Whether Plaintiff and the Class have been damaged by the wrongs complained of herein, and if so, whether Plaintiff and the Class are entitled to injunctive and/ or other equitable relief, including actual damages, restitution or disgorgement, and if so, the nature and amount of such relief.

42. Plaintiff's claims are typical of the Class members' claims. Defendants' common course of conduct caused Plaintiff and all Class members the same harm. In

particular, Defendants' conduct caused each Class member's economic losses. Likewise, Plaintiff and other Class members must prove the same facts in order to establish the same claims.

43. Plaintiff is an adequate Class representative because she is a member of the class she seeks to represent and her interests do not conflict with other Class members' interests. Plaintiff retained counsel competent and experienced in consumer protection class actions, and Plaintiff and her counsel intend to prosecute this action vigorously for the class's benefit. Plaintiff and her counsel will fairly and adequately protect Class interests.

44. The Class may be properly maintained under Rule 23(b)(2). Defendants have acted or refused to act, with respect to some or all issues presented in this Complaint, on grounds generally applicable to the Class, thereby making appropriate final injunctive relief with respect to the Class as a whole.

45. The Class can be properly maintained under Rule 23(b)(3). A class action is superior to other available methods for the fair and efficient adjudication of this litigation because individual litigation of each Class member's claim is impracticable. Even if each Class member could afford to bring individual actions, the court system could not. It would be unduly burdensome for thousands of individual cases to proceed. Individual litigation also presents the potential for inconsistent or contradictory judgments, the prospect of a race to the courthouse, and the risk of an inequitable allocation of recovery among those with equally meritorious claims. Individual litigation would increase the expense and delay to all parties and the courts because it requires individual resolution of common legal and factual questions. By contrast, the class action device presents far fewer management difficulties

and provides the benefit of a single adjudication, economies of scale, and comprehensive supervision by a single court.

COUNT ONE

Violation Of the Florida Deceptive and Unfair Trade Practices Act (FDUTPA), Sections 501.201, *et seq.*, Florida Statutes (2005)

46. Plaintiff, individually and on behalf of the Class, incorporates by reference all of the factual allegations contained in the preceding paragraphs of this Complaint.

47. This cause of action is brought pursuant to the Florida Deceptive and Unfair Trade Practices Act, Fla. Stat. §501.201 *et seq.* (the “Act” or “FDUTPA”). The stated purpose of the Act is to “protect the consuming public . . . from those who engage in unfair methods of competition, or unconscionable, deceptive, or unfair acts or practices in the conduct of any trade or commerce.” Fla. Stat. §501.202(2).

48. Plaintiff is a consumer as defined by Fla. Stat. §501.203 and has standing to pursue this claim because she was exposed to Defendants’ representations regarding health and nutrition, purchased the Products, has suffered injury in fact and has lost money or property as a result of Defendants’ actions as set forth above.

49. The Products in question are goods within the meaning of the Act, and Defendants are engaged in commerce with the meaning of the Act.

50. Fla. Stat. §501.204(1) declares unlawful “[u]nfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce.”

51. Defendants’ conduct alleged herein violates the legislatively declared policies in the FDUTPA. Defendants misled Florida consumers into believing that their Products

possessed heightened healthful and nutritional ingredients when, in fact, there was no material increase in the health and nutrition of its Products. Defendants concealed this fact from consumers.

52. As a result of Defendants' "unfair" or "deceptive" conduct, Plaintiff and members of the Class spent money on the premium-priced Products that they would not otherwise have spent and they did not receive the increased health and nutritional benefits Defendants promised.

53. Defendants have violated the Act by engaging in the unfair and deceptive practices as described herein that offend public policies and are immoral, unethical, unscrupulous and substantially injurious to consumers.

54. Plaintiff and the Class have been aggrieved by Defendants' unfair and deceptive practices because they purchased the offending Products described herein.

55. The damages Plaintiff and the Class suffered were directly and proximately caused by the deceptive, misleading and unfair practices of Defendants as more fully described herein.

56. Pursuant to Fla. Stat. §§501.211(2) and 501.2105, Plaintiff and the Class seek damages, attorney fees and costs of prosecuting this action.

57. Pursuant to Fla. Stat. §501.211(1), Plaintiff and the Class seek a declaratory judgment and court order enjoining the above-described wrongful acts and practices of Defendants and for restitution and disgorgement.

COUNT TWO
Unjust Enrichment

58. Plaintiff, individually and on behalf of the Class, incorporates by reference all of the factual allegations contained in the preceding paragraphs of this Complaint.

59. As a result of Gerber's deceptive and misleading labeling, advertising, marketing, and sales of Puffs, Gerber was enriched at the expense of Plaintiff and all others similarly situated, through the payment of the purchase price for Gerber's Puffs.

60. Under the circumstances, it would be against equity and good conscience to permit Gerber to retain the ill-forgotten benefits that it received from Plaintiff and the members of the Class in light of the fact that Puffs purchased by Plaintiff and the members of the Class were not what Defendants purported them to be. Thus, it would be unjust or inequitable for Defendants to retain the benefit without restitution to Plaintiffs and the members of the Class for the monies paid to Gerber for such Products.

PRAYER FOR RELIEF

Plaintiff, on behalf of herself and the Class, requests that the Court order the following relief and enter judgment against Defendants as follows:

- a. An Order certifying the proposed Class under Rule 23 of the Federal Rules of Civil Procedure and appointing Plaintiff and her counsel to represent the class;
- b. A declaration that Defendants have engaged in the illegal conduct described herein;

- c. An Order awarding declaratory and injunctive relief as permitted by law or equity, including permanently enjoining Defendants from continuing their unlawful practices as set forth herein;
- d. A judgment awarding Plaintiff and the Class actual damages, punitive damages, disgorgement and restitution in an amount according to proof and all other entitled awards under the FDUTPA;
- e. Ordering Defendants to engage in a corrective advertising campaign;
- f. Awarding attorney fees and costs incurred in prosecuting this action;
- g. Pre-judgment and post-judgment interest; and
- h. All other relief that the Court deems necessary, just and proper.

JURY DEMAND

Pursuant to Fed. R. Civ. P. 38(b), Plaintiff hereby demands a trial by jury.

Respectfully Submitted,

/s/ Joshua R. Gale

Joshua R. Gale, Esquire

Florida Bar #63283

**Wiggins, Childs, Pantazis, Fischer &
Goldfarb, LLC**

101 N. Woodland Blvd. Suite 600

Deland, Florida 32720

Telephone: (386) 675-6946

Fax: (386) 675-6947

Email: JGale@WCQP.com

Attorney for Plaintiff

OF COUNSEL:

E. Clayton Lowe, Jr.
Pro Hac Vice Motion Pending
The Lowe Law Firm, LLC
301 19th Street North, Ste. 525
Birmingham, AL 35203
Telephone: (205) 314-0607
Facsimile: (205) 314-0707
Email: clowe@claylowelaw.com