

Gerber Seeks Dismissal of Putative Class Action Over Allegedly Misleading Protein Content Claims on Baby Food Containing Added Sugar

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[Gerber Judge Calls Baby Food False Ad Claim 'Pretty Weird'](#)

- A motion to dismiss hearing was held on February 9, 2023 over a proposed class action lawsuit filed in the US District Court for the Northern District of California that alleges protein content statements on the packages imply that Gerber Products Co.'s foods for infants and toddlers are healthy and this is misleading because the foods contain high amounts of added sugar. At issue are the statement "2 grams of plant protein" on the front label, and the statement "Nutritious, plant-based, and specifically designed to provide 2 grams of protein" on the back of the package for Gerber products such as Fruit & Yogurt Strawberry Banana pouches. Gerber asserts that the claims are permitted by FDA's food labeling regulations, that both statements are factual and neutral, and the back label simply describes the protein.
- The judge in the dismissal hearing is quoted by Law360 as saying, "That's pretty weird, the idea that if you see on the label... 'great source of protein,' I don't need to check how much sugar is in this," and adding, "I get why FDA might want to regulate it, but to the extent that you're saying that this states a fraud claim under state law, I'm not quite there I think." The judge is also said to have mentioned muscle milk, protein bars, and bacon as examples of foods that may tout protein content and "are probably not bad for you," and to have struggled with the idea that stating the protein content on the label will mislead people into thinking that the product is healthy.
- Compliance with FDA's regulations that are intended to prevent misleading consumers has been an important factor in many fraud cases. In this regard, FDA defines a nutrient content claim (NCC) as a claim that expressly or impliedly characterizes the level of a nutrient which is of the type required to be in nutrition labeling. FDA has no regulations that would permit express or implied NCCs for protein in food intended specifically for use by infants and children less than 2 years of age. FDA has provided "5 grams of fat" as an example of a statement that does not implicitly characterize the level of the nutrient. FDA has cited "healthy, contains 3 grams (g) of fat," however, as an example of a factual statement about

the grams of a nutrient that when accompanied by a characterizing term, e.g., “healthy,” can misleadingly imply that a food, because of its nutrient content, may be useful in maintaining healthy dietary practices.

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