

Stephen D. Raber (State Bar No. 121958)
David M. Horniak (State Bar No. 268441)
Joelle S. Perry (State Bar No. 275244)
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, DC 20005
Telephone: (202) 434-5000
Facsimile: (202) 434-5029
E-mail: sraber@wc.com
E-mail: dhorniak@wc.com
E-mail: jperry@wc.com

*Attorneys for Defendants Mars, Inc. and Mars
Chocolate North America, LLC*

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

LINDA CHESLOW and MIKE XAVIER, on
behalf of themselves and all others similarly
situated,

Plaintiffs,

v.

MARS, INC. and MARS CHOCOLATE
NORTH AMERICA, LLC,

Defendants.

Case No.:

NOTICE OF REMOVAL

CLASS ACTION

PLEASE TAKE NOTICE that Defendants Mars, Inc. and Mars Chocolate North America, LLC (collectively, "Mars"), through undersigned counsel, hereby remove this action from the Superior Court of California for the County of San Francisco to the United States District Court for the Northern District of California. This removal is made pursuant to 28 U.S.C. §§ 1331, 1332, 1441, 1446, and 1453. The grounds for removal are as follows:

THE REMOVED ACTION

1. On or about August 26, 2015, Plaintiffs Linda Cheslow and Mike Xavier filed this putative class action in the Superior Court of California for the County of San Francisco. True and

1 correct copies of the complaint, summons, civil case cover sheet, alternative dispute resolution
 2 program information package, expedited jury trial information sheet, and notice of case
 3 management conference are attached as Exhibits A and B to the Declaration of Joelle S. Perry
 4 (“Perry Decl.”).

5 2. Plaintiffs served the complaint on Mars on August 28, 2015. Perry Decl. ¶¶ 5–6,
 6 Ex. C (Proof of Service). Mars did not answer the complaint in San Francisco County Superior
 7 Court prior to removal and is not aware of any further proceedings or filings regarding this action in
 8 that court. *Id.* ¶ 6.

9 3. Plaintiffs allege that they purchased M&M’s brand ice cream cones and ice cream
 10 cookies, and Twix brand ice cream bars, from retail stores in California. Compl. ¶¶ 9–10.
 11 According to the Plaintiffs, the labeling of these products violates the Federal Food, Drug and
 12 Cosmetic Act (“FDCA”) and implementing regulations regarding the disclosure of artificial
 13 flavoring used in ice cream products, as incorporated by California’s Sherman Law, Health &
 14 Safety Code §§ 109930, 110100, and 110760. *Id.* ¶¶ 1, 6. Specifically, Plaintiffs allege that,
 15 although each product is labeled “*Flavored Ice Cream*,” and although the nutrition facts panel of
 16 each product discloses artificial flavor as an ingredient, FDA regulations further require that the
 17 phrase “artificial flavor added” appear on the “principal display panel” of the product. *Id.* ¶¶ 25–27.
 18 Plaintiffs further allege that one or more Mars products “fail to include the name of the product (*i.e.*,
 19 ‘Vanilla Flavored Ice Cream’)” on the principal display panel and instead “relegat[e] it to a side
 20 panel.” *Id.* ¶ 44.

21 4. Based on this alleged conduct, Plaintiffs assert five causes of action. Plaintiffs assert
 22 three causes of action under California’s Unfair Competition Law (“UCL”), Business & Professions
 23 Code §§ 17200 *et seq.*, for allegedly “unlawful,” “unfair,” and “fraudulent” business acts and
 24 practices. Compl. ¶¶ 60–79. Plaintiffs assert one cause of action under California’s False
 25
 26
 27
 28

Advertising Law (“FAL”), Business & Professions Code §§ 17500 *et seq.*, for allegedly “deceptive, untrue or misleading” advertising. *Id.* ¶¶ 80–85. Plaintiffs assert one cause of action under California’s Consumers Legal Remedies Act (“CLRA”), Civil Code §§ 1750 *et seq.* *Id.* ¶¶ 86–93. The latter claim alleges Mars represented that the products at issue “had characteristics or ingredients which they did not have,” “were of a particular standard, quality or grade, which they were not,” and “advertised the Products with the intent not to provide what [was] advertised.” *Id.* ¶ 89.

5. Plaintiffs seek to represent a putative class of “[a]ll California consumers.” Compl. ¶ 50. Plaintiffs disclaim any interest in monetary relief or restitution, and seek only injunctive and declaratory relief, as well as attorneys’ fees and costs. *Id.* ¶ 8. Specifically, Plaintiffs ask the Court to “declare Mars’ Products’ labeling unlawful and enjoin Mars from continuing to violate the [UCL, FAL, and CLRA] by selling or offering for sale the mislabeled Products in California.” *Id.* ¶¶ 66, 72, 79, 85, 92.

PROCEDURAL ISSUES

6. Removal is timely under 28 U.S.C. § 1446(b). Plaintiffs served Mars on August 28, 2015, *see* Perry Decl., Ex. C, and Mars filed this Notice of Removal within thirty (30) days of service, as computed under Federal Rule of Civil Procedure 6. *See, e.g., Murphy Bros. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 347–48 (1999).

7. Venue is proper under 28 U.S.C. § 1441(a) because this Court is the United States District Court for the district and division embracing the place where the state court case was pending. Pursuant to Local Rule 3-2(d), this matter is filed in the San Francisco Division.

NOTICE TO ADVERSE PARTY AND STATE COURT

8. Pursuant to 28 U.S.C. § 1446(d), Mars is serving written notice of the removal of this case on Plaintiffs’ counsel (identified below):

Rosemary M. Rivas
 Alyssa Dang
 Finkelstein Thompson LLP
 One California Street, Suite 900
 San Francisco, CA 94111

Joseph N. Kravec, Jr.
 McKean J. Evans
 Feinstein Doyle Payne & Kravec, LLC
 429 Forbes Avenue
 Allegheny Building, Suite 1705
 Pittsburgh, PA 15219

9. Pursuant to 28 U.S.C. § 1446(d), Mars will promptly file a Notice of Filing of Notice of Removal with the Clerk of the Superior Court of California, County of San Francisco. Perry Decl. ¶ 7.

BASES FOR REMOVAL JURISDICTION

10. Mars asserts two independent bases for this Court’s jurisdiction: (1) the Class Action Fairness Act of 2005 (“CAFA”), Pub. L. No. 109-2, 119 Stat. 4 (codified as amended at 28 U.S.C. §§ 1332(d), 1335, 1441, 1453, 1603, 1711–1715); and (2) original jurisdiction under 28 U.S.C. §§ 1331 and 1441(a). Each ground for removal is addressed in turn.¹

I. JURISDICTION IS PROPER UNDER THE CLASS ACTION FAIRNESS ACT

11. CAFA confers federal jurisdiction over class actions involving: (a) minimal diversity (i.e., diversity between any defendant and any plaintiff or putative class member); (b) at least 100 putative class members; and (c) at least \$5 million in controversy, inclusive of attorneys’ fees but exclusive of interest and costs. 28 U.S.C. § 1332(d)(2), (5). The notice of removal need only contain a “short and plain statement of the grounds for removal”; evidence is required only if the plaintiffs subsequently contest, or the Court questions, Mars’s allegations. *See Dart Cherokee Basin Operating Co. v. Owens*, --- U.S. ---, 135 S. Ct. 547, 552–53 (2014); *see also Roa v. TS Staffing Servs., Inc.*, No. 2:14-cv-08424, 2015 WL 300413, at *2 (C.D. Cal. Jan. 22, 2015) (“While *Dart Cherokee* focused only on the amount-in-controversy requirement, the Court finds that the

¹ By removing this matter, Mars does not waive and, to the contrary, reserves any rights it may have including, without limitation, all available arguments and affirmative defenses. Mars does not concede that class certification is appropriate or that Plaintiffs are entitled to any recovery.

rationale behind *Dart Cherokee* applies equally to the other CAFA requirements.”). This case satisfies the jurisdictional requirements under CAFA.

A. The Parties Are Minimally Diverse.

12. CAFA requires minimal diversity, that is, at least one putative class member must be a citizen of a state different from any defendant. 28 U.S.C. § 1332(d)(2)(A). Here, both Plaintiffs are citizens of a different state from both Defendants.

13. In evaluating citizenship in the context of CAFA, a corporation or limited liability company is deemed to be a citizen of both the state where it is incorporated or organized and the state where it has its principal place of business. 28 U.S.C. § 1332(c)(1); 28 U.S.C. § 1332(d)(10); *see Heritage Pac. Fin., LLC v. Cole*, No. CV 10-0394 PSG (JEMx), 2010 WL 2349607, at *1 (C.D. Cal. June 7, 2010). The phrase “principal place of business” “refers to the place where the corporation’s high level officers direct, control, and coordinate the corporation’s activities.” *Hertz Corp. v. Friend*, 559 U.S. 77, 80 (2010). “[I]n practice [this] should normally be the place where the corporation maintains its headquarters.” *Id.* at 93.

14. Mars, Inc. is incorporated in the State of Delaware and maintains its headquarters in McLean, Virginia. Compl. ¶ 11. Mars Chocolate North America, LLC is organized under the laws of the State of Delaware and maintains its headquarters in Hackettstown, New Jersey. *Id.* ¶ 12. For CAFA jurisdiction purposes, Mars, Inc. is a citizen of Delaware and Virginia; Mars Chocolate North America, LLC, is a citizen of Delaware and New Jersey.

15. Plaintiffs each allege they are citizens of the State of California. Compl. ¶¶ 9, 10. Neither Defendant is a citizen of California. Accordingly, the parties are minimally diverse.

B. The Proposed Class Exceeds 100 Members.

16. For purposes of removal, the Court looks to a plaintiff’s allegations respecting class size. *See Kuxhausen v. BMW Fin. Servs. NA LLC*, 707 F.3d 1136, 1140 (9th Cir. 2013) (CAFA

1 requirement of 100 class members satisfied by plaintiff's complaint). Plaintiffs purport to bring
 2 claims on behalf of themselves and "[a]ll California consumers." Compl. ¶ 50. Plaintiffs
 3 acknowledge the putative class would be comprised of "thousands of members." *Id.* ¶ 53. Thus,
 4 the proposed class exceeds 100 members.

5 **C. The Amount in Controversy Exceeds \$5 Million.**

6
 7 17. CAFA provides that "the claims of the individual class members shall be aggregated
 8 to determine whether the matter in controversy exceeds the sum or value of \$5,000,000, exclusive
 9 of interest and costs." 28 U.S.C. § 1332(d)(6). "[T]he statute tells the District Court to determine
 10 whether it has jurisdiction by adding up the value of the claim of each person who falls within the
 11 definition of [plaintiffs'] proposed class and determine whether the resulting sum exceeds \$5
 12 million." *Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345, 1348 (2013). Although Mars denies
 13 Plaintiffs or the putative class are entitled to any relief, in determining the amount in controversy
 14 the Court must assume that the allegations in the complaint are true. *Fong v. Regis Corp.*, No. 13-
 15 04497, 2014 WL 26996, at *2 (N.D. Cal. Jan. 2, 2014).

16
 17 18. "[A] defendant's notice of removal need include only a plausible allegation that the
 18 amount in controversy exceeds the jurisdictional threshold." *Dart Cherokee*, 135 S. Ct. at 554.
 19 "Where CAFA applies," the value of injunctive relief "can be determined from either the plaintiff
 20 class's or the defendant's 'viewpoint.'" *Bayol v. Zipcar, Inc.*, No. 14-cv-02483-TEH, 2015 WL
 21 4931756, at *10 (N.D. Cal. Aug. 18, 2015); *see Tompkins v. Basic Research LL*, No. CIV. S-08-244
 22 LKK/DAD, 2008 WL 1808316, at *4 (E.D. Cal. Apr. 22, 2008) ("The amount in controversy to be
 23 considered [] includes either the defendant's cost of compliance with an injunction or the plaintiff's
 24 benefit from the injunction."). Here, Plaintiffs seek to enjoin Mars from "selling or offering for
 25 sale" the products at issue. Compl. ¶ 66. Viewed from the perspective of either the putative class
 26 or Mars, the amount in controversy in this matter easily exceeds \$5 million.
 27
 28

1 19. Over the past twelve months, sales of the six-count boxes of M&M's Ice Cream
 2 Cookies, M&M's Ice Cream Cones, and Twix Ice Cream Bars in the San Francisco, Los Angeles,
 3 Sacramento, and San Diego metropolitan areas exceeded \$1.5 million. Decl. of Sahar Amir ("Amir
 4 Decl.") ¶ 12. Notably, the \$1.5 million figure represents sales for only a limited geographic area
 5 within California, and only for a subset of retail outlets. Amir Decl. ¶ 5. Taking into account all
 6 retailers throughout California for the four years preceding the filing of the complaint,² it is more
 7 than plausible that Mars's past sales of the products at issue well exceeded \$5 million. It is thus
 8 also reasonable to assume that but for the requested injunctive relief, Mars's sales of those products
 9 will exceed \$5 million. *See Anderson v. Seaworld Parks & Entm't, Inc.*, No. 15-cv-02172-SC, 2015
 10 WL 5612499, at *5 (N.D. Cal. Sept. 22, 2015) ("A reasonable assumption here includes that past
 11 performance . . . is indicative (albeit not determinative) of [Defendants'] expected future [] sales.").

12
 13 20. Plaintiffs assert that but for the allegedly misleading labeling of Mars's products,
 14 Plaintiffs "would not have purchased the Products," "would have been willing to pay less for the
 15 Products," or "would have purchased a similar product, that was less expensive." Compl. ¶¶ 9–10;
 16 *see id.* ¶¶ 65, 71, 78, 84 ("As a result of Mars' alleged conduct, Plaintiffs have lost money."). If, as
 17 Plaintiffs allege, an injunction is necessary to prevent putative class members from spending money
 18 on products that they would not otherwise purchase, the value to the class of an injunction over the
 19 next four years is more than \$5 million.

20
 21 21. From Mars's perspective, the cost of injunctive relief likewise exceeds the threshold
 22 amount. Although retail prices are higher than the prices Mars charges its customers, Amir Decl.
 23 ¶ 7, that more than \$1.5 million of the products at issue were sold in the San Francisco, Los
 24 Angeles, Sacramento, and San Diego areas alone over the past twelve months plausibly suggests
 25 that a state-wide, permanent injunction would cost Mars significantly more than \$5 million.

26
 27 ² *See* Cal. Bus. & Prof. Code § 17208 (establishing a four-year statute of limitations for actions to
 28 enforce the UCL).

22. Moreover, the above analysis does not take into account attorneys' fees, which Plaintiffs also seek, Compl. ¶ 93, further adding to the amount in controversy. *Guglielmino v. McKee Foods Corp.*, 506 F.3d 696, 701 (9th Cir. 2007). Potential harm to Mars's reputation from an adverse judgment, the cost of developing new packaging, and other costs of complying with an injunction would likewise increase the amount in controversy. *See Anderson*, 2015 WL 5612499, at * 6. Thus, this case satisfies the amount in controversy requirement for CAFA jurisdiction.

II. THE COURT HAS ORIGINAL JURISDICTION OVER THIS ACTION

23. In addition to CAFA, this Court also has original jurisdiction over this action. This Court has original jurisdiction over all cases arising under the laws of the United States. 28 U.S.C. § 1331. Jurisdiction exists here because Plaintiffs' claims necessarily require the adjudication of substantial, disputed questions of federal law.

A. The Claims in This Case Arise Under the Laws of the United States.

24. Federal question jurisdiction exists in actions involving only state-law claims where those claims require the resolution of a substantial, disputed issue of federal law. *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 314–15 (2005) (affirming federal-question jurisdiction over state quiet-title action based on need to resolve predicate issue under federal Internal Revenue Code). Plaintiffs' claims necessitate the resolution of substantial, disputed questions of federal law, including the meaning and application of the FDCA and food labeling regulations promulgated by the FDA, because Plaintiffs' claims expressly challenge statements on the labels of Mars products on the ground that they violate the FDCA and FDA regulations.

25. For Plaintiffs to prove Mars's products are misbranded, Plaintiffs will have to prove that the products' labels violate the requirements set forth in §§ 343(k), (a)(1), and 331(a) of the FDCA, and 21 C.F.R. § 135.110. Resolving Plaintiffs' claims will require, among other things, interpretation of this statute and related FDA regulations. Indeed, the FDCA expressly preempts

any state law labeling requirements that are “not identical” to those established by the FDCA and FDA regulations. *See* 21 U.S.C. § 343-1(a)(4), (5) (2012); 21 C.F.R. § 100.1(c)(4)(i)–(ii). Thus, Plaintiffs cannot succeed on their claims unless the Court definitively interprets these federal provisions.

26. Although Plaintiffs seek to enforce FDA regulations through California’s Sherman Law and other California state laws, those laws are general in nature and do not provide the regulatory framework that Plaintiffs rely on here. There are no California state law equivalents to the relevant FDA standards Plaintiffs invoke, except to the extent that California law incorporates by reference the entire body of FDA food-labeling regulations. *See* Cal. Health & Safety Code § 110100(a) (“All food labeling regulations and any amendments to those regulations adopted pursuant to the federal act, in effect on January 1, 1993, or adopted on or after that date shall be the food labeling regulations of this state.”). Thus, Plaintiffs’ complaint necessarily depends upon the interpretation of federal law. *Cnty. of Santa Clara v. Astra USA, Inc.*, 401 F. Supp. 2d 1022, 1025 (N.D. Cal. 2005) (federal jurisdiction lies “when an issue of federal law undergirds a claim otherwise based in state law.”); *In re Zyprexa Prods. Liab. Litig.*, Nos. 04-MD-1596, 07-CV-1933 (JBW), 2008 WL 398378, at *5 (E.D.N.Y. Feb. 12, 2008) (absence of state-law equivalent standard evidences necessity of federal law); *Pickern v. Best W. Timber Cove Lodge Marina Resort*, 194 F. Supp. 2d 1128, 1132 n.5 (E.D. Cal. 2002) (“Simply by incorporating the [federal act] into state law, state legislatures cannot divest the federal courts of original jurisdiction over state claims that are, for all intents and purposes, federal [] claims.”).

27. There is a significant federal interest in the adjudication of such disputes in a federal forum, and the exercise of federal question jurisdiction will not “disturb[] any congressionally approved balance of federal and state judicial responsibilities.” *Grable*, 545 U.S. at 314. Congress has made it clear that national uniformity in the regulation of food labeling is an important federal

1 concern. *See Lam v. Gen. Mills, Inc.*, 859 F. Supp. 2d 1097, 1102 (N.D. Cal. 2012) (explaining that
 2 Congress amended the FDCA via the Nutritional Labeling and Education Act, Pub. L. No. 101-535,
 3 104 Stat. 2353 (1990), to ““establish uniform national standards for the nutritional claims and the
 4 required nutrient information displayed on food labels.”” (quoting H.R. Rep. No. 101-538 (1990),
 5 *reprinted in* 1990 U.S.C.C.A.N. 3336, 3342)). Removal of cases that necessarily require the
 6 interpretation of federal food labeling regulations to federal court helps to achieve this aim.
 7

8 28. Accordingly, the Court’s exercise of federal question jurisdiction is appropriate
 9 because Plaintiffs’ state law claims necessarily involve the resolution of substantial, disputed
 10 questions of federal law, including whether the challenged label statements were permitted by and
 11 complied with the FDCA and FDA regulations.³

12 CONCLUSION

13 Pursuant to 28 U.S.C. §§ 1331, 1332, 1441, 1446, and 1453, Mars hereby removes the
 14 above-captioned action from the Superior Court of California for the County of San Francisco to the
 15 United States District Court for the Northern District of California.
 16
 17
 18
 19
 20
 21
 22
 23

24 ³ To the extent not otherwise provided for above, supplemental jurisdiction exists as to all other
 25 claims as set forth in the Complaint, pursuant to 28 U.S.C. § 1367. A court may exercise
 26 supplemental jurisdiction “over all other claims that are so related to claims in the action within
 27 such original jurisdiction that they form part of the same case or controversy.” 28 U.S.C. § 1367(a).
 28 This standard is satisfied here because Plaintiffs’ claims are so related to claims as to which there is
 federal question jurisdiction that they form parts of the same case or controversy. In addition,
 Plaintiffs’ claims do not raise novel or complex issues of state law and do not substantially
 predominate over the federal claims. *See* 28 U.S.C. § 1367(c).

1 Dated: September 28, 2015

Respectfully submitted,

2
3 By: /s/Stephen D. Raber

Stephen D. Raber (State Bar No. 121958)

4 David M. Horniak (State Bar No. 268441)

Joelle S. Perry (State Bar No. 275244)

5 WILLIAMS & CONNOLLY LLP

725 Twelfth Street, N.W.

6 Washington, DC 20005

Telephone: (202) 434-5000

7 Facsimile: (202) 434-5029

E-mail: [sraber@wc.com](mailto:srabber@wc.com)

8 E-mail: dhorniak@wc.com

9 E-mail: jperry@wc.com

10 *Attorneys for Defendants Mars, Inc. and Mars*
11 *Chocolate North America, LLC*
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CERTIFICATE OF SERVICE

I hereby certify that on September 28, 2015, I electronically filed Mars's Notice of Removal, Declaration of Joelle S. Perry in Support of Notice of Removal and accompanying exhibits, and Declaration of Sahar Amir in Support of Notice of Removal with the Clerk of Court using the CM/ECF system which sent an email notification to all participants in this case who are registered CM/ECF users. I further caused the documents listed above to be served via U.S. Mail on the following:

Rosemary M. Rivas
Alyssa Dang
Finkelstein Thompson LLP
One California Street, Suite 900
San Francisco, CA 94111

Joseph N. Kravec, Jr.
McKean J. Evans
Feinstein Doyle Payne & Kravec, LLC
429 Forbes Avenue
Allegheny Building, Suite 1705
Pittsburgh, PA 15219

Dated: September 28, 2015

Respectfully submitted,

By: /s/Stephen D. Raber
Stephen D. Raber (State Bar No. 121958)
David M. Horniak (State Bar No. 268441)
Joelle S. Perry (State Bar No. 275244)
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, DC 20005
Telephone: (202) 434-5000
Facsimile: (202) 434-5029
E-mail: sraber@wc.com
E-mail: dhorniak@wc.com
E-mail: jperry@wc.com

*Attorneys for Defendants Mars, Inc. and
Mars Chocolate North America, LLC*

Stephen D. Raber (State Bar No. 121958)
David M. Horniak (State Bar No. 268441)
Joelle S. Perry (State Bar No. 275244)
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, DC 20005
Telephone: (202) 434-5000
Facsimile: (202) 434-5029
E-mail: sraber@wc.com
E-mail: dhorniak@wc.com
E-mail: jperry@wc.com

*Attorneys for Defendants Mars, Inc. and Mars
Chocolate North America, LLC*

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

LINDA CHESLOW and MIKE XAVIER, on
behalf of themselves and all others similarly
situated,

Plaintiffs,

v.

MARS, INC. and MARS CHOCOLATE
NORTH AMERICA, LLC,

Defendants.

Case No.:

**DECLARATION OF JOELLE S.
PERRY IN SUPPORT OF NOTICE
OF REMOVAL**

CLASS ACTION

Pursuant to 28 U.S.C. § 1746, I, Joelle S. Perry, hereby testify and declare as follows:

1. I am over the age of eighteen and competent to testify to and have personal
knowledge of the matters contained herein.

2. I am an attorney with the law firm Williams & Connolly LLP, which represents
Defendants Mars, Inc. and Mars Chocolate North America, LLC (collectively "Mars") in this
matter.

3. Public records indicate that on August 26, 2015, Plaintiffs Linda Cheslow and Mike
Xavier filed a Complaint in the Superior Court of California for the County of San Francisco

1 (“Superior Court”), captioned *Linda Cheslow and Mike Xavier, on behalf of themselves and all*
2 *others similarly situated v. Mars, Inc. and Mars Chocolate North America, LLC*, Case No. CGC-15-
3 547631. Attached as Exhibit A is a true and correct copy of the Complaint.

4 4. Attached as Exhibit B are true and correct copies of the additional documents filed in
5 the state action and/or served on Mars: Superior Court Summons, Superior Court Civil Case Cover
6 Sheet, Superior Court Alternative Dispute Resolution Program Information Package, Superior Court
7 Form CM-110 (Case Management Statement), Superior Court Expedited Jury Trial Information
8 Sheet, and Superior Court Notice to Plaintiff.

9 5. Attached as Exhibit C is a true and correct copy of the proof of service of the
10 Complaint received by Mars.

11 6. As reflected in Exhibit C, Mars was served on August 28, 2015. Mars did not
12 answer the Complaint in Superior Court before filing this Notice of Removal. Mars is not aware of
13 any further proceedings or filings regarding this action in Superior Court.

14 7. Notice of this removal will promptly be given both to the adverse parties and to the
15 Superior Court pursuant to 28 U.S.C. § 1446(d).

16 I declare under penalty of perjury under the laws of the United States of America that the
17 foregoing is true and correct.

18 Executed this 28th day of September, 2015, in Washington, D.C.

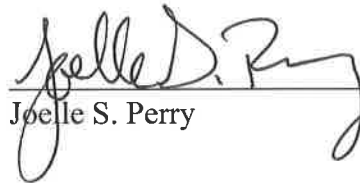
19
20
21 
22 Joelle S. Perry
23
24
25
26
27
28

EXHIBIT A
(PART 1 OF 2)

Rosemary M. Rivas (SBN 209147)
Alyssa Dang (SBN 292995)
FINKELSTEIN THOMPSON LLP
One California Street, Suite 900
San Francisco, CA 94111
Tel: (415) 398-8700
Fax: (415) 398-8704
Email: rrivas@finkelsteinthompson.com
adang@finkelsteinthompson.com

Joseph N. Kravec, Jr. (*pro hac* to be filed)
McKean J. Evans (*pro hac* to be filed)
FEINSTEIN DOYLE
PAYNE & KRAVEC, LLC
429 Forbes Avenue
Allegheny Building, Suite 1705
Pittsburgh, PA 15219
Tel.: (412) 281-8400
Fax: (412) 281-1007
Email: jkravec@fdpklaw.com
mevans@fdpklaw.com

*Counsel for Plaintiffs and the
Proposed Class*

**SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN FRANCISCO**

LINDA CHESLOW and MIKE
XAVIER, on behalf of themselves and
all others similarly situated,

Plaintiffs,

vs.

MARS, INCORPORATED and MARS
CHOCOLATE NORTH AMERICA,
LLC,

Defendants.

FILED
Superior Court of California
County of San Francisco

AUG 26 2015

CLERK OF THE COURT
BY: DENNIS TOYAMA
Deputy Clerk

CASE NO. **CGC-15-547631**

CLASS ACTION

**COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF**

DEMAND FOR JURY TRIAL

1 Upon personal knowledge as to their own acts and status, and based upon their investigation,
 2 their counsel's investigation, and information and belief as to all other matters, Plaintiffs Mike
 3 Xavier and Linda Cheslow ("Plaintiffs"), on behalf of themselves and all others similarly situated,
 4 allege as follows:

5 INTRODUCTION

6 1. This is a consumer class action seeking declaratory and injunctive relief to restrain
 7 Defendants Mars, Incorporated and Mars Chocolate North America, LLC (collectively "Mars" or
 8 "Defendants") from continuing to sell in California ice cream products, as identified herein, that
 9 contain artificial flavors, but which omit the "Artificial Flavor Added" statement on the principle
 10 display panel of its labels as required by Food and Drug Administration ("FDA") regulations. This
 11 identical conduct also violates California's Sherman Law, which expressly adopts the FDA
 12 regulations. *See* Cal. Health & Safety Code §§ 109930, 110100 and 110760.

13 2. Mars labels each Product "Vanilla Flavored Ice Cream," "Coffee Flavored Ice
 14 Cream" or "Vanilla and Chocolate Flavored Ice Cream." Under governing FDA regulations detailed
 15 herein, "flavored" ice cream must also affirmatively disclose "Artificial Flavor Added" on the
 16 portion of the label most prominently displayed to consumers (known as the "Principal Display
 17 Panel" or "PDP;" 21 C.F.R. § 101.1). *See* ¶¶ 19-20, *infra* (citing 21 C.F.R. §§ 135.110(f)(2)(ii)
 18 (requiring "Flavored" disclosure) and 135.110(f)(3)(i) (requiring "Artificial Flavor Added"
 19 disclosure)). Thus, by labeling ice cream products as "Flavored," Mars admits these products must
 20 also affirmatively disclose "Artificial Flavor Added" on their PDP.

21 3. Mars violates this requirement by failing to disclose "Artificial Flavor Added" on the
 22 Products' PDP. Instead, Mars buries its disclosure of artificial ice cream flavors in the Products'
 23 ingredients list on the back of the Products' packaging. This violates federal and California law and
 24 misleads consumers. Mars's ice cream products labeled as "Flavored" but omitting the "Artificial
 25 Flavor Added" disclosure on their PDP are referred to herein as the "Products."¹

26
 27
 28 ¹ As detailed in ¶ 30 herein, Plaintiffs' counsel's pre-suit investigation identified the following
 Products currently being offered for sale: M&M's Ice Cream Cones, M&M's Ice Cream Cookies

1 4. The FDA adopted its rule requiring the “Artificial Flavor Added” disclosure after
2 engaging in fact-finding and concluding the presence of artificial flavors in ice cream is material to
3 consumers. The FDA’s findings are detailed in this Complaint and, among other things, found that
4 “[c]onsumers quite generally prefer natural over artificial flavorings and desire to know when
5 artificial flavorings are present in ice cream” and thus that “[l]abel statements of the use of artificial
6 flavorings are in the consumer’s interest.” *See* Exhibit A, Excerpts of 25 Fed.Reg. 7126, p. 2.

7 5. Because the presence of artificial flavors in ice cream is material to consumers as the
8 FDA’s fact-finding confirmed, an ice cream manufacturer such as Mars stands to improve its
9 position in the market, sell more products and increase its revenue and profits by failing to disclose
10 to consumers that its products contain artificial flavors. This is detrimental to consumers, who, as
11 the FDA’s fact-finding confirmed, consider the presence of artificial flavors in ice cream a material
12 part of their purchasing decisions and reasonably rely on the truth and accuracy of products’ PDPs
13 when making purchasing decisions.

14 6. Defendants’ conduct alleged herein is false and misleading and violates both
15 California’s Sherman Food, Drug, and Cosmetic Law (“Sherman Law), Cal. Health & Safety Code
16 §§ 109930, 110100 and 110760 and other applicable state laws. Defendants’ identical conduct that
17 violates the Sherman Law and other applicable states laws also violates the Federal Food, Drug and
18 Cosmetic Act (“FDCA”) 21 U.S.C. §§ 343(k), (a)(1) and 331(a), and the FDA’s ice cream flavor
19 labeling regulation, 21 C.F.R. § 135.110. This identical conduct serves as the sole factual basis of
20 each state law cause of action brought by this Complaint, and Plaintiffs do not seek to enforce any of
21 the state law claims raised herein to impose any standard of conduct that exceeds that which would
22 violate the FDCA and regulations adopted pursuant thereto. Thus, Plaintiffs’ state law claims are
23 not preempted by the FDCA because Plaintiffs’ claims for state law violations seek to enforce the
24 same standard of conduct required by federal law and Plaintiffs’ state law claims are based upon
25 Defendants’ breach of that standard of conduct. For any of Plaintiffs’ state law causes of action, the
26

27
28 and Twix Ice Cream Bars. Plaintiffs reserve the right to amend this Complaint to add additional
Products they identify through further investigation and/or discovery.

allegations supporting those causes of action and any forms of relief sought for those state law causes of action, Plaintiffs expressly disclaim any attempt to hold Defendants to a higher standard of conduct than what is required under federal law, and do not seek any form of relief based on conduct exceeding that which is required under federal law. All state law causes of action asserted in this Complaint, the allegations supporting those state law causes of action asserted herein and any forms of relief sought for those state law causes of action asserted herein shall be read consistent with the limitations set forth in this paragraph.

7. Accordingly, Plaintiffs bring this action on behalf of California consumers to declare Mars' products mislabeled and enjoin Mars from continuing to sell Products in California that violate applicable regulations for ice cream products with artificial flavors, cited herein, and mislead consumers by omitting the mandated "Artificial Flavor Added" disclosure.

8. Plaintiffs seek only declaratory and injunctive relief and attorneys' fees, costs and expenses incurred in obtaining such relief. Plaintiffs do not seek monetary relief such as damages or restitution on behalf of either themselves or the Class.

PARTIES

9. Plaintiff Linda Cheslow is a natural person and a citizen of the State of California, residing in Sonoma County. From approximately April 2010 until approximately August 2014, Ms. Cheslow purchased Mars' M&M's Ice Cream Cookies and Twix Ice Cream Bars, alternating between each product approximately once every other month, from retail stores including Safeway, Raley's, Target, near her home in Sonoma County. When purchasing these Products, Ms. Cheslow, like many consumers, reads the Products' PDP on the front of the Products' packaging before making her purchasing decision, but did not closely examine the other panels of the Products, including the ingredients list on the rear panel. None of the Products Ms. Cheslow purchased contained the FDA-mandated language "Artificial Flavor Added" on the PDPs. Nor did the Products' PDPs otherwise disclose these Products' ice cream contained artificial flavors. As a result, Ms. Cheslow believed she was purchasing ice cream containing no artificial flavors. Had she known the truth that the Products she purchased contained artificially flavored ice cream, Ms. Cheslow's purchasing decision would have been materially altered in at least one of the following ways: she

1 would not have purchased the Products, would have been willing to pay less for the Products she
2 purchased, would have purchased similar products containing ice cream without artificial flavors, or
3 would have purchased a similar product that was less expensive.

4 10. Plaintiff Mike Xavier is a natural person and a citizen of the State of California,
5 residing in San Francisco County. Mr. Xavier purchased Mars' M&M's Ice Cream Cones and Twix
6 Ice Cream Bars from retail stores near his home in San Francisco including Safeway, Lucky's,
7 Target, and Walmart. Mr. Xavier alternated his purchases of these Mars' M&M's Ice Cream Cones
8 and Twix Ice Cream Bars, purchasing one of them every four to five weeks in the period beginning
9 in or about 2013 to the Summer of 2014 period. When purchasing these Products, Mr. Xavier, like
10 many consumers, reads the Products' PDP on the front of the Products' packaging before making his
11 purchasing decision, but did not closely examine the other panels of the Products, including the
12 ingredients list on the rear panel. None of the Products Mr. Xavier purchased contained the FDA-
13 mandated language "Artificial Flavor Added" on the PDPs. Nor did the Products' PDPs otherwise
14 disclose these Products' ice cream contained artificial flavors. As a result, Mr. Xavier believed he
15 was purchasing ice cream containing no artificial flavors. Had he known the truth that the Products
16 she purchased contained artificially flavored ice cream, Mr. Xavier's purchasing decision would
17 have been materially altered in at least one of the following ways: he would not have purchased the
18 Products, would have been willing to pay less for the Products he purchased, would have purchased
19 similar products containing ice cream without artificial flavors, or would have purchased a similar
20 product that was less expensive.

21 11. Defendant Mars Incorporated is a Delaware corporation with its address at 6885 Elm
22 Street, McLean, Virginia 22101. Mars Incorporated owns the brands used to label, market and sell
23 the Products including M&M's, Twix and Dove.

24 12. Defendant Mars Chocolate North America, LLC is a Delaware Corporation with its
25 address at 6885 Elm Street, McLean, Virginia 22101. Mars Chocolate North America, LLC,
26 operates as a subsidiary of Mars, Incorporated. According to the Products' labeling, Mars Chocolate
27 North America, LLC distributes the Products and also maintains a place of business at Hacketstown,
28 NJ 07840.

JURISDICTION AND VENUE

13. This Court has jurisdiction over the parties, and venue is proper in San Francisco County Superior Court.

14. This Court has jurisdiction and venue pursuant to California Code of Civil Procedure §§ 395.5 and 410.10 over the claims raised in this Complaint for the following reasons: (i) Mars regularly engages in the sale of food including the Products in San Francisco County and throughout the State of California; (ii) Mars advertises in San Francisco County and throughout the State of California; (iii) a substantial portion of the underlying transactions and events complained of herein occurred, and affected persons and entities, in San Francisco County; and (iv) Plaintiffs are citizens of California, and Plaintiff Xavier resides in and his purchases of the products at issue occurred in San Francisco County.

THE FDA REQUIRES THAT ICE CREAM LABELS DISCLOSE ARTIFICIAL FLAVORS

15. The U.S. Congress passed the Food, Drug and Cosmetic Act (“FDCA”). 21 U.S.C. §§ 301, *et seq.* The FDCA provides a food shall be deemed to be “misbranded” “[i]f it bears or contains any artificial flavoring...unless it bears labeling stating that fact” or “if its labeling is false or misleading in any particular[.]” 21 U.S.C. §§343(k) and (a)(1). The FDCA and California law prohibit selling or distributing misbranded food. 21 U.S.C. § 331(a); Cal. Health & Safety Code § 110760.

16. The FDCA empowers the FDA to “promulgate regulations fixing and establishing for any food...a reasonable definition and standard of identity[.]” 21 U.S.C. §§ 341 and 371. This statute also provides the FDA “shall, for the purpose of promoting honesty and fair dealing in the interest of consumers, designate the optional ingredients which shall be named on the label.” *Id.* California’s Sherman Law adopts all food labeling regulations the FDA promulgates pursuant to this authority. Cal. Health & Safety Code §§ 109930 and 110100.

17. Pursuant to its statutory authority, the FDA promulgated regulations governing when and how labels for ice cream products must disclose artificial flavors. *See* 21 C.F.R. § 135.110.

1 18. Ice cream containing no artificial flavor must simply be labeled with the words “ice
2 cream” and the name of its characterizing flavor on its PDP² (e.g., “Vanilla Ice Cream” or
3 “Chocolate Ice Cream”). 21 C.F.R. §135.110(2)(i). Ice cream containing artificial flavors must bear
4 specific disclosures depending on the nature and type of the artificial flavors. *Id.*

5 19. At issue here is the disclosure required when ice cream contains both a natural,
6 predominating characterizing flavor and an artificial flavor simulating it. In such case, the ice cream
7 must disclose the presence of the artificial flavor in two different ways.

8 20. First, the ice cream must label itself as “flavored” (e.g., “Vanilla Flavored Ice
9 Cream”) on the PDP. 21 C.F.R. § 135.110(f)(2)(ii). Second, the ice cream must affirmatively
10 disclose the artificial flavor by stating “Artificial Flavor Added” or “Artificial ____ Flavor Added”
11 (e.g., “Artificial Vanilla Flavor Added”) wherever the name of the characterizing flavor appears on
12 the label so conspicuously as to be easily seen under customary conditions of purchase. *Id.*, §
13 (f)(3)(i) and (ii). Since the characterizing flavor must appear in the ice cream product’s name on its
14 PDP, as a practical matter this regulation requires the “Artificial Flavor Added” statement also
15 appear on the PDP, in addition to appearing anywhere else on the package the characterizing flavor
16 is identified. *Id.*

17 **THE FDA, AFTER FACT-FINDING, DETERMINED THE PRESENCE OF ARTIFICIAL**
18 **FLAVORS IN ICE CREAM IS MATERIAL TO CONSUMERS**

19 21. Prior to promulgating the regulation presently codified at 21 C.F.R. §135.110, the
20 FDA conducted extensive research and fact-finding. After due notice, the FDA conducted a series
21 of public hearings over a ten year period. Based on evidence received at these hearings, the FDA
22 published proposed conclusions and findings of fact. The FDA considered responses to its
23 proposals, adopting and rejecting some such responses. Thereafter, the FDA promulgated findings
24 of fact “on the basis of reliable, probative and substantial evidence.” *See* Exhibit A, Excerpts of 25
25 Fed. Reg. 7126, p. 1.

26
27
28 ² The PDP is “the part of a label that is most likely to be displayed, presented, shown, or examined
under customary conditions of display for retail sale.” 21 C.F.R. § 101.1.

22. The FDA's findings of fact determined the presence of artificial flavors in ice cream is material to consumers. The FDA found

When so used that they do not create a misleading impression as to the presence of a natural ingredient or the amount of a natural ingredient present, artificial food flavorings are suitable ingredients of ice cream. Consumers quite generally prefer natural over artificial flavorings and desire to know when artificial flavorings are present in ice cream. To the extent that accurate information can be conveyed to consumers by labeling on ice cream, label statements of the use of artificial flavorings are in the consumer's interest. Label statements that comply with the requirements of the general provisions of the Federal Food, Drug, and Cosmetic Act are "artificially flavored," "artificial flavoring added," "with added artificial flavoring"

[. . .]

The purpose sought to be served by prescribing the flavoring ingredients was the prevention of misleading labeling.

Exhibit A, p. 2, ¶¶19-20.

23. Other FDA findings reinforce the materiality of artificial versus natural flavors by finding "[t]he sole purpose for distinguishing between natural and artificial flavors is for economic reasons [and] [i]n most instances, natural flavor is more expensive than artificial flavor." Exhibit B, Excerpts of 38 Fed. Reg. 33285, p. 2, ¶ 10.

24. These regulatory findings of fact demonstrate that the mislabeling of artificial flavors in ice cream by the absence of a label statement "show[ing] that artificial flavoring is . . . used" (i.e., "Artificial Flavor Added") "immediately and conspicuously" accompanying the name "Vanilla Flavored Ice Cream" is material to consumers. 21 C.F.R. § 135.110(f)(3)(ii).

MARS' LABELING OF THE PRODUCTS UNIFORMLY VIOLATES THE FDA'S REGULATIONS

25. Mars labels each Product "Vanilla *Flavored* Ice Cream," "Coffee *Flavored* Ice Cream" or "Vanilla and Chocolate *Flavored* Ice Cream." Each Product thus makes the first of the two disclosures the FDA requires when a product contains both a natural, predominating characterizing ice cream flavor and an artificial ice cream flavor simulating it. See ¶¶ 19-20, *supra* (citing 21 C.F.R. § 135.110(f)(2)(ii) (requiring "Flavored" disclosure). No circumstance other than the presence of a natural, predominating characterizing ice cream flavor and an artificial ice cream flavor simulating it requires Mars to make this "Flavored" disclosure. Thus, by making the

1 “Flavored” disclosure, Mars admits each Product contains both a natural, predominating
2 characterizing ice cream flavor and an artificial ice cream flavor simulating it.

3 26. Since Mars admits each Product contains both a natural, predominating characterizing
4 ice cream flavor and an artificial ice cream flavor simulating it, Mars has admitted it is required to
5 make both the “Flavoring” and the “Artificial Flavor Added” disclosures required under such
6 circumstances.³ Yet, Mars only makes the first of the two disclosures. Mars fails to make the
7 second required disclosure because it fails to affirmatively state “Artificial Flavor Added” on the
8 Products’ PDPs. See ¶¶ 19-20, *supra* (citing 21 C.F.R. § 135.110(f)(3)(i) (requiring “Artificial
9 Flavor Added” disclosure”).

10 27. Each Product’s labeling misleads consumers and violates FDA regulations, the FDCA
11 and the Sherman Law uniformly because each Product contains both a natural, predominating
12 characterizing ice cream flavor and an artificial ice cream flavor simulating it, yet omits the FDA-
13 mandated “Artificial Flavor Added” disclosure.

14 28. In addition to uniformly omitting the required “Artificial Flavor Added” disclosure,
15 the Products share uniform characteristics and are marketed as a single product line. Each Product is
16 one of Mars’ chocolate brand products (M&M’s, Snickers, etc.,) in the form of an ice cream bar or
17
18

19 ³ Alternatively, even if Mars’ use of the “Flavoring” disclosure were erroneous or otherwise not due
20 to the presence of a natural, predominating characterizing ice cream flavor and an artificial ice cream
21 flavor simulating it, Mars would still be required to make the “Artificial Flavor Added” disclosure.
22 This is because any artificial flavor not simulating the natural flavor separately and independently
23 triggers the “Artificial Flavor Added” disclosure requirement. 21 C.F.R. § 135.110(f)(3)(i)
24 (requiring “Artificial Flavor Added” disclosure if a food “contains any artificial flavor not
25 simulating the characterizing flavor”). The ingredients list on the rear panel of each of the Products
26 identifies “artificial flavor” as an ingredient in the ice cream of the Products. Thus, if Mars contends
27 the artificial ice cream flavor in the Products does not simulate the characterizing flavor, Mars’
28 labeling is still unlawful and deceptive as alleged throughout this Complaint. Similarly, if Mars
contends the artificial ice cream flavor in the Products predominates over the natural characterizing
flavor, Mars’s products would be unlawful and deceptive for failing to make the FDA-mandated
artificial flavor disclosure applicable under such circumstances. See 21 C.F.R. § 135.110(f)(2)(iii).
The only circumstance under which Mars’ current labeling would not violate the FDA’s artificial ice
cream flavor disclosure requirements and mislead consumers would be if Mars added no artificial
flavor whatsoever to the Products.

1 similar hand-held novelty. Mars' promotional materials expressly group the Products as a single
2 product line by, for example, offering a coupon applicable to the entire product line.⁴

3 29. Each Product's ingredients list on the back of the Product's label confirms the
4 Products contain artificial ice cream flavors. However, disclosing artificial flavors in the fine print
5 on the back label does not comply with 21 C.F.R. § 135.110(f)(3)(ii), which requires Mars' Products
6 bear the "Artificial Flavor Added" disclosure "immediately and conspicuously preced[ing] or
7 follow[ing]" the Product's name on the PDP. This back-panel disclosure is thus inadequate to
8 correct the false and misleading omission of the FDA-mandated "Artificial Flavor Added" disclosure
9 on the Products' front labeling. This is because reasonable consumers typically do not look past
10 misleading representations on the front of packaged food to discover the truth in the ingredient list
11 on the back of the package. Plaintiffs and other consumers reasonably expect the PDP on the front
12 labels of packaged food to be truthful, accurate and compliant with FDA regulations, and do not
13 scour the back of the product's labeling to verify the accuracy of the front labeling.

14 30. Mars' Products currently offered for sale include:

- 15 a. Mars' M&M's Ice Cream Cones;
- 16 b. Mars' M&M's Ice Cream Cookies; and
- 17 c. Mars' Twix Ice Cream Bars.

18 31. Exemplars of each Product's labels are attached hereto as Exhibit C.

19 32. Mars' M&M's Ice Cream Cookies Product is currently offered for sale in California
20 labeled "Vanilla Flavored Ice Cream."

21 33. Mars' M&M's Ice Cream Cookies Product is currently offered for sale in California
22 containing artificial flavors in its ice cream.

23 34. Mars' M&M's Ice Cream Cookies Product is currently offered for sale in California
24 containing both a natural, predominating characterizing ice cream flavor and an artificial ice cream
25 flavor simulating it.

26
27
28 ⁴ See, Exhibit D, Mars Product Line Coupons.

1 35. Mars' M&M's Ice Cream Cookies Product is currently offered for sale in California
2 bearing labeling that does not disclose "Artificial Flavor Added" immediately and conspicuously
3 adjacent to the statement "Vanilla Flavored Ice Cream."

4 36. Mars' Twix Ice Cream Bars Product is currently offered for sale in California labeled
5 "Vanilla Flavored Ice Cream."

6 37. Mars' Twix Ice Cream Bars Product is currently offered for sale in California
7 containing artificial flavors in its ice cream.

8 38. Mars' Twix Ice Cream Bars Product is currently offered for sale in California
9 containing both a natural, predominating characterizing ice cream flavor and an artificial ice cream
10 flavor simulating it.

11 39. Mars' Twix Ice Cream Bars Product is currently offered for sale in California bearing
12 labeling that does not disclose "Artificial Flavor Added" immediately and conspicuously adjacent to
13 the statement "Vanilla Flavored Ice Cream."

14 40. Mars' M&M's Ice Cream Cones Product is currently offered for sale in California
15 labeled "Vanilla Flavored Ice Cream."

16 41. Mars' M&M's Ice Cream Cones Product is currently offered for sale in California
17 containing artificial flavors in its ice cream.

18 42. Mars' M&M's Ice Cream Cones Product is currently offered for sale in California
19 containing both a natural, predominating characterizing ice cream flavor and an artificial ice cream
20 flavor simulating it.

21 43. Mars' M&M's Ice Cream Cones Product is currently offered for sale in California
22 bearing labeling that does not disclose "Artificial Flavor Added" immediately and conspicuously
23 adjacent to the statement "Vanilla Flavored Ice Cream."

24 44. Additionally, at least some of Mars' Products labels violate 21 C.F.R. § 135.110(f)
25 for the separate and independent reason they fail to include the name of the product (*i.e.*, "Vanilla
26 Flavored Ice Cream") on their PDP at all, instead relegating it to a side panel. Exhibit C, pp. 1-2,
27 Label for Mars' M&M's Ice Cream Cones Product.
28

45. Mars is or reasonably should be aware that the Products' labeling is unlawful, false and misleading as described here. Besides the applicable FDA regulations which it is required to comply with and thus must be aware of, the International Dairy Foods Association ("IDFA"), an industry organization representing ice cream manufacturers such as Mars, publishes an Ice Cream and Frozen Desserts Labeling Manual specifically addressing the FDA regulations Mars violates. See Exhibit E, Excerpts of Ice Cream and Frozen Desserts Labeling Manual. The IDFA's manual provides specific examples of FDA-compliant labeling, including the addition of the FDA-mandated "Artificial Flavor Added" declaration adjacent to the "Vanilla Flavored Ice Cream" declaration on the label of ice cream containing both natural vanilla flavor and artificial flavor, with the natural flavor predomination, as Mars' Products do. Exhibit E, pp. 4-6 (Category II and Illustration 2).

MARS REFUSED TO CEASE ITS WRONGDOING

46. On April 29, 2015, Plaintiff Cheslow notified Mars of the allegations in this Complaint via letter pursuant to the CLRA, Cal. Civ. Code §§ 1750-85. A copy of Plaintiff's CLRA letter to Mars is attached hereto as Exhibit F. Mars' agents signed the U.S. mail return receipt forms confirming Mars received Plaintiff's CLRA letter by May 5, 2015. Exhibit F, pp. 37 and 39.

47. Plaintiff's CLRA letter put Mars on notice of the allegations of this Complaint and demanded Mars cease selling in California the Products bearing the unlawful, false and misleading labels described herein.

48. Mars never responded to Plaintiff's CLRA letter.

49. Although Mars has now had ample notice of Plaintiffs' allegations that its labeling is unlawful, false and misleading as described herein and an opportunity to address Plaintiffs' demands, Mars has failed to do so.

CLASS ACTION ALLEGATIONS

50. This action asserts claims for declaratory and injunctive relief on behalf of a California Class pursuant to Cal. Civ. Proc. Code § 382, defined as:

All California consumers.

51. Excluded from the Class are: (i) Mars, Incorporated and Mars Chocolate North America, LLC, including any entity in which Mars, Incorporated or Mars Chocolate North America,

1 LLC has a controlling interest, is a parent or subsidiary, or which is controlled by Mars, Incorporated
 2 or Mars Chocolate North America, LLC as well as their officers, directors, affiliates, legal
 3 representatives, heirs, predecessors, successors, and assigns; and (ii) the judges to whom this action
 4 is assigned and any members of their immediate families.

5 52. Certification of Plaintiffs' claims for class-wide treatment is appropriate because
 6 Plaintiffs can prove the elements of their claims on a class-wide basis using the same evidence as
 7 would be used to prove those elements in individual actions alleging the same claims.

8 **A. The Parties are Numerous and Ascertainable**

9 53. There are thousands of members of the Class who are geographically dispersed
 10 throughout California. Therefore, individual joinder of the Class members in order to bring them all
 11 before the Court is impracticable.

12 **B. There is a Well-Defined Community of Interest**

13 54. In order to determine if there is a well-defined community of interest such that the
 14 question is one of a common or general interest, a court should consider: (1) whether common
 15 questions of law and facts predominate; (2) whether the class representatives' claims or defenses are
 16 typical of the class; and (3) whether the class representatives can adequately represent the class.

17 **i. Common Questions of Law and Fact Predominate**

18 55. Common questions of law or fact exist as to all members of the Class and
 19 predominate over any questions affecting only individual members of the Class. These common
 20 legal or factual questions include:

- 21 a. Whether Mars continues to offer for sale or make available for sale in California
- 22 the Products as described herein;
- 23 b. Whether Mars' mislabeling of the Products as described herein is unlawful;
- 24 c. Whether Mars' mislabeling is material to consumers; and
- 25 d. Whether Plaintiffs and members of the Class are entitled to declaratory and
- 26 injunctive relief.

ii. Plaintiffs' Claims Are Typical of the Class

56. Plaintiffs' claims are typical of the claims of the Class. Plaintiffs purchased Mars' Products as described in ¶¶ 9-10, *supra*. Plaintiffs are California consumers who continue to be exposed to Mars' mislabeling. Therefore, Plaintiffs are no different in any material respect from any other members of the Class, and the relief sought by Plaintiffs is common to the relief sought by the Class.

iii. The Class Representatives Can Adequately Represent the Class

57. Plaintiffs are adequate representatives of the Class because their interests are neither antagonistic to nor in conflict with the interests of the Class members that they seek to represent, and they have retained counsel competent and experienced in conducting complex class action litigation. Plaintiffs and their counsel will adequately protect the interests of the Class.

C. A Class Action Is Superior to All Other Available Methods For The Fair And Efficient Adjudication of Plaintiffs' And Class Members' Claims

58. A class action is superior to other available means for the fair and efficient adjudication of this dispute. Because this action seeks declaratory and injunctive relief to restrain Mars from selling or making available for sale the mislabeled Products throughout California, this action is only appropriate as a class action because it affects all California consumers by the nature of the relief sought. It would be virtually impossible for Class members individually to obtain this relief. Even if members of the Class could afford individual actions, a multitude of such individual actions still would not be preferable to class wide litigation. Individual actions also present the potential for inconsistent or contradictory judgments, which would be dispositive of at least some of the issues and hence interests of the other members not party to the individual actions, would substantially impair or impede their ability to protect their interests, and would establish incompatible standards of conduct for the party opposing the class.

59. A class action presents far fewer litigation management difficulties and provides the benefits of single adjudication, economies of scale, and comprehensive supervision by a single court. The Class may also be certified because Mars acted or refused to act on grounds generally applicable to the Class, thereby making preliminary and final injunctive relief and corresponding declaratory

1 relief appropriate. Also in the alternative, the Class may be certified with respect to particular
2 issues.

3 **FIRST CAUSE OF ACTION**
4 **("Unlawful" Business Practices in Violation of the Unfair Competition Law ("UCL"),**
5 **Cal. Bus. & Prof. Code §§ 17200, et seq.)**

6 60. Plaintiffs hereby incorporate all other paragraphs of this Complaint and restate them
7 as if fully set forth herein.

8 61. The UCL defines unfair business competition to include any "unlawful, unfair or
9 fraudulent" act or practice, as well as any "unfair, deceptive, untrue or misleading" advertising. Cal.
10 Bus. Prof. Code § 17200.

11 62. A business act or practice is "unlawful" if it violates any established state or federal
12 law.

13 63. As described throughout this Complaint, Mars' Products' labeling fails to disclose the
14 presence of artificial ice cream flavors through the FDA-mandated "Artificial Flavor Added"
15 statement and is false and misleading. Mars' conduct thus violated and continues to violate the
16 federal FDCA, 21 U.S.C. §§ 343(k), (a)(1) and 331(a), and the FDA's ice cream flavor labeling
17 regulation, 21 C.F.R. § 135.110. This identical conduct also violates California's Sherman Law,
18 Cal. Health & Safety Code §§ 109930, 110100 and 110760.

19 64. Mars continues to violate the UCL through its ongoing violation of California and
20 federal law as described herein.

21 65. As described herein, Mars obtained money from Plaintiffs through its unlawful acts
22 and practices because Plaintiffs purchased Mars' Products relying on the accuracy of the Products'
23 labeling and the accuracy of Mars' Products' labeling was a material part of Plaintiffs' purchasing
24 decisions. As a result of Mars' alleged conduct, Plaintiffs have lost money.

25 66. Accordingly, Plaintiffs request the Court declare Mars' Products' labeling unlawful
26 and enjoin Mars from continuing to violate the UCL by selling or offering for sale the mislabeled
27 Products in California, or causing the mislabeled Products to be sold or offered for sale in California.
28 Unless Mars is permanently enjoined from continuing to engage in such violations of the UCL,
future consumers of Mars' Products will be harmed by its acts and practices in the same way as

1 Plaintiffs. Plaintiffs seek only declaratory and injunctive relief and seek no monetary relief, such as
2 damages or restitution, either individually or on behalf of the Class.

3 **SECOND CAUSE OF ACTION**
4 **(“Unfair” Business Practices in Violation of the Unfair Competition Law (“UCL”),**
5 **Cal. Bus. & Prof. Code §§ 17200, *et seq.*)**

6 67. Plaintiffs hereby incorporate all other paragraphs of this Complaint and restate them
7 as if fully set forth herein.

8 68. The UCL defines unfair business competition to include any “unlawful, unfair or
9 fraudulent” act or practice, as well as any “unfair, deceptive, untrue or misleading” advertising. Cal.
10 Bus. Prof. Code § 17200.

11 69. As described throughout this Complaint, Mars’ Products’ labeling fails to disclose the
12 presence of artificial flavors in the ice cream through the FDA-mandated “Artificial Flavor Added”
13 statement and is false and misleading. Defendant’s practices constitute unfair business practices in
14 violation of the UCL because, among other things, they are immoral, unethical, oppressive,
15 unscrupulous or substantially injurious to consumers, and/or any utility of such practices is
16 outweighed by the harm caused to consumers. Defendant’s practices violate the legislative policies
17 of the underlying statutes alleged herein, namely, of protecting consumers and preventing persons
18 from false and misleading advertising. Defendant’s practices caused substantial injury to Plaintiffs
19 and Class members, are not outweighed by any benefits, and Plaintiffs and Class members could not
20 have reasonably avoided their injuries.

21 70. Mars continues to violate the UCL through its ongoing unfair acts and practices as
22 described herein.

23 71. As described herein, Mars obtained money from Plaintiffs through its unlawful acts
24 and practices because Plaintiffs purchased Mars’ Products relying on the accuracy of the Products’
25 labeling and the accuracy of Mars’ Products’ labeling was a material part of Plaintiffs’ purchasing
26 decisions. As a result of Mars’ alleged conduct, Plaintiffs have lost money.

27 72. Accordingly, Plaintiffs request the Court declare Mars’ Products’ labeling unlawful
28 and enjoin Mars from continuing to violate the UCL by selling or offering for sale the mislabeled
Products in California, or causing the mislabeled Products to be sold or offered for sale in California.

Unless Mars is permanently enjoined from continuing to engage in such violations of the UCL, future consumers of Mars' Products will be harmed by its acts and practices in the same way as Plaintiffs. Plaintiffs seek only declaratory and injunctive relief and seek no monetary relief, such as damages or restitution, either individually or on behalf of the Class.

THIRD CAUSE OF ACTION
("Fraudulent" Business Practices in Violation of the Unfair Competition Law ("UCL"),
Cal. Bus. & Prof. Code §§ 17200, et seq.)

73. Plaintiffs hereby incorporate all other paragraphs of this Complaint and restate them as if fully set forth herein.

74. The UCL defines unfair business competition to include any "unlawful, unfair or fraudulent" act or practice, as well as any "unfair, deceptive, untrue or misleading" advertising. Cal. Bus. Prof. Code § 17200.

75. A business act or practice is "fraudulent" under the UCL if it actually deceives or is likely to deceive members of the consuming public.

76. As described throughout this Complaint, Mars' Products' labeling fails to disclose the presence of artificial ice cream flavors through the FDA-mandated "Artificial Flavor Added" statement and is false and misleading. As alleged throughout this Complaint, the FDA determined the presence of artificial ice cream flavors is material to consumers. Thus, omitting the FDA-mandated "Artificial Flavor Added" statement from the Products' PDPs actually deceives and/or is likely to deceive Class members and the consuming public.

77. Mars continues to violate the UCL through its ongoing fraudulent acts and practices as described herein.

78. As described herein, Mars obtained money from Plaintiffs through its unlawful acts and practices because Plaintiffs purchased Mars' Products relying on the accuracy of the Products' labeling and the accuracy of Mars' Products' labeling was a material part of Plaintiffs' purchasing decisions. As a result of Mars' alleged conduct, Plaintiffs have lost money.

79. Accordingly, Plaintiffs request the Court declare Mars' Products' labeling unlawful and enjoin Mars from continuing to violate the UCL by selling or offering for sale the mislabeled Products in California, or causing the mislabeled Products to be sold or offered for sale in California.

1 Unless Mars is permanently enjoined from continuing to engage in such violations of the UCL,
 2 future consumers of Mars' Products will be harmed by its acts and practices in the same way as
 3 Plaintiffs. Plaintiffs seek only declaratory and injunctive relief and seek no monetary relief, such as
 4 damages or restitution, either individually or on behalf of the Class.

5 **FOURTH CAUSE OF ACTION**
 6 **(False Advertising in Violation of the False Advertising Law ("FAL")**
 7 **Cal. Bus. & Prof. Code §§ 17500, *et seq.*)**

8 80. Plaintiffs hereby incorporate all other paragraphs of this Complaint and restate them
 9 as if fully set forth herein.

10 81. Mars uses advertising on the Products' packaging to sell the Products. Mars
 11 disseminates advertising concerning the Products which by its very nature is deceptive, untrue or
 12 misleading within the meaning of the FAL because omitting the FDA-mandated "Artificial Flavor
 13 Added" disclosure is misleading, likely to deceive and continues to deceive Class members and the
 14 general public as described throughout this Complaint.

15 82. In making or disseminating the Products' labeling described herein, Mars knew or
 16 should have known that the Products' labeling was misleading and acted in violation of the FAL.

17 83. Mars' material non-disclosures as described throughout this Complaint constitute
 18 false and misleading advertising and therefore violate the FAL.

19 84. As described herein, Mars obtained money from Plaintiffs through its unlawful acts
 20 and practices because Plaintiffs purchased Mars' Products relying on the accuracy of the Products'
 21 labeling and the accuracy of Mars' Products' labeling was a material part of Plaintiffs' purchasing
 22 decisions. As a result of Mars' alleged conduct, Plaintiffs have lost money.

23 85. Accordingly, Plaintiffs request the Court declare Mars' Products' labeling unlawful
 24 and enjoin Mars from continuing to violate the FAL by selling or offering for sale the mislabeled
 25 Products in California, or causing the mislabeled Products to be sold or offered for sale in California.
 26 Unless Mars is permanently enjoined from continuing to engage in such violations of the FAL,
 27 future consumers of Mars' Products will be harmed by its acts and practices in the same way as
 28 Plaintiffs. Plaintiffs seek only declaratory and injunctive relief and seek no monetary relief, such as
 damages or restitution, either individually or on behalf of the Class.

FIFTH CAUSE OF ACTION
(Violation of the Consumers Legal Remedies Act ("CLRA"),
California Civil Code §§ 1750, *et seq.*)

86. Plaintiffs hereby incorporate all other paragraphs of this Complaint and restate them as if fully set forth herein.

87. Plaintiffs and each Class member are "consumers" within the meaning of Civil Code § 1761(d).

88. Plaintiffs' purchases of Mars' Products are "transactions" within the meaning of Civil Code § 1761(e) and Mars' Products are "goods" within the meaning of Civil Code § 1761(a).

89. Mars violated and continues to violate the CLRA in at least the following respects:

- a. in violation of Civil Code § 1770(a)(5), Mars represented that the Products had characteristics or ingredients which they did not have;
- b. in violation of Civil Code § 1770(a)(7), Mars represented that the Products were of a particular standard, quality or grade, which they were not; and
- c. in violation of Civil Code § 1770(a)(9), Mars advertised the Products with the intent not to provide what it advertised.

90. Mars knew or should have known that its Products' mislabeling as alleged throughout this Complaint violated consumer protection laws, and that the Products' mislabeling were material to Plaintiffs and the members of the Class.

91. As described herein, Mars obtained money from Plaintiffs through its unlawful acts and practices because Plaintiffs purchased Mars' Products relying on the accuracy of the Products' labeling and the accuracy of Mars' Products' labeling was a material part of Plaintiffs' purchasing decisions.

92. Accordingly, Plaintiffs request the Court declare Mars' Products' labeling unlawful and enjoin Mars from continuing to violate the FAL by selling or offering for sale the mislabeled Products in California, or causing the mislabeled Products to be sold or offered for sale in California. Unless Mars is permanently enjoined from continuing to engage in such violations of the CLRA, future consumers of Mars' Products will be harmed by its acts and practices in the same way as

1 Plaintiffs. Plaintiffs seek only declaratory and injunctive relief and seek no monetary relief, such as
 2 damages or restitution, either individually or on behalf of the Class.

3 93. Plaintiffs request this Court award Plaintiffs court costs and attorneys' fees pursuant
 4 to the CLRA, Cal.Civ.Code § 1780(e).

5 PRAYER

6 Plaintiffs, on behalf of themselves and all members of the Class, request that the Court order
 7 the following relief and enter judgment against Mars as follows:

8 A. An order certifying that this action is properly brought and may be maintained as a
 9 class action, that Plaintiffs be appointed Class Representatives for the Class and that Plaintiffs'
 10 counsel be appointed Class Counsel.

11 B. An order declaring Mars' mislabeling of the Products as described herein is unlawful.

12 C. An order enjoining Mars from selling or offering the mislabeled Products for sale in
 13 California, or causing the mislabeled Products to be sold or offered for sale in California.

14 D. An order awarding Plaintiffs their costs of suit, including reasonable attorneys' fees
 15 and expenses under the CLRA, California Code of Civil Procedure Section 1021.5, or as otherwise
 16 provided by law.

17 E. Such other and further injunctive and/or declaratory relief as may be available as part
 18 of the statutory claims asserted herein, or other injunctive and/or declaratory relief as may be
 19 deemed necessary or appropriate for any of the claims asserted.

20
 21 DATED: August 26, 2015

FINKELSTEIN THOMPSON LLP

22 By: 
 23 Rosemary M. Rivas

24 Alyssa Dang
 25 One California Street, Suite 900
 26 San Francisco, California 94111
 27 Tel: 415-398-8700/Fax: 415-398-8704

**FEINSTEIN DOYLE PAYNE
 & KRAVEC, LLC**

28 Joseph N. Kravec, Jr. (*pro hac* to be filed)
 19

McKean J. Evans (*pro hac* to be filed)
429 Forbes Avenue
Allegheny Building, Suite 1705
Pittsburgh, PA 15219
Tel.: (412) 281-8400/Fax: (412) 281-1007

Counsel for Plaintiffs and the Proposed Class

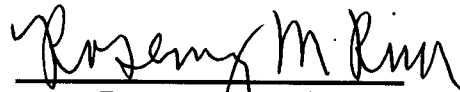
AFFIDAVIT OF ROSEMARY M. RIVAS

I, Rosemary M. Rivas, declare as follows:

1. I am a partner with the law firm Finkelstein Thompson LLP, one of the law firms representing Plaintiffs Linda Cheslow and Mike Xavier in this action. I am admitted to practice law in California and before this Court, and am a member in good standing of the State Bar of California. This declaration is made pursuant to Cal. Civ. Code § 1780(d). This affidavit is based on my research of public records and also upon personal knowledge and, if called upon to do so, could and would testify competently thereto.

2. Defendants Mars Incorporated and Mars Chocolate North America, LLC conduct business within this County. Specifically, the products at issue are sold in retail stores within this County.

I declare under penalty of perjury under the laws of the United States and State of California this 26th day of August 2015 in San Francisco, California that the foregoing is true and correct.


Rosemary M. Rivas

ACKNOWLEDGMENT

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

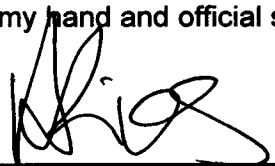
State of California
County of San Francisco

On 8/24/15 before me, Anita Rivas, Notary
(insert name and title of the officer)

personally appeared ROSEMARY RIVAS
who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/~~are~~
subscribed to the within instrument and acknowledged to me that ~~he~~/she/~~they~~ executed the same in
~~his~~/her/~~their~~ authorized capacity(ies), and that by ~~his~~/her/~~their~~ signature(s) on the instrument the
person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature  (Seal)

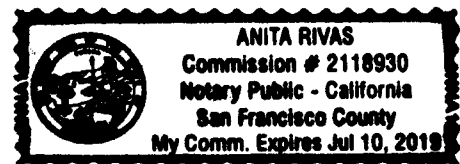


EXHIBIT A

Title 21—FOOD AND DRUGS

Chapter 1—Food and Drug Administration, Department of Health, Education, and Welfare

SUBCHAPTER B—FOOD AND FOOD PRODUCTS

[Docket Nos. 84, 84(a)]

PART 20—FROZEN DESSERTS; DEFINITIONS AND STANDARDS OF IDENTITY

Ice Cream, Ice Milk, Frozen Custard, Sherbet, Water Ices, and Related Foods; Order Establishing Standards of Identity

In the matter of fixing and establishing definitions and standards of identity for ice cream, frozen custard, ice milk, sherbet, water ices, and related foods:

After due notices published in the *Federal Register*, public hearings were held in the above-entitled matter in 1942, 1951, and 1952. Based upon evidence received at these hearings, the Commissioner of Food and Drugs, under authority delegated to him by the Secretary of Health, Education, and Welfare, published on March 26, 1958 (23 F.R. 1991) proposed findings of fact, conclusions, and proposed identity standards for these foods. After consideration of the exceptions and written arguments received, some of which were adopted in whole or in part and some of which were rejected, as is shown by marginal notations on the exceptions on file in the office of the Hearing Clerk, the Commissioner, pursuant to the authority provided in the Federal Food, Drug, and Cosmetic Act (secs. 401, 701(e), 52 Stat. 1046, 1055, as amended 70 Stat. 919; 21 U.S.C. 341, 371 (e)), and delegated to him by the Secretary of Health, Education, and Welfare (35 F.R. 5611), and on the basis of reliable, probative, and substantial evidence in the whole record, orders the promulgation of the following findings of fact, conclusions, and definitions and standards of identity for the subject foods.

FINDINGS OF FACT¹

1. Ice cream is the common and usual name of the frozen food made from cream or a mixture of milk and cream, or from a combination of dairy products, with or without water, having substantially an equivalent composition. The food is sweetened with sugar or other suitable sweetening agent and may contain natural or artificial flavoring or other food ingredients, such as cocoa, fruit, and nuts, to characterize it as a kind of ice cream. It may contain small amounts of added salt as seasoning. Substances described in later findings and often referred to as stabilizers are usually added to prevent formation of large ice crystals. Artificial coloring and certain other optional ingredients may be added. (R. 42-46, 62, 231-232, 297, 430, 526-529, 688, 800, 4834)

2. The usual household practice of preparing ice cream is to prepare it from sweet cream or a mixture of sweet milk and sweet cream.² However, a large portion of commercially produced ice cream is prepared from various dairy products, with or without water, so combined that in composition the mixture closely resembles cream or a mixture of milk and cream (see finding 3). When prepared for freezing, the sweetened dairy ingredient (with other ingredients used with or without the addition of flavoring or other characterizing ingredient) is known in the trade as ice cream mix. Certain characterizing ingredients such as fruit may be, and frequently are, added while the mix is being frozen. (R. 230-233, 402, 671-672, 699, 1049, 2262, 5236)

3. Milk and cream are composed of certain proportions of water, milk fat, and other constituents commonly referred to as nonfat milk solids or serum solids. The nonfat milk solids include proteins, milk sugar, various minerals, and certain water-soluble vitamins. The dairy products other than milk and cream (referred to in finding 2) that are used and are suitable for use in making

¹ The citations following each finding of fact refer to the pages of the transcript of the testimony and the exhibits received in evidence at the hearing.

commercial ice cream contain milk fat or nonfat milk solids or both in varying proportions and may also contain added sweetening agents. Such dairy products are dried cream, concentrated milk, evaporated milk, sweetened condensed milk, superheated condensed whole milk, dried milk, skim milk, concentrated (evaporated or condensed) skim milk, superheated condensed skim milk, sweetened condensed skim milk (including sweetened condensed part skim milk), nonfat dry milk, liquid or condensed or dried sweet cream buttermilk (see findings 6), butter and butter oil. (Cream includes plastic cream and a so-called concentrated milk fat; butter oil includes milk fat prepared from milk, cream, or butter.) Combinations of two or more of these products may be used. Water is added if necessary. To produce the properties associated by consumers with ice cream, the proportions of the various products used in such combinations are so adjusted that the finished ice cream mix contains substantial amounts of both milk fat and nonfat milk solids. In recent years the proportion of nonfat milk solids to milk fat in ice cream has been generally increased, as compared with the proportion naturally present in cream or mixtures of cream and milk previously used as the dairy ingredient. The most important and expensive single constituent of ice cream, however, is milk fat, and ice cream cannot be made without a substantial proportion of this constituent. There is no evidence that any milk or milk product other than cow's milk or a cow's milk product is used in making ice cream. (R. 44, 46, 50, 402, 440, 532-533, 564, 606-607, 721-728, 732, 756, 1101, 4422, 5204, 5492-5491, 5903-5910, 5967, 5969, 6190, 6196, 6241, 6366, 6902-6904, 6912-6932, 6994-7013)

4. The fat of milk is sometimes separated from milk or from butter by processes that free it almost entirely from moisture and nonfat milk solids. Such fat from butter is usually referred to as butter oil. When prepared directly from milk or cream it may also be called dry butter or dry butterfat. Butter oil is the name commonly used to designate milk fat prepared from butter by processes which eliminate moisture

and nonfat milk solids almost completely. Such a product can be prepared directly from milk or cream. (R. 5906, 5968, 6241, 6366, 6422, 6503, 6917, 6933, 7010-7013, 7445-7446, 9754)

5. A proposal was made to recognize as an optional ingredient of ice cream a product prepared from skim milk by the following process: The acidity of the skim milk is adjusted to about 0.05 percent. Then water is removed until the solids content reaches about 20 percent. To this concentrated skim milk a lactic acid starter is added, and the mixture is held at 70°-72° F. until the acidity reaches 1.5 percent. It is then sprayed. No satisfactory explanation was given of how a product of such high acidity could be used in ice cream making without causing the mix to curdle during pasteurization, unless the cultured skim milk powder were to be used in an ice cream mix that was neutralized. In experimental batches of ice cream that were neutralized the use of the cultured product was said to offer a means of producing a distinctive culture flavor in ice cream. It cannot be concluded that these manipulations are necessary or desirable or that the use of such a product would promote honesty and fair dealing in the interest of consumers. The abuses that might arise from neutralization of ice cream mixes are described in finding 37. (R. 7153-7180, 7210-7243)

6. Sweet cream buttermilk, in liquid or condensed or dried form, has substantially the same composition as the corresponding form of skim milk. Careful selection and handling of the product sold as sweet cream buttermilk are necessary to avoid some degree of souring. To be suitable for use in ice cream, the product is made from cream churned when it is fresh and sweet. No starter or neutralizer is used, and the resulting buttermilk is promptly used or is promptly evaporated or dried while it is still sweet. Such buttermilk, or the concentrated or dried product mixed with water to a total solids content of 8.5 percent, has a titratable acidity of not more than 0.17 percent, calculated as lactic acid. While there was evidence concerning the desirability of limiting the total bacteria count, this is impracticable at this time. (R. 276-277, 406,

RULES AND REGULATIONS

minor protein fractions of the skim milk. The product is prepared by adding mild alkalizing ingredients to skim milk and heating the mixture. Hydrochloric acid is added in an amount sufficient to effect precipitation of the protein fractions. Alkali is then added to the precipitated curd to adjust the pH to approximately 6.6 or 6.7. The product is spray-dried. The resultant powder is said to have extensive water-holding properties. The product appears to be essentially a caseinate and may properly be classed as sodium caseinate and permitted as an optional ingredient for addition to ice cream mix containing not less than 20 percent total milk solids. (R. 6447-6459, 15600-15657, 15664-15668, 15677-15700)

15. Cheese whey is the product from milk remaining after the removal of most of the fat and casein in the process of cheese making. It may contain some of the enzymatic or other material used for coagulating the casein and is often slightly acid in reaction. Cheese whey in ice cream, ice milk, and sherbet has been advocated, based largely on some experimental use of a dried cheese whey in replacing part of the nonfat milk solids normally used in preparing ice cream and sherbet. Dried whey is inferior in some respects to the common dairy products used in ice cream or ice milk. Dried cheese whey has had limited commercial testing, and there is no evidence in the record that would indicate that the consumer would expect ice cream or ice milk to contain even limited amounts of this byproduct from cheese-making in substitution for the customary ingredients. Milk solids are less important as characterizing factors in sherbet than in ice cream, and sherbets in which cheese whey has been substituted for skim milk are reported to have desirable properties and to have been used commercially for some time. If cheese whey is used as an optional ingredient in sherbet it would promote honesty and fair dealing in the interest of the consumer for such sherbets to bear informative labeling to properly distinguish them from ordinary fruit sherbets (see finding 52). (R. 5910-5912, 6671-6724, 6729, 6772-6791, 6800-6810, 6825-6829, 6851-6856, 6866-6867, 6887-6892, 6895, 6896, 6903-6904, 7111-7146, 7449-7450, 7646, 9401-9408, 9440-9446, 9657, 9753-9759, 10748, 12858)

16. There was evidence about a product sold under the trade name of Sana-lac and the advantages of using it in ice cream. It was first said to be made by treating skim milk with an alkali to a point where some change occurred in the lactose. The mixture was then neutralized with an acid, concentrated, and dried. Further testimony indicated that this method was changed, and that the skim milk was treated in some other way. The evidence on the composition of this product is contradictory, and the record contains no substantial basis upon which its suitability for use in ice cream can be determined. The sponsors of this product later withdrew their proposal to have it recognized as an optional ingredient. (R. 729, 1428-1503, 1661-1675, 1677-1694, 2119-2720, 2729-2731, 5462-5464, 7313)

17. The sweetening agent most commonly used in ice cream is sugar (sucrose). It is often used in the form of a sugar sirup. Sirups containing various proportions of sugar and invert sugar are sometimes used. The term "liquid sugar" is used in the sugar trade to designate various sugar and invert sugar sirups or combinations thereof. Other products that impart sweetness are used and are suitable for such use. These are dextrose or corn sugar, corn sirup or dried corn sirup, glucose sirup or dried glucose sirup, and invert sugar in the form of paste or sirup. There are some sirups of which the sweetening ingredient is mainly maltose that may be described as "maltose sirup," and these are suitable ingredients for ice cream. Although lactose has little sweetening efficacy in comparison with sucrose, it is occasionally added in small amounts to ice creams having a relatively low content of nonfat milk solids. The amount of lactose that can be used is limited by danger of "sardiness," which may occur if too much is used. For such use lactose should be considered a sweetening ingredient. It is unnecessary in definitions and standards of identity for ice cream, frozen custard, sherbets, etc., to prescribe rigid specifications for the sweetening ingredients designated by their common names. Additional products that serve the dual purpose of sweetening the ice cream and imparting to it their own characteristic taste and flavor are specified in finding 27. Sweetening ingredients may be used in various com-

binations. (R. 44-45, 407-409, 537, 693, 733, 831, 1126, 1766-1716, 1794-1787, 1799-1803, 1814-1820, 1835-1838, 1845-1846, 1853-1859, 1862, 1882-1937, 1939-1953, 11275-11295, 11312-11324, 11332-11374, 15040-15103, 15114-15126, 15146-15220)

18. Ground spices, ground vanilla beans, infusions of coffee or tea, and a large variety of natural food flavorings, such as extracts of lemon and vanilla, are used as characterizing flavors of ice cream and are suitable for such use. (R. 54-55, 237, 248, 409, 544, 1152, 3032; OP Ex. 3)

19. Various artificial food flavorings are also widely used to modify or characterize the flavor of ice cream. They may be added as such or as components of other ingredients. When so used that they do not create a misleading impression as to the presence of a natural ingredient or the amount of a natural ingredient present, artificial food flavorings are suitable ingredients of ice cream. Consumers quite generally prefer natural over artificial flavorings and desire to know when artificial flavorings are present in ice cream. To the extent that accurate information can be conveyed to consumers by labeling on ice cream, label statements of the use of artificial flavorings are in the consumer's interest. Label statements that comply with the requirements of the general provisions of the Federal Food, Drug, and Cosmetic Act are "artificially flavored," "artificially flavored," or, if the artificial flavoring is not added as such but as a component of some other ingredient, the statement "artificially flavored," the blank being filled in with the name of such other ingredient. (R. 85-86, 416, 428-429, 1249, 1383-1384, 1391-1394, 1401-1402, 1963-1965, 1969, 1997, 2011-2012, 2903, 5095-5099, 5254, 21324-21326, 21371-21374; Ex. 413)

20. The kind of ice cream now produced in greatest quantity has a flavor derived from one or a combination of the substances vanilla beans and extract of vanilla beans (which are the sources of the flavoring recognized by consumers as "vanilla"), and from artificial flavoring substances such as synthetically produced vanillin, which simulate vanilla flavor. Persons interested in the vanilla bean industry advocated that standards for ice cream

should prescribe the type of flavor used and that for the food with the specified name "vanilla ice cream" the standard should require that only natural flavor from vanilla beans could be used. The notices of the hearing and the preponderance of the evidence as submitted by other persons support establishing a standard for the food "ice cream" and listing the characterizing ingredients and flavorings as optional ingredients. The testimony of the witnesses appearing in behalf of the vanilla bean industry pointed toward prescribing separate specific standards for each of the many kinds of ice cream. Aside from being inadequately supported by the record, regulations setting separate specific standards for the different kinds of ice cream would be more complex and restrictive than a standard listing the characterizing ingredients and flavorings as optional ingredients. The purpose sought to be served by prescribing the flavoring ingredients was the prevention of misleading labeling. It is concluded that a preferable way to achieve this purpose, and one which will promote honesty and fair dealing in the interest of consumers, is to provide, in designating artificial flavoring for label declaration, that where the label names the food as "vanilla ice cream" or "vanilla flavored ice cream" no artificial flavoring is used, and to provide further that in any ice cream where both natural and artificial flavors are used, any representation made on the label that the ice cream contains natural flavoring shall be accompanied immediately and conspicuously by labeling to show that artificial flavoring is also used. (R. 54-55, 237, 538, 540, 1394, 1395, 4451-4452, 4469, 4462-4465, 4468, 4471, 4473, 4479, 4511-4513, 4517, 4521, 4527, 4532-4535, 4552-4553, 4566, 4578, 4587-4591, 4650, 4659, 4661, 4681-4683, 4688, 4710, 4713, 4728, 4730, 4756, 4782, 4786, 4801, 4912-4913, 4916-4917, 4943, 4952, 4971, 4980, 5093, 5094, 11101-11119, 11122-11123, 11129-11131, 11137, 15289, 15306, 15319, 15327; Ex. 228-232, 310)

21. Chocolate, various kinds of cocoas, the unpolymerized residual material prepared by removing part of the fat from ground cacao beans, or mixtures of any two or more of these substances are used as characterizing ingredients of a kind of ice cream. These cacao ingredients may be added to the ice cream mix as

Wednesday, July 27, 1960

FEDERAL REGISTER

7141

as prescribed in paragraph (g) (1) of this section, showing the optional ingredients used.

(i) Wherever the name of the food appears on the label so conspicuously as to be easily seen under customary conditions of purchase the statements specifying in this section, showing the optional ingredients used, shall immediately and conspicuously precede or follow such name without intervening written, printed, or graphic matter.

§ 20.5 Water ices; identity; label statement of optional ingredients.

(a) Water ices are the foods, each of which is prepared by freezing, while stirring, a mix composed of one or more of the optional characterizing fruit ingredients specified in paragraph (b) of this section, sweetened with one or more of the optional sweetening ingredients specified in paragraph (c) of this section. One or more of the optional ingredients specified in paragraph (d) of this section may be used, subject to the conditions hereinafter set forth. The titratable acidity of the finished water ice, calculated as lactic acid, is not less than 0.36 percent. Coloring may be added. The mix, with or without added water, may be seasoned with salt, and may be homogenized. The finished water ice weighs not less than 6 pounds to the gallon.

(b) The optional fruit ingredients referred to in paragraph (a) of this section are any mature fruit or the juice of any mature fruit. The fruit or fruit juice used may be fresh, frozen, canned, concentrated, or partially or wholly dried. The fruit may be thickened with pectin or other of the optional ingredients named in paragraph (d) (1) of this sec-

tion subject to the restriction on the total quantity of such substances in water ices prescribed in that paragraph. The fruit is prepared by the removal of pits, seeds, skins, and cores where such removal is usual in preparing that kind of fruit for consumption as fresh fruit. The fruit may be screened, crushed, or otherwise comminuted. It may be acidulated with citric or ascorbic acid. In the case of fruit or fruit juices from which part of the water is removed, substances contributing flavor volatilized during water removal may be condensed and reincorporated in the concentrated fruit or fruit juice. In the case of citrus fruits, the whole fruit, including the peel but excluding the seeds, may be used, and in the case of citrus juice or concentrated citrus juices, cold-pressed citrus oil may be added thereto in an amount not exceeding that which would have been obtained if the whole fruit had been used. The quantity of fruit ingredients used is such that in relation to the weight of the finished water ice, the weight of fruit or fruit juices as the case may be (including water necessary to reconstitute partially or wholly dried fruits or fruit juices to their original moisture content) is not less than 2 percent in the case of citrus ices, 5 percent in the case of berry ices, and 10 percent in the case of ices prepared with other fruits.

(c) The optional sweetening ingredients referred to in paragraph (a) of this section are: Sugar (sucrose), dextrose, invert sugar (paste or sirup), glucose sirup, dried glucose sirup, corn sirup, dried corn sirup, malt sirup, malt extract, dried malt sirup, dried malt extract, maltose sirup, dried maltose sirup.

(d) Other optional ingredients referred to in paragraph (a) of this section are:

(1) Agar-agar, algin (sodium alginate), egg white, gelatin, gum acacia, gum seed gum, gum karaya, locust bean gum, oat gum, gum tragacanth, Irish moss, extract of Irish moss, pectin, pectin seed husk, sodium carboxymethylcellulose. The total weight of the solids of any such ingredient used singly, or of any combination of two or more such ingredients used (including any such ingredient added separately to the fruit ingredient), is not more than 0.5 percent of the weight of the finished water ice. Such ingredients may be added in admixture with dextrin.

(2) Citric acid, tartaric acid, malic acid, lactic acid, ascorbic acid, or any combination of two or more of these in such quantity as seasons the finished food.

(3) Any natural flavoring.

(4) Any artificial flavoring.

(e) The name of each such water ice is "----- ice," the blank being filled in with the common name of the fruit or fruits from which the fruit ingredient used is obtained. When the names of two or more fruits are included, such names shall appear in the order of predominance, if any, by weight of the respective fruit ingredients used.

(f) When the optional ingredients artificial coloring, artificial flavoring, or natural flavoring are used in water ices they shall be named on the labels as follows:

(1) The label shall designate artificial coloring by the statement "artificially colored," "artificial coloring added," "with added artificial coloring," or "----- an artificial color added," the blank being filled in with the name of the artificial coloring used.

(2) The label shall designate artificial flavoring by the statement "artificially

flavored," "artificial flavoring added," "with added artificial flavoring," or "----- an artificial flavor added," the blank being filled in with the name of the artificial flavoring used.

(3) The label shall designate natural flavoring by the statement "flavoring added," "with added flavoring," or "----- flavoring added," the blank being filled in with the name of the flavoring used.

Label statements may be combined, as for example, "flavoring and artificial coloring added."

(g) Where one or more of the optional ingredients artificial coloring, artificial flavoring, or natural flavoring are used and there appears on the labeling any representation as to the fruit or fruits in the ice, such representation shall be immediately and conspicuously accompanied by appropriate label statements as prescribed in paragraph (f) of this section, showing the optional ingredients used.

(h) Wherever the name of the food appears on the label so conspicuously as to be easily seen under customary conditions of purchase, the statements set out in this section, showing the optional ingredients used, shall immediately and conspicuously precede or follow such name, without intervening written, printed, or graphic matter.

Effective date. This order shall become effective 90 days from the date of its publication in the Federal Register.

Dated: July 19, 1960.

[SEAL]

Geo. P. LARSEN,

Commissioner of Food and Drugs.

[P.R. Doc. 60-6979; Filed July 26, 1960; 8:45 a.m.]

EXHIBIT B

33284

RULES AND REGULATIONS

	U.S. Fed- eral	For eign	State and local	Total
Current tax expense....	\$2,312	\$380	\$100	\$2,792
Deferred tax expense....	2,336	420	2,756
	4,648	780	400	5,820

Deferred tax expense results from timing differences in the recognition of revenue and expense for tax and financial statement purposes. The sources of these differences in 1973 and the tax effect of each were as follows:

Excess of tax over book depreciation.....	\$600
Research and development costs expensed on tax return and deferred on books.....	1,440
Revenue recognized on completed contract basis on tax return and on percentage of completion basis on books.....	960
Tax deductible inventory reserve provided in foreign tax jurisdiction.....	420
Warranty cost charged to expense on books but not deductible until paid.....	(672)
	\$2,748

Total tax expense amounted to \$5,820 (an effective rate of 38.8%), a total less than the amount of \$7,200 computed by applying the U.S. Federal income tax rate of 48% to income before tax. The reasons for this difference are as follows:

	Dollar amount	Percent of pretax income
Computed "expected" tax expense... Increases (reductions) in taxes resulting from:	\$7,200	48.0
Foreign income subject to foreign income tax but not expected to be subject to U.S. tax in foreseeable future (\$2,400 × 48%)—\$720—\$372.....	(372)	(2.5)
Tax exempt municipal bond income.....	(720)	(4.8)
Investment tax credit on assets purchased in 1972.....	(700)	(4.7)
Goodwill amortization not deductible for tax purposes.....	384	2.6
State and local income taxes, net of Federal income tax benefit.....	208	1.4
Benefits from income taxed at capital gains rate (1,000 × 20%)—(1,000 × 20%)—\$200.....	(180)	(1.2)
Actual tax expense.....	\$5,820	38.8

¹ Since these amounts are less than 5 percent of the computed "expected" tax expense, they could be combined with any other items less than \$360 into an aggregate total. For example, these items could be disclosed as follows: "Miscellaneous items * * * \$25 * * * 0.3 percent." If no single item had exceeded \$360 in this case and the total net difference of all items was also less than \$360, this reconciliation would not have been required.

Based upon currently anticipated expenditures and operations, it is expected that the deferred income tax balance will be substantially reduced in 1976 and the cash outlay for taxes associated with that year will exceed tax expense by approximately \$4,000, primarily due to the book amortization in that year of research and development expense previously deducted for tax purposes.

III. *Computational Guide.* (Furnished only to enable interested parties to determine source of numbers shown in above illustrative note; not to be required of registrants in filings.)

- A. Tax computations
Book income before tax \$15,000
State income tax (400)

Permanent differences:	
Goodwill amortization.....	800
Municipal bond income.....	(1,500)
Foreign income, no domestic income tax.....	(2,400)
Capital gain.....	(1,000)
	\$10,500
Timing differences:	
Excess depreciation.....	(1,250)
R & D deducted on tax return.....	(3,000)
Warranty cost not deductible until paid.....	1,400
Percentage of completion income.....	(2,000)
Taxable income (excluding capital gain).....	4,650
Tax to be paid:	
Tax on ordinary income .48 × 4,650.....	2,232
Plus capital gain tax .30 × 1,000.....	300
Less investment credit.....	(700)
Actual tax paid.....	2,832

Tax expense per books:	
Tax expense on ordinary income .48 × 10,500.....	5,040
Plus capital gain tax.....	300
Less investment credit.....	(700)
Tax expense—Federal.....	4,640
Foreign tax.....	780
State and local income tax.....	400

B. Facts affecting disclosure of net deferred income taxes.

Estimated Changes in Deferred Income Tax Accounts on Balance Sheets:

	1974	1975	1976
Balance—beginning of year....	\$10,000	\$11,000	\$10,500
Additions for timing differences in each year ¹	3,000	1,500	500
Reversals of balances at beginning of each year.....	(2,000)	(2,000)	(4,500)
Balance—end of year.....	11,000	10,500	6,500

¹ NOTE: Includes effect of expected expenditures in each subsequent period which give rise to additional tax deferrals.

C. Computations of disclosure limits per Rule 3-16(c)
Computed amount, 15,000 × .48 = 7,200.
5% of computed amount, 0.05 × 7,200 = 360.
15% of deferred tax, 0.15 × 2,728 = 409.

[FR Doc.73-25608 Filed 11-29-73; 12:27 pm]

Title 19—Customs Duties

CHAPTER I—UNITED STATES CUSTOMS SERVICE, DEPARTMENT OF THE TREASURY

[T.D. 73-325]

PART 1—GENERAL PROVISIONS

Ports of Entry; Greenville, Mississippi

NOVEMBER 21, 1973.

On September 7, 1973, notice of a proposal to extend the port limits of Greenville, Mississippi, in the New Orleans, Louisiana, Customs district (Region V), was published in the *FEDERAL REGISTER* (38 FR 24374). No comments were received regarding this proposed extension.

Accordingly, by virtue of the authority vested in the President by section 1 of the Act of August 1, 1914, 38 Stat. 623, as amended (19 U.S.C. 2), and delegated to the Secretary of the Treasury by Executive Order No. 10289, September 17, 1951 (3 CFR Ch. II), and pursuant to the authorization provided by Treasury Department Order No. 190, Rev. 9 (38 FR 17517), the port limits of Greenville, Mississippi, in the New Orleans, Louisiana, Customs district (Region V), are

hereby extended to include all of the Washington County, Mississippi.

To reflect this change, the table in section 1.3(c) of the Customs Regulations is amended by substituting "Greenville, Mississippi (including the territory described in T.D. 73-325)" for "Greenville, Miss. (T.D. 55697 including the territory described in T.D. 55839)." in the column headed "Ports of entry" in the New Orleans, Louisiana, district (Region V).

(Sec. 1, 37 Stat. 494, sec. 1, 38 Stat. 623, as amended; 19 U.S.C. 1, 2.)

It is desirable to make this extension of the port limits of Greenville, Mississippi, available to the public as soon as possible. Therefore, good cause is found for dispensing with the delayed effective date provision of 19 U.S.C. 553(d).

Effective date. This amendment shall be effective December 3, 1973.

[SEAL] EDWARD L. MORGAN,
Assistant Secretary
of the Treasury.

[FR Doc.73-25600 Filed 11-30-73; 8:45 am]

Title 21—Food and Drugs

CHAPTER I—FOOD AND DRUG ADMINISTRATION, DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

SUBCHAPTER A—GENERAL

PART 1—REGULATIONS FOR THE ENFORCEMENT OF THE FEDERAL FOOD, DRUG, AND COSMETIC ACT AND THE FAIR PACKAGING AND LABELING ACT

Food Labeling; Spices, Flavorings, Colorings, and Chemical Preservatives

In the *FEDERAL REGISTER* of January 19, 1973 (38 FR 2139), the Commissioner of Food and Drugs published a proposal to revise the requirements contained in § 1.12 (21 CFR 1.12) with respect to the labeling of flavor when sold in bulk and when contained in food. A final order on this matter was published in the *FEDERAL REGISTER* of August 2, 1973 (38 FR 20718).

A number of requests were received for reconsideration or modification of the August 2 order. The Commissioner proposed further modification of that order in the *FEDERAL REGISTER* of October 5, 1973 (38 FR 27622), and permitted four weeks for comment. Comments were received from a number of organizations, companies, and individuals.

The Commissioner has reviewed all of the comments and petitions submitted with respect to the January 19 and October 5 proposals and the August 2 order, in promulgating the final regulation set out below. The major points that have been made with respect to the August 2 order and the October 5 proposal, and the Commissioner's conclusions, are as follows:

1. Several comments, concurring with the proposal to delete the broad category of "reaction products" from the definition of natural flavor in § 1.12(a)(3), stated that the definition should further be revised to permit products obtained by roasting, heating, or enzymolysis. It was pointed out that such products have traditionally been regarded as natural flavors.

RULES AND REGULATIONS

33285

The Commissioner concurs in this comment and the definition has been so revised.

2. Several comments suggested that "other reaction products" should be retained but modified in a way that would not permit the broad construction which led the Commissioner to propose its deletion in the October 5 notice. One comment suggested that "cooking" would be an adequate substitute.

The Commissioner concludes that the addition of "roasting, heating, or enzymolysis" is sufficient to cover flavoring constituents long regarded as natural in origin, and to exclude those, such as vanillin, which are essentially synthetic and result from chemical reactions.

3. One comment requested that the word "fish" be replaced with the broader term "seafood" in the definition of a natural flavor.

This was the intent of the earlier definition, and thus the Commissioner concurs with this comment and has changed the definition accordingly.

4. Comments requested that the term "protein" be added to the term "hydrolysate" in the definition of a natural flavor in order to clarify the intent.

The Commissioner concurs with this comment and has so revised the definition.

5. One comment argued that the definition of artificial color in § 1.12(a)(4) should not include natural substances such as beet juice.

The Commissioner points out that, where beet juice is used to color food in which it is not naturally found, it is being used as an artificial color for those products. Nothing in § 1.12 would prohibit the food manufacturer in those circumstances from declaring the presence of natural beet juice, either on the principal display panel or in the statement of ingredients. Thus, any manufacturer who wishes to use fully informative labeling of this type will be permitted to do so, and no change in the regulation is needed.

6. One comment states that the term "artificial color" in section 403(k) of the Federal Food, Drug, and Cosmetic Act was intended by Congress to apply solely to coal tar colors. The comment admits that there is little legislative history on this point.

The Commissioner concludes that coloring derived other than from the same type of food to which the color is being added is properly characterized as artificial. As already noted, any consumer confusion can readily be avoided by a statement that the product contains the specific natural ingredient involved.

7. Numerous comments indicated widespread failure to understand the relatively limited circumstances under which § 1.12(i) will apply. Several comments reflected the erroneous interpretation that all food must be so labeled with respect to its flavor content.

The Commissioner advises that, if a food makes no direct or indirect representations with respect to flavor, the provisions of § 1.12(i) are inapplicable. In

such circumstances, the presence of artificial or natural flavor, or both, may be declared simply in the statement of ingredients, as permitted by sections 403(i) and (k) of the act.

8. One comment requested clarification of the circumstances under which a food name would make representations with respect to flavor.

The Commissioner concludes that it is not possible to set out all circumstances under which a flavor representation is or is not implied. Any use of a vignette showing a fruit or vegetable clearly constitutes such a representation. Designation of a soft drink as a "cola" beverage or ginger ale or root beer, or with well-recognized proprietary brand names, does not constitute a flavor representation. On the other hand, use of a specific fruit flavor in the food name, such as "orange soda," does constitute such a representation and requires compliance with § 1.12(i). The Commissioner will provide advisory opinions with respect to specific terminology upon request.

9. One comment suggested that the term "characterizing flavor" referred to in § 1.12(i) should be replaced with the phrase "primary recognizable flavor." This would permit additional use of minor spices without their being declared on the principal display panel.

The Commissioner concurs in this suggestion and the provision has been so revised. It is not intended that individual spices added, for example, to canned foods be required to be separately declared on the principal display panel as part of the name of the food where they are not the primary flavor and are added for garnishment purposes.

10. Comments were submitted that use of the term "artificial" misleads the public into believing that an artificial flavor is in some way inferior to a natural flavor. Comments pointed out that there is no available evidence to indicate any difference in safety or nutritional value between a naturally occurring flavor and its synthetic counterpart.

The Commissioner concurs with the comment that an artificial flavor is no less safe, no less nutritious, and not inherently less desirable, than a natural flavor. The sole purpose for distinguishing between natural and artificial flavors is for economic reasons. In most instances, natural flavor is more expensive than artificial flavor. Where a label creates an impression that a natural flavor is present, the consumer has the right to rely upon that implication or representation.

11. It was suggested that § 1.12(i)(1) should be deleted, on the ground that there is no need to declare the flavor in the name if enough characterizing ingredient is present and natural characterizing flavor is added to enhance or stabilize the flavor of the food.

The Commissioner agrees with this comment and this provision has been deleted. It is unlikely that a food with a characterizing ingredient would also contain added natural characterizing flavor, and in those few instances where this

occurs the consumer will be fully protected since all the characterizing flavor in the product will still be from natural sources.

12. There was comment that a determination whether there is a "sufficient" quantity of a characterizing food ingredient to characterize the food independent of any added natural characterizing flavor involves subjective judgment, and that the distinction between the two situations is so subtle as to have little meaning to the consumer.

The Commissioner recognizes that this determination will in some instances be difficult to make. The difference between a product that contains a characterizing food ingredient and a product that contains no such ingredient, however, is not at all subtle, and is very important to the value of the product and thus to the consuming public.

13. A comment suggested that the term "ingredient" should be substituted for "component" in proposed § 1.12(i)(1) and (ii).

The Commissioner concurs with this comment and final § 1.12(i)(1)(i) has been so revised.

14. Comments pointed out that use of the non-specific term "flavor added" or "flavored" in the proposal is inconsistent with the statement made by the Commissioner in the preamble to his August 2 order that this designation is not meaningful to consumers.

The Commissioner does not agree with this comment. The concern expressed in the preamble to the August 2 order related to the use of the non-specific term "flavored" where part of the characterizing flavor is artificial. The Commissioner has no objection to use of the term "flavored" where all the characterizing flavor is natural in origin.

15. Comments suggested that, in § 1.12(i)(1) and (2), the only important issue is the nature of the characterizing flavor.

The Commissioner concurs with this comment, and has revised these provisions to refer to flavor which "simulates, resembles or reinforces the characterizing flavor." The addition of natural or artificial non-characterizing flavor may properly be designated in the statement of ingredients as such and may include the name of the ingredient(s). For example, in a "chocolate pudding" which contains cocoa and vanillin, it will be unnecessary to state on the principal display panel as the October 5 notice had proposed, that the product contains artificial vanilla flavor. Under the final regulation, this may be stated in the statement of ingredients. Thus, the "except" clause is also deleted from § 1.12(i)(2).

16. Similarly, there was comment that, in proposed § 1.12(i)(1)(iii), there is no need to state on the principal display panel the presence of natural flavor that is not derived from the product whose flavor is simulated.

The Commissioner does not concur in this comment. If there is no flavor whatever from the product whose flavor is simulated, the product is properly labeled

33290

RULES AND REGULATIONS

A flavor used shall be required to make such a written certification only where he adds to or combines another flavor with a flavor which has been certified by a flavor supplier as containing no artificial flavor, but otherwise such user may rely upon the supplier's certification and need make no separate certification. All such certifications shall be retained by the certifying party throughout the period in which the flavor is supplied and for a minimum of three years thereafter, and shall be subject to the following conditions:

(i) The certifying party shall make such certifications available upon request at all reasonable hours to any duly authorized officer or employee of the Food and Drug Administration or any other employee acting on behalf of the Secretary of Health, Education, and Welfare. Such certifications are regarded by the Food and Drug Administration as reports to the government and as guarantees or other undertakings within the meaning of section 301(h) of the act and subject the certifying party to the penalties for making any false report to the government under 18 U.S.C. 1001 and any false guarantee or undertaking under section 303(a) of the act. The defenses provided under section 303(c) (2) of the act shall be applicable to the certifications provided for in this section.

(ii) Wherever possible, the Food and Drug Administration shall verify the accuracy of a reasonable number of certifications made pursuant to this section, constituting a representative sample of such certifications, and shall not request all such certifications.

(iii) Where no person authorized to provide such information is reasonably available at the time of inspection, the certifying party shall arrange to have such person and the relevant materials and records ready for verification as soon as practicable; provided that, whenever the Food and Drug Administration has reason to believe that the supplier or user may utilize this period to alter inventories or records, such additional time shall not be permitted. Where such additional time is provided, the Food and Drug Administration may require the certifying party to certify that relevant inventories have not been materially disturbed and relevant records have not been altered or concealed during such period.

(iv) The certifying party shall provide, to an officer or representative duly designated by the Secretary, such qualitative statement of the composition of the flavor or product covered by the certification as may be reasonably expected to enable the Secretary's representatives to determine which relevant raw and finished materials and flavor ingredient records are reasonably necessary to verify the certifications. The examination conducted by the Secretary's representative shall be limited to inspection and review of inventories and ingredient records for those certifications which are to be verified.

(v) Review of flavor ingredient records shall be limited to the qualitative formula

and shall not include the quantitative formula. The person verifying the certifications may make only such notes as are necessary to enable him to verify such certification. Only such notes or such flavor ingredient records as are necessary to verify such certification or to show a potential or actual violation may be removed or transmitted from the certifying party's place of business: *Provided*, That, where such removal or transmittal is necessary for such purposes the relevant records and notes shall be retained as separate documents in Food and Drug Administration files, shall not be copied in other reports, and shall not be disclosed publicly other than in a judicial proceeding brought pursuant to the act or 18 U.S.C. 1001.

Effective date.—Labeling may be changed to comply with this regulation beginning December 3, 1973. All labeling ordered for food subject to § 1.12(i) ordered after March 15, 1974, and all labeling used for products shipped in interstate commerce after December 31, 1974, shall comply with this regulation.

(Secs. 402, 403, 405, 701(a), 702, 703, 704, 52 Stat. 1046, 1047, 1048-1049 as amended, 1056, 1058-1067 as amended; 21 U.S.C. 342, 343, 346, 371(a), 372, 373, 374.)

Dated: November 21, 1973.

A. M. SCHMIDT,
Commissioner of Food and Drugs.

(PR Doc.73-25329 Filed 11-30-73;8:45 am)

Title 26—Internal Revenue

CHAPTER I—INTERNAL REVENUE SERVICE, DEPARTMENT OF THE TREASURY
SUBCHAPTER A—INCOME TAX

[T.D. 7392]

PART 1—INCOME TAX; TAXABLE YEARS BEGINNING AFTER DECEMBER 31, 1953

Special Rules for Determining Foreign Tax Credit

By a notice of proposed rulemaking appearing in the *Federal Register* for March 23, 1971 (36 FR 5423), amendments to the Income Tax Regulations (26 CFR Part 1) were proposed in order to conform such regulations to changes made by section 10 of the Revenue Act of 1962 (76 Stat. 1002) and section 106 (c) of the Foreign Investors Tax Act of 1966 (80 Stat. 1570), relating to the separate limitation on the foreign tax credit in the case of section 904(f) interest income. A public hearing was not requested, and none was held. After consideration of all such relevant matter as was presented by interested persons regarding the rules proposed, certain changes were made, and the proposed amendments of the regulations, subject to the changes indicated below, are adopted by this document.

In the regulations as proposed it was unclear whether, in determining under § 1.904-4(a)(2)(i) whether interest income is derived from a transaction directly related to the active conduct of a trade or business, a trade or business conducted by a corporation which is affiliated with the taxpayer within the

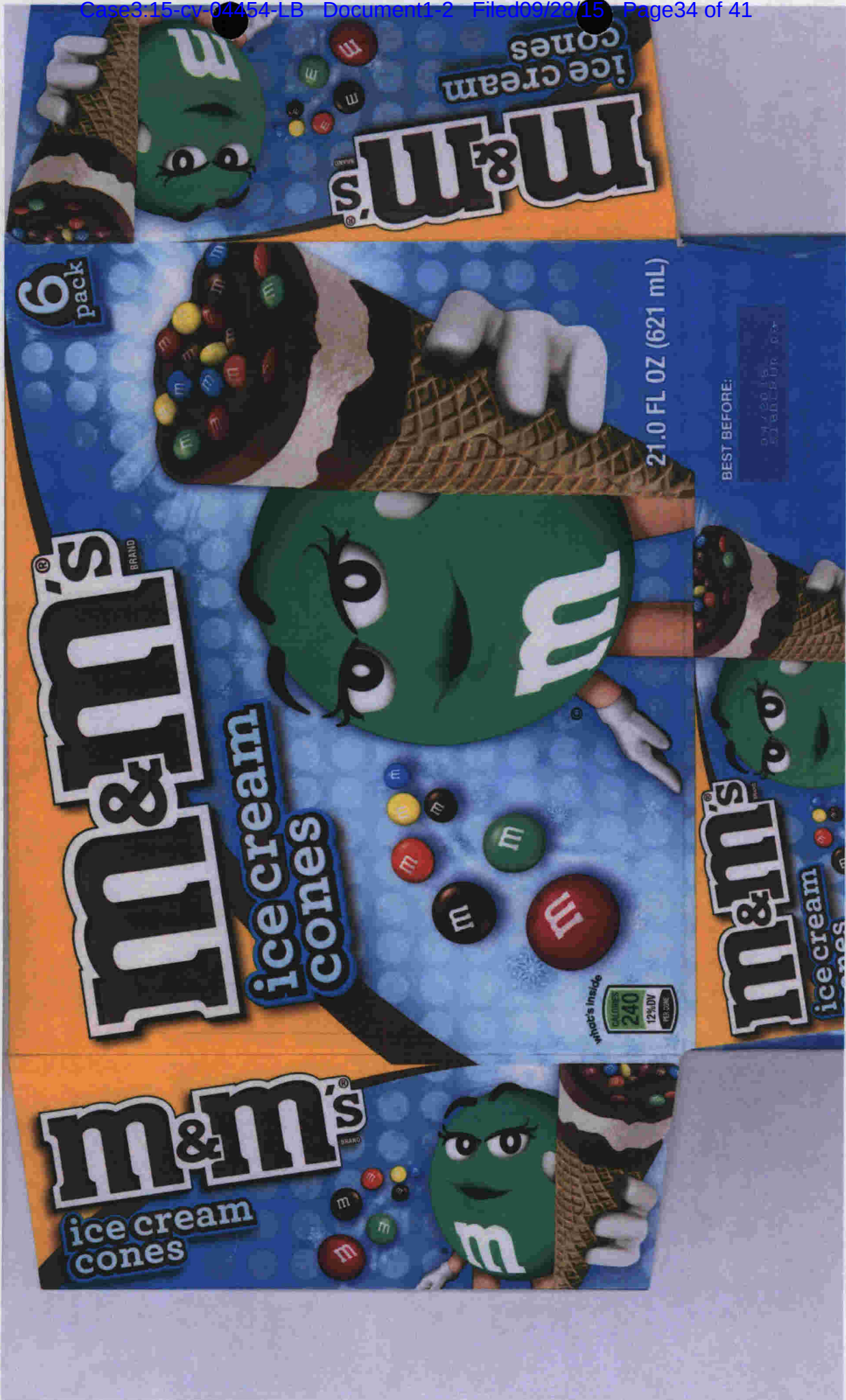
meaning of section 1504 should be considered. The regulations as adopted make it clear that the exclusion provided by section 904(f)(2)(A) or 904(f)(2)(B) applies only to interest derived from a transaction which is directly related to the active conduct by the taxpayer of a trade or business or derived in the conduct by the taxpayer of a banking, financing or similar business.

The last clause of the last sentence of § 1.904-4(b)(1) in the regulations as proposed has been deleted. The sentence as proposed established the rule that the period of time during which the taxpayer has conducted a trade or business in a foreign country will be considered in determining whether the conduct of such trade or business is the active conduct of a trade or business, particularly if the acquisition of the business was for the purpose of avoiding income tax. The clause relating to the period of time during which the taxpayer has conducted the trade or business has been retained, while the clause relating to the tax-avoidance motive has been deleted. A new sentence has been added at the end of § 1.904-4(b)(1) to provide that the treatment of a foreign subsidiary as a domestic corporation pursuant to section 1504(d) does not affect the location of the subsidiary's trade or business for purposes of section 904(f).

The rules in § 1.904-4(b)(2)(i) of the proposed regulations relating to the types of transactions which will be considered as being directly related to the active conduct of a trade or business in a foreign country have been made less restrictive. The introductory language of § 1.904-4(b)(2)(i) has been changed to make clear that the list of transactions therein is not considered to be all inclusive. In the regulations as proposed, the language indicated that credit extended by the taxpayer to enable the taxpayer's debtor to purchase the goods or services furnished by the taxpayer would be considered as directly related to the active conduct of the trade or business. The wording has been changed in the final regulations to provide that credit extended to secure an outlet for such goods or services will be considered as directly related to the active conduct of the trade or business. This language covers the situation, for example, where a taxpayer extends credit on arm's length terms to meet the general credit needs of a customer so as to encourage such customer to purchase goods from the taxpayer. Section 1.904-4(b)(2)(i) has also been amended to provide that interest from the short-term investment of excess funds is business related and that interest from sources outside a foreign country may be related to business carried on in that country.

The last sentence of § 1.904-4(b)(2)(iii) has been revised to be more in conformity with § 1.864-4(c)(2)(iii)(b) of the Income Tax Regulations and to make clear that the personnel managing the investment of the asset are not required to be in the same foreign country in which the asset is located.

EXHIBIT C



m&m's
BRAND
**ice cream
cones**

m&m's
BRAND
**ice cream
cones**



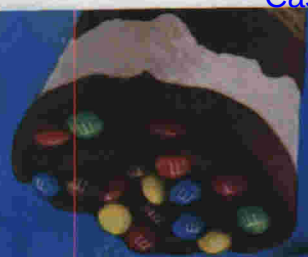
what's inside
240
CALORIES
12% DV
PER SERVING

**6
pack**

21.0 FL OZ (621 mL)

BEST BEFORE:

09/2015
03/2016



A sugar cone filled with vanilla flavored ice cream topped with lots of M&M'S® MINIS candies, with a fudge swirl and a chocolatey nugget in the bottom of the cone.

ice cream
cones

M&M'S®

m&m's®
ice cream
cones



Melts In Your Mouth and In Your Hand®

That loveable M&M'S® Brand Green Character has really done it this time! Cool, creamy ice cream topped with lots of M&M'S® MINIS Milk Chocolate Candies and rich fudge swirled throughout the ice cream. And as an extra treat - a chocolatey nugget at the bottom of the crisp sugar cone.

Try M&M'S® Brand Ice Cream Cookies, too!



We value your questions or comments.
Call 1-800-551-0895.
Please save the empty wrapper.



RECYCLABLE



KEEP DEEP FROZEN

what's inside...					PER CONE
CALORIES	TOTAL FAT	SAT. FAT	SUGARS	SODIUM	
240	12g	6g	22g	75mg	
12% DV	18% DV	30% DV	*	3% DV	

DATA ARE BASED ON A 2,000 CALORIE DIET.
To learn more visit www.marschocolate.com
*% Daily Value is based on a diet of 2,000 calories.

Nutrition Facts

Serving Size 1 cone (71g)
Servings Per Container 6

Amount Per Serving

Calories 240 Calories from Fat 110

% Daily Value**

Total Fat 12g	18%
Saturated Fat 6g	30%
Trans Fat 0g	
Cholesterol 15mg	5%
Sodium 75mg	3%
Total Carbohydrate 30g	10%
Dietary Fiber 1g	4%
Sugars 22g	

Protein 3g

Vitamin A 2%	Vitamin C *
Calcium 6%	Iron *

*Contains less than 2% of the Daily Value of these nutrients.

**Percent Daily Values are based on a 2,000 calorie diet. Your daily values may be higher or lower depending on your calorie needs:

	Calories:	2,000	2,500
Total Fat	Less than	85g	80g
Sat. Fat	Less than	20g	25g
Cholesterol	Less than	300mg	300mg
Sodium	Less than	2,400mg	2,400mg
Total Carbohydrate		300g	375g
Dietary Fiber		25g	30g

INGREDIENTS: ICE CREAM: SKIM MILK, CREAM, SUGAR, CORN SYRUP, WHEY, MONO AND DIGLYCERIDES, CAROB BEAN GUM, GUAR GUM, CARRAGEENAN, NATURAL AND ARTIFICIAL FLAVOR, ANNATTO EXTRACT (COLOR). COATING: PALM OIL, SUGAR, SKIM MILK, LACTOSE, CHOCOLATE, COCOA POWDER, MILKFAT, MONO AND DIGLYCERIDES, SOY LECITHIN, ARTIFICIAL FLAVOR. CONE: BLEACHED WHEAT FLOUR, SUGAR, PARTIALLY HYDROGENATED SOYBEAN AND/OR COTTONSEED OIL, SALT, SOY LECITHIN, CARAMEL COLOR, ARTIFICIAL FLAVOR. COATED M&M'S® BRAND MINIS™ MILK CHOCOLATE CANDIES: MILK CHOCOLATE (SUGAR, CHOCOLATE, SKIM MILK, COCOA BUTTER, LACTOSE, MILKFAT, SOY LECITHIN, SALT, ARTIFICIAL FLAVORS), SUGAR, COLORING (INCLUDES BLUE 1 LAKE, RED 40, YELLOW 6, YELLOW 5, BLUE 1, YELLOW 5 LAKE, RED 40 LAKE, YELLOW 6 LAKE, BLUE 2 LAKE, BLUE 2, DEXTROL, CORN SYRUP, CORNSTARCH), COCOA BUTTER, CHOCOLATE SAUCE: CORN SYRUP, HIGH FRUCTOSE CORN SYRUP, WATER, COCOA POWDER PROCESSED WITH ALKALI, MODIFIED CORN STARCH, SALT, NATURAL FLAVOR. ©D

ALLERGY INFORMATION: CONTAINS MILK, WHEAT AND SOY. MAY CONTAIN PEANUTS.

Distributed by Mars Chocolate North America, LLC
Hackettstown, NJ 07840-1503 USA Plant Number 17-16
©/TM trademarks ©Mars, Incorporated

We value your questions or comments.
Call 1-800-521-0886.
Please save the empty canister.

Amount Per Serving		% Daily Value
Calories 250		
Total Fat 12g		24%
Saturated Fat 7g		35%
Trans Fat 0g		
Sodium 150mg		18%
Total Carbohydrate 34g		6%
Dietary Fiber 0g		0%
Sugars 24g		
Protein 1g		
Vitamin A 4%		Vitamin C 4%

Question	Yes (%)	No (%)	Don't Know (%)
1. Do you think that the U.S. is the only place in the world where a person can get a good education?	54%	42%	4%
2. Do you think that the U.S. is the only place in the world where a person can get a good job?	54%	42%	4%
3. Do you think that the U.S. is the only place in the world where a person can get a good life?	54%	42%	4%
4. Do you think that the U.S. is the only place in the world where a person can get a good future?	54%	42%	4%
5. Do you think that the U.S. is the only place in the world where a person can get a good past?	54%	42%	4%
6. Do you think that the U.S. is the only place in the world where a person can get a good present?	54%	42%	4%
7. Do you think that the U.S. is the only place in the world where a person can get a good family?	54%	42%	4%
8. Do you think that the U.S. is the only place in the world where a person can get a good country?	54%	42%	4%
9. Do you think that the U.S. is the only place in the world where a person can get a good world?	54%	42%	4%
10. Do you think that the U.S. is the only place in the world where a person can get a good universe?	54%	42%	4%

Introducing
MARS
Specialized
Management Information
Control Systems

Melts In Your Mouth and In Your Hand

That lovable Red M&M's® Brand Character has really done it this time. A scoop of cool & creamy vanilla flavored ice cream surrounded by two chewy, home-style cookies with lots of M&M's® Brand MINIS Milk Chocolate Candies baked right in. It's two desserts in one for twice the fun!

Try M&M'S® Brand Ice Cream Cones Too!

SAVE
up to **\$200**
to

Vanilla Ice Cream and Chocolate

Look inside to save up to \$2.00 the next time you purchase Ice Cream or Chocolate from these brands:

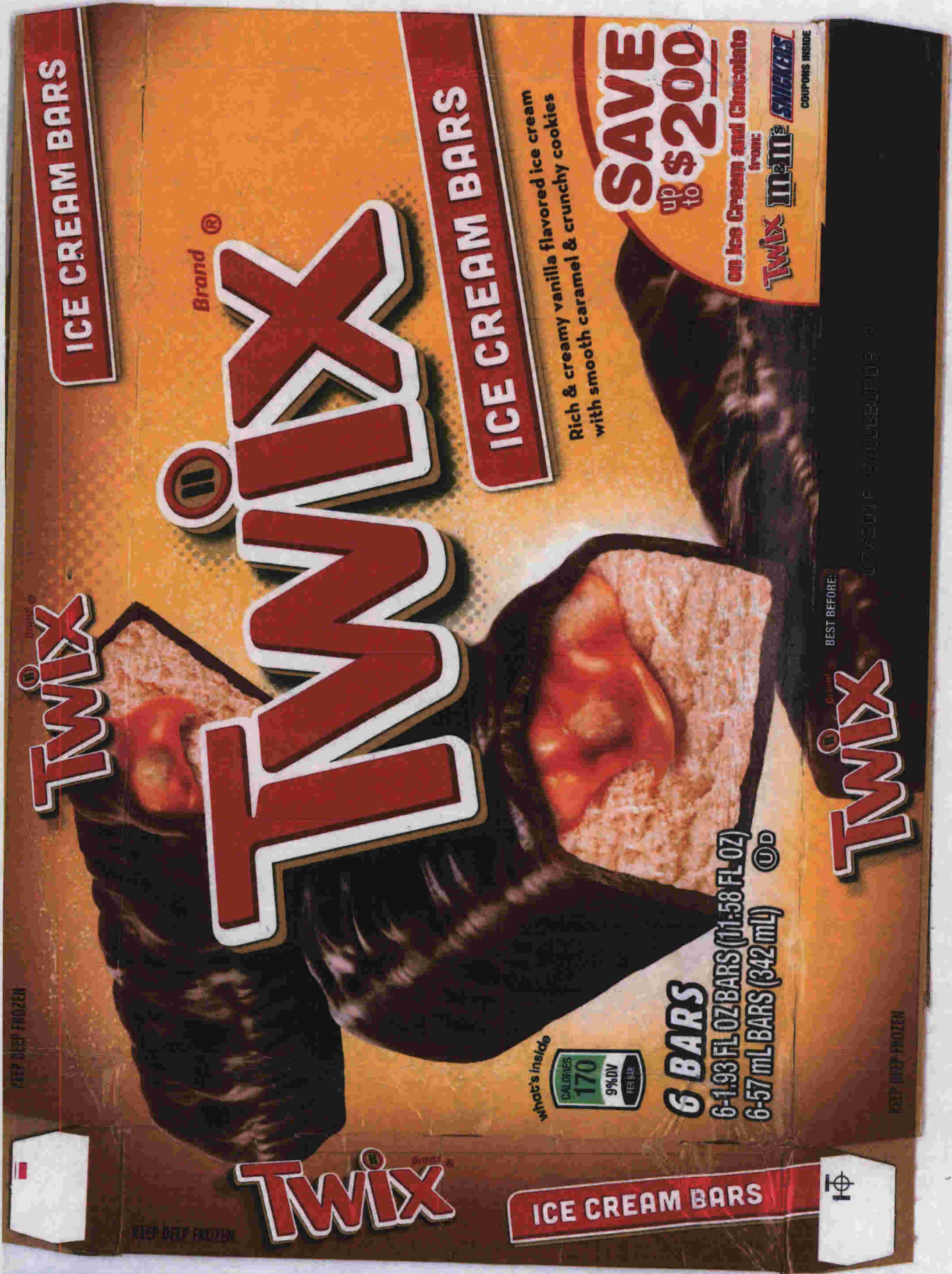


0 467 1691 2

KEEP DEEP FROZEN

13%LOW
 25%OFF
 13%OFF
 7%OFF
 2%OFF
 10%OFF
 10%OFF
 10%OFF

Feb-15
ELK O-6593759
279867-7
23162B



Nutrition FactsServing Size 1 bar (45g)
Servings Per Container 6

Amount Per Serving

Calories 170

Calories from Fat 90

% Daily Value*

Total Fat 10g

15%

Saturated Fat 7g

35%

Trans Fat 0g

Cholesterol 10mg

3%

Sodium 50mg

2%

Total Carbohydrate 18g

6%

Dietary Fiber 0g

0%

Sugars 15g

Protein 2g

Vitamin A *

Vitamin C *

Calcium 4%

Iron *

*Percent Daily Values are based on a diet of other people's misdeeds.

*Percent Daily Values are based on a diet of other people's misdeeds.

*Percent Daily Values are based on a diet of other people's misdeeds.

*Percent Daily Values are based on a diet of other people's misdeeds.

*Percent Daily Values are based on a diet of other people's misdeeds.

*Percent Daily Values are based on a diet of other people's misdeeds.

*Percent Daily Values are based on a diet of other people's misdeeds.

*Percent Daily Values are based on a diet of other people's misdeeds.

*Percent Daily Values are based on a diet of other people's misdeeds.

*Percent Daily Values are based on a diet of other people's misdeeds.

*Percent Daily Values are based on a diet of other people's misdeeds.

*Percent Daily Values are based on a diet of other people's misdeeds.

*Percent Daily Values are based on a diet of other people's misdeeds.

*Percent Daily Values are based on a diet of other people's misdeeds.

*Percent Daily Values are based on a diet of other people's misdeeds.

*Percent Daily Values are based on a diet of other people's misdeeds.

*Percent Daily Values are based on a diet of other people's misdeeds.

*Percent Daily Values are based on a diet of other people's misdeeds.

*Percent Daily Values are based on a diet of other people's misdeeds.

*Percent Daily Values are based on a diet of other people's misdeeds.

*Percent Daily Values are based on a diet of other people's misdeeds.

*Percent Daily Values are based on a diet of other people's misdeeds.

*Percent Daily Values are based on a diet of other people's misdeeds.

*Percent Daily Values are based on a diet of other people's misdeeds.

*Percent Daily Values are based on a diet of other people's misdeeds.

*Percent Daily Values are based on a diet of other people's misdeeds.

*Percent Daily Values are based on a diet of other people's misdeeds.

SAVE
up to **\$2.00**

on Ice Cream and Chocolate

Look inside to save up to
\$2.00 the next time you
purchase Ice Cream or Chocolate
from these brands:Also try
SNICKERS® Brand & MILKY WAY® Brand
Ice CreamWe value your questions
or comments.
Call 1-800-851-0062.
Please save the empty canisters.

What's Inside...					
PER BAR	PER BAR	PER BAR	PER BAR	PER BAR	PER BAR
CALORIES	TOTAL FAT	SAT. FAT	SUGARS	SODIUM	
170	10g	7g	15g	50mg	
9% DV	15% DV	35% DV	*	2% DV	

*EST'S ARE BASED ON A 2,000 CALORIE DIET.
To learn more visit www.marcbaking.com

No DV defined



0 47677 30123 8

ICE CREAM BARS

TWIX

Feb 15
ELK O-6593786

EXHIBIT D

MANUFACTURER'S COUPON EXPIRES 09/06/2015
DO NOT DOUBLE**\$1.00 OFF**any ONE (1) SNICKERS® Brand, TWIX® Brand, M&M'S® Brand,
MILKY WAY® Brand, DOVEBAR® Ice Cream or
STARBURST® Brand Multi-Packs (3-6 ct.)

Consumer: Limit one coupon per purchase. Valid only for products/quantity indicated. You pay sales tax. Void if altered, copied, exchanged, sold or transferred. No cash/cash back. Redeemable on terms stated for consumer. Mars Chocolate N.A., LLC will reimburse you for the face value of the coupon plus 14¢ handling if submitted in compliance with Mars Chocolate N.A. Coupon Redemption Policy, available at www.marschocolate.com/CPM/ManufacturerCoupons/RedemptionPolicies.aspx, incorporated herein. Redeemable only in USA (incl. territories & US military installations). Void where taxed, restricted or prohibited by law. Cash value 1/10¢. Mail coupon to: Mars Chocolate N.A. P.O. Box 880499 El Paso, TX 88588-0499. ©/TM trademarks ©Mars, Incorporated 2015

TRY YOUR FAVORITE
**CHOCOLATE BRANDS IN
ICE CREAM****SNICKERS***Dove*
Chocolate**Twix****m&m's**TRY YOUR FAVORITE CHOCOLATE BRANDS IN
ICE CREAM

©/TM SNICKERS is a trademark of Mars, Inc. © Mars, Incorporated 2015. All rights reserved.

Sale Price

Coupon Savings*

Final Price

ADVERTISED PRICES EFFECTIVE: 7/12-7/18/15

2/\$6 - \$1.00 off 1 = 2/\$5

*Coupon required for pricing

AVAILABLE AT

Walgreens

EXHIBIT A
(PART 2 OF 2)

EXHIBIT E

ICE CREAM AND FROZEN DESSERTS LABELING MANUAL



International Dairy Foods Association
Milk Industry Foundation
National Cheese Institute
International Ice Cream Association

© International Dairy Foods Association

1250 H Street, NW, Suite 900 • Washington, DC 20005

(202) 737-4332

www.idfa.org

ABOUT THE INTERNATIONAL DAIRY FOODS ASSOCIATION

The International Dairy Foods Association (IDFA) is the Washington, DC-based organization that represents the nation's dairy processors, manufacturers, marketers and distributors. IDFA was founded in 1990 in recognition of the many common concerns and issues facing the various segments of the dairy foods industry. IDFA is composed of three constituent organizations:

- Milk Industry Foundation (MIF) founded in 1908
- National Cheese Institute (NCI) founded in 1927
- International Ice Cream Association (IICA) founded in 1900

Each of the constituent organizations provides its members with the leadership and expertise for addressing challenges and issues unique to that particular industry. MIF serves companies that provide fluid milk and milk products, cultured products, refrigerated dairy desserts, as well as juices, juice drinks and bottled water. NCI members provide all types of cheese and cheese products. IICA serves the ice cream and related frozen desserts industry.

Member companies range from large multi-national organizations to single-plant companies in the United States, Canada and other countries around the world. The IDFA staff is prepared to provide assistance and guidance to the specific needs of an individual company.

Membership also consists of companies that supply products and services to the dairy processing industry, including processing equipment and materials; packaging equipment and supplies; ingredients; quality assurance; R&D; other supplies and services; as well as state and regional trade associations.

Whether conferring with the White House and Administration officials, advising and testifying before Congress, advocating industry positions with regulators or developing messaging for media inquiries, IDFA consistently focuses on the growth and success of the dairy industry.

IDFA's Mission

As the premier organization for dairy foods processors, manufacturers and marketers, IDFA:

- Offers unparalleled strategic leadership, expertise and advocacy to promote the success of our members.
- Influences federal, state and international government policies with strong legislative, executive and regulatory advocacy focused on dairy policy and other key industry issues.
- Serves as a trusted source of relevant and timely information on dairy-related issues for members and the media, and collaborates with dairy industry partners to protect and enhance the image of dairy.
- Provides expert training, education programs and materials, and is a forum for dairy industry stakeholders to meet and exchange views on the key issues facing our industry.

FLAVOR LABELING

CONTAINER SIZE	TYPE SIZE (POINT)
less than 1 pint	6
1 pint to less than ½ gallon	8
½ gallon to less than 1 gallon	10
1 gallon or more	12

FLAVOR LABELING EXAMPLES FOR ICE CREAM AND MELLORINE PRODUCTS

Vanilla Flavors

CATEGORY I

The following flavor labeling requirements apply to all ice cream and mellorine products which contain natural vanilla flavors. Although all vanilla ice cream and mellorine products would follow the same flavor labeling requirements, “vanilla ice cream” is used for illustrative purposes.

Characterizing Flavor Declaration: “vanilla”

Subsidiary Flavor Declaration: none

Type of Flavoring Permitted: vanilla beans, vanilla extract and/or vanilla powder. No artificial flavor.

Amount of Flavor Required: added in an amount sufficient to impart the characterizing flavor, “vanilla.”

Labeling Requirements

Letter Height:

- **Characterizing Flavor Declaration:** “vanilla” — not less than ½ the height of the letters used in the name of the food, “ice cream.”
- **Subsidiary Flavor Declaration:** none

Location: Must accompany the name of the food, “ice cream,” on the principal display panel.

Letter Style: Block, italic, script lettering or any other style which is easily seen under customary conditions of purchase. The name of the food and the flavor declaration may be in different type style, but must be the same type style within each declaration.

FLAVOR LABELING

ILLUSTRATION 1
Category I — Vanilla Flavors

CATEGORY II

The following flavor and labeling requirements apply to all ice cream and mellorine products which contain both natural vanilla flavor and artificial flavor, with the natural flavor predominating. Although all vanilla flavored ice cream and mellorine products would follow the same flavor labeling requirements, "vanilla flavored ice cream" is used for illustrative purposes.

Characterizing Flavor Declaration: "vanilla flavored"

Subsidiary Flavor Declaration: "artificial flavor added," "artificial vanilla flavor added" or "vanilla and artificial vanilla flavor" (the third declaration is not specified in the regulations, but it has been industry practice to use such a phrase to convey that both natural and artificial flavor were added to flavor the product).

Type of Flavoring Permitted: vanilla beans, vanilla extract and/or vanilla powder and artificial vanilla flavoring (vanillin).

Amount of Flavor Required: vanilla beans, vanilla extract, natural vanilla flavoring, natural vanilla flavoring, or vanilla powder used in combination with vanillin if the amount of vanillin does not exceed 1 ounce per "1 unit of vanilla constituent," as that term is defined in the vanilla standards (21 CFR §169.3 *Definitions*).

Concentrations may be used where the relationship between "vanilla constituent" and vanillin remains 1 to 1. For example, if a gallon of vanilla contains 26.7 ounces of beans, a maximum of 2 ounces of vanillin may be used.

One unit "vanilla constituent" means the total extractable flavor components contained in 13.35 ounces of vanilla beans of not more than 25 percent moisture of a proportionately greater amount of vanilla beans if the mixture exceeds 25 percent (if the beans contained 33.25 percent moisture, 15 ounces of vanilla beans would be required).

FLAVOR LABELING

Labeling Requirements

Letter Height:

- **Characterizing Flavor Declaration:**

- » “vanilla” — not less than $\frac{1}{2}$ the height of the letters in the name of the food, “ice cream.”
- » “flavored” — not less than $\frac{1}{2}$ the height of the letters in the name of the characterizing flavor, “vanilla”

- **Subsidiary Flavor Declaration:** “artificial flavor added,” “artificial vanilla flavor added” or “vanilla and artificial flavor” — the height of the letters is determined by the container size. Each word in this declaration must be the same height and type style and be not less than the following:

CONTAINER SIZE	TYPE SIZE (POINT)
less than 1 pint	6
1 pint to less than $\frac{1}{2}$ gallon	8
$\frac{1}{2}$ gallon to less than 1 gallon	10
1 gallon or more	12

Location: The word “flavored” must follow the name of the characterizing flavor, “vanilla,” wherever it appears on the label.

The subsidiary declaration must either precede or follow the name of the characterizing flavor, “vanilla,” wherever it appears on the label. However, if the flavor name and trademark or brand, are presented together, other written, printed or graphic matter associated with the trademark or brand may intervene, as long as the subsidiary declaration clearly relates to the characterizing flavor.

Letter Style: Block, italic, script lettering or any other style which is easily seen under customary conditions of purchase. The name of the food and the flavor declaration may be in different type style, but must be the same type style within each declaration.

FLAVOR LABELING

ILLUSTRATION 2
Category II – Vanilla Flavors

CATEGORY III

The following flavor and labeling requirements apply to all ice cream and mellorine products which contain artificial flavor with or without natural flavor, and in which the artificial flavor predominates. Although all vanilla flavored ice cream and mellorine products would follow the same flavor labeling requirements, "artificially flavored vanilla ice cream" is used for illustrative purposes.

Characterizing Flavor Declaration: "artificially flavored vanilla" or "artificial vanilla"

Subsidiary Flavor Declaration: none

Type of Flavoring Permitted: artificial vanilla with or without vanilla beans, vanilla extract or vanilla powder.

Amount of Flavor Required: If the product is flavored solely with vanillin (methyl) or when combined with vanilla, the amount of vanillin (methyl) used is greater than one ounce per "one unit of vanilla constituent," it must be labeled in accordance with this category.

The product may also be flavored exclusively or in part with other artificial vanillas, such as ethyl vanillin. If ethyl vanillin is combined with vanilla beans, vanilla extract, natural vanilla flavoring or vanilla powder, the standard does not establish a rule to determine predominance. This determination must be made by the manufacturer.

FLAVOR LABELING

Labeling Requirements

Letter Height:

• Characterizing Flavor Declaration:

- "vanilla" — not less than $\frac{1}{2}$ the height of the letters in the name of the food "ice cream."
- "artificially flavored" or "artificial" — not less than $\frac{1}{2}$ the height of the letters in the name of the characterizing flavor "vanilla."

• Subsidiary Flavor Declaration: none

Location: The words "artificially flavored" or "artificial" must precede the name of the characterizing flavor, "vanilla," wherever it appears on the label.

Letter Style: Block, italic, script lettering or any other style which is easily seen under customary conditions of purchase. The name of the food and the flavor declaration may be in different type style, but must be the same type style within each declaration.

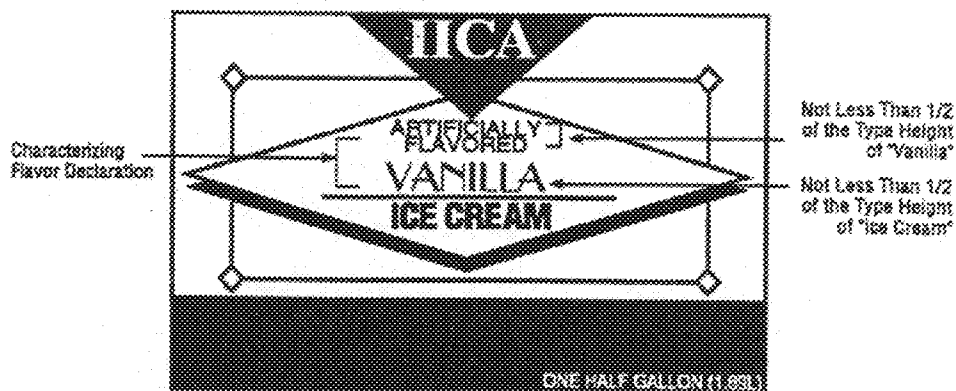


ILLUSTRATION 3
Category III – Vanilla Flavors

Citrus Flavors

CATEGORY I

Although all citrus fruit flavored ice cream and mellorine products would follow the same flavor labeling requirements, "orange ice cream" is used for illustrative purposes.

Characterizing Flavor Declaration: "orange"

Subsidiary Flavor Declaration: none

Type of Flavoring Permitted: natural orange flavor, orange oil, whole oranges without seeds, concentrated orange juice or orange juice. No artificial flavor.

FOOTNOTES:

1 Prepackaged retail products and those sold from self-service bulk containers are generally required to carry nutrition labeling unless the food qualifies for an exemption. The three most common types of exemptions from nutrition labeling in the retail channel, provided the food bears no nutritional claim, are:

1. The "Small Business Exemption" for foods sold by small businesses. Small businesses are defined as:
 - retailers with no more than \$500,000 annual gross sales OR no more than \$50,000 annual gross food sales; OR
 - food companies that sold fewer than 100,000 units of the product in the U.S. during the preceding year, AND that employed fewer than an average of 100 full-time equivalent (FTE) employees. Companies claiming this exemption must file annual notice with FDA. [21CFR 101.9(j)(1) and (18)]

2. Exemption for foods that contain an insignificant amount of all nutrients required on the nutrition label. "Insignificant amount" for total carbohydrates, dietary fiber, and protein is the amount that allows a declaration of "less than one gram" on the nutrition label. For all other nutrients required on the nutrition label, it is the amount that allows a declaration of "zero." [21 CFR 101.9(j)(4)]

3. Exemption for foods sold in small packages. Small packages are defined as those with a total surface area available to bear labeling of less than 12 square inches. The label must include an address or telephone number that consumers may use to obtain the required nutrition information. [21 CFR 101.9(j)(13)]

Additional exemptions for limited special cases are summarized in this table. [21 CFR 101.9 (j)]

2 Product Name [21 CFR 101.3]
 Net Quantity [58 FR 243: 67444-67464, Dec. 21, 1993; 21 CFR 101.105]
 Ingredient List [21 CFR 101.4]
 Company Name & Location [21 CFR 101.5]
 Nutrition Labeling [21 CFR 101.9]

Individual units must be:

- securely enclosed by the outer wrapper
 - not intended to be separated from the retail package
 - labeled with the statement "This Unit Not Labeled For Retail Sale" in type size not less than 1/16 inch in height.
- The word "individual" may be used in lieu of or immediately preceding the word "Retail" in the statement. [21 CFR 1.24(a)(14)]

Nutrition Labeling [21 CFR 101.9(j)(15)]

4 Labeling requirements for bulk packages sold directly to consumers are the same as the requirements for standard retail food packages.

5 Food that is to be processed, labeled or re-packed in substantial quantity at a different place than where it was originally processed or packed is exempt from food labeling requirements if:

- the company that introduces the food into interstate commerce is the same company that processes, labels or re-packs the food, or

- there is a written agreement between the two companies involved, and that agreement:

- contains specifications for processing, labeling or re-packing of the food;
- ensures that the food will not be adulterated or misbranded upon completion of processing, labeling, or re-packing; and
- is kept by both businesses involved for two years after final shipment. [21 CFR 101.100(d)]

If there is no such written agreement, bulk food package labels are legally required to carry all mandatory labeling information except nutrition information (in most cases).

Under normal inspection circumstances, however, FDA has generally been satisfied if the invoice accompanying a food product contains all the requisite labeling information. Individual companies must decide whether they are willing to risk the possibility of regulatory action for providing labeling information via the invoice only.

Even when bulk food packages are exempt from food labeling requirements under [21 CFR 101.100(d)], for practical business purposes manufacturers are advised to:

- provide at least the product name as well as the company name & location on food labels
- include any additional relevant information on the accompanying product invoice.

6 Although no labeling information is required, if the manufacturer voluntarily puts information on the shipping container, it must be truthful and not misleading.

7 Product name, net quantity, ingredient list and flavor declaration, and company name & location [21 CFR 101.100(d)]
 Nutrition Labeling [21 CFR 101.9(j)(9)]

8 Product name, ingredient list, and nutrition labeling may be provided by displaying the bulk shipping container with the required information clearly in view, or by point-of-purchase information such as a counter card or sign.

[21 CFR 101.9(a)(2) and (j)(16); 21 CFR 101.100(a) and (b)]
 Net Quantity [21 CFR 1.24(a)(1)]
 Company Name & Location [21 CFR 101.100(b)]

9 Food sold in a retail establishment that is sold from behind a counter and placed in a wrapper, carry-out box, or other non-durable container whose sole purpose is to facilitate handling would not be considered "packaged food" and would not need to bear product name, net quantity, ingredient list, company name & location statements.
 Nutrition Labeling [21 CFR 101.9(j)(3)]

10 Nutrition labeling is required on retail packages as sold. Although legal responsibility for providing nutrition information falls on the retailer, FDA generally looks to the manufacturer to provide accurate nutrition information about the product so the retailer can generate correct labeling.

11 Foods fully prepared and portioned ("standardized") at a central facility are treated like standard food packages and do require nutrition labeling at retail.

12 Because the product is primarily processed and prepared on-site by the store, it is exempt from nutrition labeling. However, it is treated as a "packaged food" and must carry all of the other labeling requirements.
 Nutrition Labeling [21 CFR 101.9(j)(3)]

13 On this type of package, required information may be printed in a type size not less than 1/32 inch in height, if total area available for labeling is 3 square inches or less and if there is insufficient space to print required information in a type size of 1/16 inch in height. Any further exemption requires consultation with FDA. [21 CFR 101.2(c)(2)]
 The net quantity exemption applies when this type of package contains less than 1/2 ounce or 1/2 fluid ounce. [21 CFR 1.24(a)(3)]
 Nutrition Labeling [21 CFR 101.9(j)(2)]

14 The general exemption from food labeling under 21 CFR 101.100(d) does not apply here because the food does not undergo any further processing, labeling, or re-packing. The exemption from nutrition labeling, however, is unconditional in this case since consumers never see the food's shipping package. [21 CFR 101.9(j)(2)(iv)]

15 Food must be ready-to-eat; processed and prepared primarily at the food service facility and not offered for sale outside the establishment. These foods are not considered "packaged food" and are not required to bear product name, net quantity, ingredient list, and company name & location information. [21 CFR 101.9(j)(2)] and [21 CFR 101.10]

16 Restaurant-type "ready-to-eat" foods for immediate consumption include:

- foods served at restaurants as well as at schools and hospitals, on planes and trains and at bakeries and delis with facilities for immediate consumption on premises; and
- foods eaten where purchased or while walking away from ice cream shops, sidewalk carts, vending machines, mall counters and lunch wagons. Includes similar foods purchased at convenience stores as well as delivery services that bring ready-to-eat foods to homes or offices.

Also exempt from nutrition labeling are ready-to-eat foods not for immediate consumption, such as those purchased at retail establishments where there are no facilities for consumption (e.g., bakeries, delis, and in-store salad/soup bars, delis and bakeries). [21 CFR 101.9(j)(3)]

17 Food sold at a salad bar is not considered "packaged food" and is not required to bear product name, net quantity, ingredient list, and company name & location information.
 Nutrition Labeling [21 CFR 101.9(j)(3)]

EXHIBIT F

**Feinstein
Doyle
Payne &
Kravec LLC**

429 Forbes Avenue
Allegheny Building, 17th Floor
Pittsburgh, PA 15219
www.fdpklaw.com
T: 412.281.8400
F: 412.281.1007

Writer's Extension: 109
jkravec@fdpklaw.com

April 29, 2015

via Certified Mail/Return Receipt Requested

Tracey Massey
President
Mars Chocolate North America, LLC
800 High Street
Hackettstown, NJ 07840

Tracey Massey
President
Mars Chocolate North America, LLC
c/o CT Corporation System
818 West Seventh Street, 2nd Floor
Los Angeles, CA 90017

John Donofrio
Vice President, Secretary, and General Counsel
Mars, Incorporated
6885 Elm Street
McLean, VA 22101

John Donofrio
Vice President, Secretary, and
General Counsel
Mars, Incorporated
c/o CT Corporation
818 West Seventh Street, 2nd Floor
Los Angeles, CA 90017

Re: Mars' Failure to Label Its Vanilla, Chocolate, and Coffee Flavored Ice Cream Novelties as "Artificial Flavor Added" in Violation of California and Federal Law

Dear Ms. Massey and Mr. Donofrio:

We represent Linda Cheslow and, potentially, a class of California consumers who purchased ice cream novelties ("Ice Cream Novelties")¹ labeled as "Vanilla Flavored Ice Cream," "Vanilla & Chocolate Flavored Ice Cream," or "Coffee Flavored Ice Cream" without being statutorily labeled as having "Artificial Flavor Added" in violation of California and federal law. The material omission of the "Artificial Flavor Added" disclosure conceals from consumers that the Ice Cream Novelties contain one or more artificial flavors, and simply labeling the Ice Cream Novelties as "Flavored" is insufficient to put consumers on notice of this

¹ At least the following Mars Ice Cream Novelties are labeled as "Vanilla Flavored Ice Cream," "Vanilla & Chocolate Flavored Ice Cream," or "Coffee Flavored Ice Cream" without being statutorily labeled "Artificial Flavor Added" as described herein: M&M's Ice Cream Cookies, Twix Ice Cream Bars, M&M's Brownie Ice Cream Sandwiches, and Dove Café Collection Cappuccino and Java Chip Miniatures.

Ms. Tracey Massey and Mr. John Donofrio
Mars Chocolate North America, LLC and Mars, Incorporated
April 29, 2015
Page 2

fact. For this reason, U.S. Food and Drug Administration ("FDA") regulations require all ice creams labeled "Flavored" also to be labeled "Artificial Flavor Added." See 21 C.F.R. § 135.110(f)(3)(i). Mars took the first step by labeling its Ice Cream Novelties as "Vanilla Flavored Ice Cream," "Vanilla & Chocolate Flavored Ice Cream," or "Coffee Flavored Ice Cream" but failed to take the required second step of labeling them "Artificial Flavor Added."

This letter is to demand that, in California, Mars Chocolate North America, LLC and Mars, Incorporated (collectively, "Mars") cease the false advertising described herein, refrain from using labels that do not comply with California and federal law, and pay damages to consumers who purchased Ice Cream Novelties labeled as "Vanilla Flavored Ice Cream," "Vanilla & Chocolate Flavored Ice Cream," or "Coffee Flavored Ice Cream" without also being statutorily labeled as having "Artificial Flavor Added." If Mars does not do so within thirty (30) days of receipt of this letter, Ms. Cheslow may bring claims, including under California's Consumers Legal Remedies Act ("CLRA"), Cal. Civ. Code §§ 1750-85.

Ms. Cheslow purchased Mars M&M's Ice Cream Cookies and Twix Ice Cream Bars in the San Francisco Bay Area on multiple occasions over the past four years, the last of which she purchased in September 2014. She made her purchases based on Mars' representations on the products' principal display panels that she was purchasing "Vanilla Flavored Ice Cream," which indicated to her that she was purchasing vanilla ice cream novelties with no artificial flavoring. Without the required "Artificial Flavor Added" disclosure on their labels, the "Vanilla Flavored Ice Cream" statements deceptively and misleadingly indicated to Ms. Cheslow that the M&M's Ice Cream Cookies and Twix Ice Cream Bars contained no artificial flavors. Indeed, the "Vanilla Flavored Ice Cream" statements alone did not put Ms. Cheslow on notice of this fact. Besides receiving ice cream products with artificial flavors for which she did not bargain, had she known the truth that they contained one or more artificial flavors, she would not have purchased the M&M's Ice Cream Cookies and Twix Ice Cream Bars. Images of the Ice Cream Novelties' labels, including the M&M's Ice Cream Cookies' and Twix Ice Cream Bars' labels, are enclosed.

The FDA has promulgated specific regulations for the labeling of ice cream. See 21 C.F.R. § 135.110. For ice cream containing both a natural characterizing flavor and an artificial flavor simulating it, and where the natural flavor predominates, the common name of the characterizing flavor on the principal display panel or panels of the label must be followed by the word "Flavored," e.g., "Vanilla Flavored Ice Cream." *Id.* § 135.110(f)(2)(ii). Additionally, for ice cream labeled "Flavored" pursuant to this regulation, the label must also state "Artificial Flavor Added" or, e.g., where vanilla is the characterizing flavor, "Artificial Vanilla Flavor Added." *Id.* § 135.110(f)(3)(i). Where the name of the characterizing flavor appears on the label "so conspicuously as to be easily seen under customary conditions of purchase," the "Artificial

Ms. Tracey Massey and Mr. John Donofrio
 Mars Chocolate North America, LLC and Mars, Incorporated
 April 29, 2015
 Page 3

Flavor Added" statement must "immediately and conspicuously precede or follow such name." *Id.* § 135.110(f)(3)(ii). A copy of the FDA regulations referenced above is enclosed.²

Moreover, in promulgating the ice cream regulations cited above, the FDA in its investigatory "Findings of Fact" concluded:

Consumers quite generally prefer natural over artificial flavorings and desire to know when artificial flavorings are present in ice cream. To the extent that accurate information can be conveyed to consumers by labeling on ice cream, label statements of the use of artificial flavorings are in the consumer's interest. Label statements that comply with the requirements of the general provisions of the Federal Food, Drug, and Cosmetic Act are "artificially flavored," "artificial flavoring added," "with added artificial flavoring"

The purpose sought to be served by prescribing the flavoring ingredients was the prevention of misleading labeling. It is concluded that a preferable way to achieve this purpose, and one which will promote honesty and fair dealing in the interest of consumers, is to provide, in designating artificial flavoring for label declaration, that where the label names the food as "vanilla ice cream" or "vanilla flavored ice cream" no artificial flavoring is used, and to provide further that in any ice cream where both natural and artificial flavors are used, any representation made on the label that the ice cream contains natural flavoring shall be accompanied immediately and conspicuously by labeling to show that artificial flavoring is also used.

Ice Cream, Ice Milk, Frozen Custard, Sherbet, Water Ices, and Related Foods; Order Establishing Standards of Identity, 25 Fed. Reg. 7126, 7128 (July 27, 1960) (to be codified at 21 C.F.R. pt. 20) (emphasis added). Although the FDA has since revised 21 C.F.R. § 135.110 to provide that the label statement "Vanilla Flavored Ice Cream" must be used for ice cream that contains both a natural, predominating characterizing vanilla flavor, and an artificial flavor simulating it, these regulatory findings of fact show that consumers expect "Vanilla Flavored Ice Cream" to contain no artificial flavoring. Furthermore, these regulatory findings of fact demonstrate that the mislabeling of artificial flavors in ice cream by the absence of a label statement "show[ing] that artificial flavoring is . . . used" (i.e., "Artificial Flavor Added") "immediately and conspicuously" accompanying the name "Vanilla Flavored Ice Cream" is material to consumers. A copy of the FDA findings of fact referenced above is enclosed.

² This conduct also violates California's Sherman Food, Drug, and Cosmetic Law ("Sherman Law"), which incorporates the very same food labeling regulations of the Federal Food, Drug, and Cosmetic Act. See Cal. Health & Safety Code § 110100(a).

Ms. Tracey Massey and Mr. John Donofrio
 Mars Chocolate North America, LLC and Mars, Incorporated
 April 29, 2015
 Page 4

Mars is in violation of the FDA's ice cream regulations because the Ice Cream Novelties are labeled on their principal display panels as "Vanilla Flavored Ice Cream," "Vanilla & Chocolate Flavored Ice Cream," or "Coffee Flavored Ice Cream" without also being immediately and conspicuously labeled as having "Artificial Flavor Added." The absence of the "Artificial Flavor Added" disclosure is a material omission, which conceals from consumers that the Ice Cream Novelties contain one or more artificial flavors. In this instance, Mars' violation is very clear-cut. By labeling the Ice Cream Novelties as "Vanilla Flavored Ice Cream," "Vanilla & Chocolate Flavored Ice Cream," or "Coffee Flavored Ice Cream," Mars took the first step and admitted that the Ice Cream Novelties contain artificial flavors. *See* 21 C.F.R. § 135.110(f)(2)(ii). Having taken this initial step, however, Mars failed to take the required second step of also labeling the Ice Cream Novelties as "Artificial Flavor Added." *See id.* § 135.110(f)(3)(ii).

Additionally, the declarations of artificial flavors in the Ice Cream Novelties' ingredients lists do not correct the deceptive and misleading "Vanilla Flavored Ice Cream," "Vanilla & Chocolate Flavored Ice Cream," and "Coffee Flavored Ice Cream" statements on their principal display panels. *See Astiana v. Dreyer's Grand Ice Cream, Inc.*, 2012 WL 2990766, at *10 (N.D. Cal. July 20, 2012) (citing *Williams v. Gerber Products Co.*, 552 F.3d 934, 939–40 (9th Cir. 2008)) ("We do not think that the FDA requires an ingredient list so that manufacturers can mislead consumers and then rely on the ingredient list to correct those misinterpretations and provide a shield for liability for the deception."). The FDA requires the "Artificial Flavor Added" statement to accompany the name of the characterizing flavor where it appears on the label "so conspicuously as to be easily seen under customary conditions of purchase," 21 C.F.R. § 135.110(f)(3)(ii), and the Ice Cream Novelties' characterizing-flavor names appear conspicuously on their principal display panels. Accordingly, the "Artificial Flavor Added" statement must appear there as well. *See also id.* § 101.1 ("The term principal display panel as it applies to food in package form . . . means the part of a label that is most likely to be displayed, presented, shown, or examined under customary conditions of display for retail sale.").

By the unlawful, misleading, and deceptive labeling described in this letter, Mars is committing multiple violations of the Federal Food, Drug, and Cosmetic Act ("FDCA"), 21 U.S.C. §§ 301–399f. Among other illegal practices, the FDCA prohibits introducing or delivering for introduction into interstate commerce any misbranded food, misbranding any food in interstate commerce, receiving any misbranded food in interstate commerce, delivering for pay or proffering for paid delivery any misbranded food in interstate commerce, and manufacturing any misbranded food in the United States. *Id.* § 331(a)–(c) & (g). The FDCA provides that a food is misbranded if, among other things, its labeling is false or misleading in any particular, any language or information required to appear on its label is not conspicuously placed thereon and in such a way as to make it likely to be read and understood by an ordinary consumer under customary conditions of purchase and use, it purports to be or is represented as a food for which there is a regulatory definition and standard of identity and its label does not include the common names of optional ingredients as required by such regulations, or it contains

Ms. Tracey Massey and Mr. John Donofrio
 Mars Chocolate North America, LLC and Mars, Incorporated
 April 29, 2015
 Page 5

any artificial flavoring and its label does not state this fact. *Id.* § 343(a), (f), (g) & (k). Mars is in violation of the FDCA, as well as the FDA's ice cream regulations, because the Ice Cream Novelties are misbranded within the meaning of 21 U.S.C. § 343, as described above. As a result of this unlawful, misleading, and deceptive labeling, Mars sold the Ice Cream Novelties to many thousands of consumers in California and many more throughout the United States, generating substantial profits for itself in turn.

Mars' conduct as described herein violates the CLRA in at least three ways. Cal. Civ. Code § 1770(a)(5) applies to misrepresentations regarding the characteristics of goods sold—specifying that misleading representations regarding ingredients, such as those described in this letter, violate the CLRA³; § 1770(a)(7) applies to misrepresentations, such as those described in this letter, regarding the standard, quality, or grade of goods sold; and § 1770(a)(9) applies to goods advertised with the intent not to provide what is advertised, which also is described herein.

In accord with Cal. Civ. Code § 1782, Ms. Cheslow now demands that within thirty (30) days from receipt of this letter, Mars take the following steps to cure the issues complained of herein:

1. Provide an accounting of its sales and profits (both gross and net profits) for the ice cream products at issue sold in California within the past four (4) years that were labeled as "Vanilla Flavored Ice Cream," "Vanilla & Chocolate Flavored Ice Cream," or "Coffee Flavored Ice Cream" (or whose labels included similar "Flavored Ice Cream" statements) but were not labeled as having "Artificial Flavor Added";
2. Refrain from selling in California ice cream products labeled as "Vanilla Flavored Ice Cream," "Vanilla & Chocolate Flavored Ice Cream," or "Coffee Flavored Ice Cream" (or whose labels include similar "Flavored Ice Cream" statements) but which do not satisfy the applicable FDA regulations as described herein;
3. Pay damages to Ms. Cheslow and to all other putative class members in California, including restitutionary disgorgement of profits earned over the past four (4) years as a result of sales in California, as well as attorneys' fees and expenses.

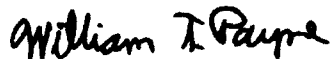
Thank you for your attention to this matter. If we do not receive a response from you within thirty (30) days of receipt of this letter, we will assume that Mars has no interest in curing the matters complained of herein, and Ms. Cheslow may file a complaint against Mars seeking damages for violations of the CLRA.

³ This conduct also violates California's Sherman Law. See Cal. Health & Safety Code § 110660 ("Any food is misbranded if its labeling is false or misleading in any particular.").

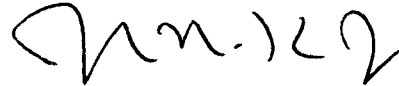
Ms. Tracey Massey and Mr. John Donofrio
Mars Chocolate North America, LLC and Mars, Incorporated
April 29, 2015
Page 6

If you wish to discuss the above, please do not hesitate to contact Joseph N. Kravec, Jr.

Sincerely,



William T. Payne
Admitted in CA and PA



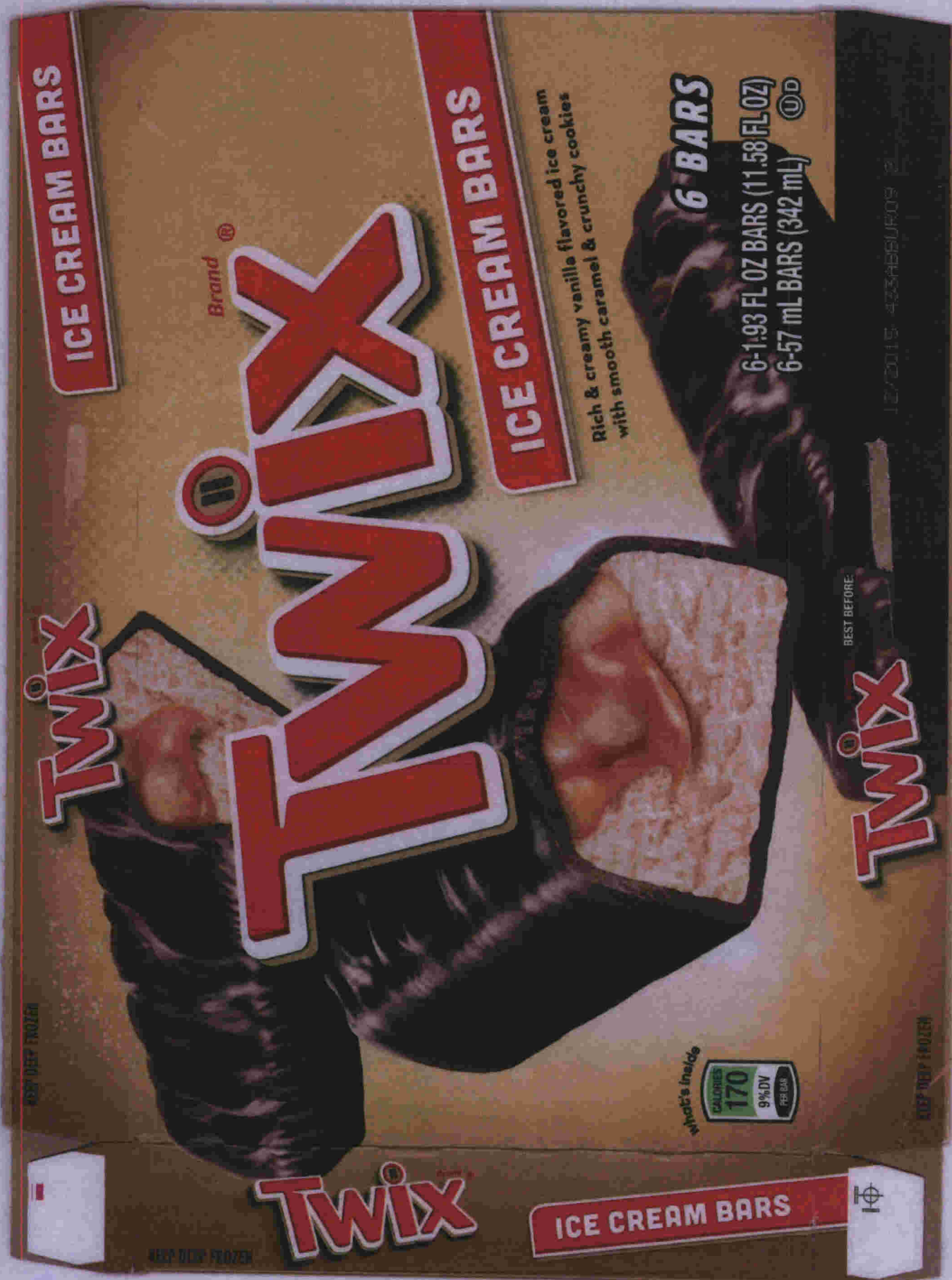
Joseph N. Kravec, Jr.
Admitted in PA

JNK,JR./mzc

Enclosures

cc: Ms. Linda Cheslow (via Electronic Mail w/o encs.)







ICE CREAM BARS



TWIX
Brand

ICE CREAM BARS



Enjoy the tasty combination of creamy vanilla flavored ice cream, gooey caramel and the great cookie crunch of TWIX® bars covered in a rich, delicious chocolatey coating.

Now that's a TWIX® Ice Cream Bar.



what's inside...

PER BAR	
CALORIES	170
TOTAL FAT	10g
SAT. FAT	7g
SUGARS	15g
SODIUM	50mg

VALUES ARE BASED ON A 2,000 CALORIE DIET. To learn more visit www.nutritionlabeling.com

We value your questions or comments. Call 1-800-851-4885. Please use the reply card.



Also try
SNICKERS® Brand & MILKY WAY® Brand
Ice Cream

Nutrition Facts

Serving Size 1 bar (45g)
Servings Per Container 6

Amount Per Serving		Calories from Fat 90
Total Fat	17g	10%
Saturated Fat	7g	20%
Trans Fat	0g	
Cholesterol	10mg	3%
Sodium	50mg	2%
Total Carbohydrate	18g	6%
Dietary Fiber	0g	0%
Sugars	15g	
Protein	5g	

Vitamin A *		Vitamin C *
Calcium	4%	Iron *

Percent Daily Values are based on a diet of other people's misdeeds.	
Total Fat	17g
Sat. Fat	7g
Cholesterol	10mg
Sodium	50mg
Total Carbohydrate	18g
Dietary Fiber	0g

8.750" x 1.000" x 5.250"





Code of Federal Regulations

Title 21. Food and Drugs

Chapter I. Food and Drug Administration, Department of Health and Human Services (Refs & Annos)

Subchapter B. Food for Human Consumption

Part 135. Frozen Desserts (Refs & Annos)

Subpart B. Requirements for Specific Standardized Frozen Desserts

21 C.F.R. § 135.110

§ 135.110 Ice cream and frozen custard.

Effective: November 8, 2005

Currentness

(a) Description.

(1) Ice cream is a food produced by freezing, while stirring, a pasteurized mix consisting of one or more of the optional dairy ingredients specified in paragraph (b) of this section, and may contain one or more of the optional caseinates specified in paragraph (c) of this section subject to the conditions hereinafter set forth, one or more of the optional hydrolyzed milk proteins as provided for in paragraph (d) of this section subject to the conditions hereinafter set forth, and other safe and suitable nonmilk-derived ingredients; and excluding other food fats, except such as are natural components of flavoring ingredients used or are added in incidental amounts to accomplish specific functions. Ice cream is sweetened with safe and suitable sweeteners and may be characterized by the addition of flavoring ingredients.

(2) Ice cream contains not less than 1.6 pounds of total solids to the gallon, and weighs not less than 4.5 pounds to the gallon. Ice cream contains not less than 10 percent milkfat, nor less than 10 percent nonfat milk solids, except that when it contains milkfat at 1 percent increments above the 10 percent minimum, it may contain the following milkfat-to-nonfat milk solids levels:

Percent milkfat	Minimum percent nonfat milk solids
10.....	10
11.....	9
12.....	8
13.....	7
14.....	6

Except that when one or more bulky flavors are used, the weights of milkfat and total milk solids are not less than 10 percent and 20 percent, respectively, of the remainder obtained by subtracting the weight of the bulky flavors from the weight of the finished food; but in no case is the weight of milkfat or total milk solids less than 8 percent and 16 percent, respectively, of the weight of the finished food. Except in the case of frozen custard, ice cream contains less than 1.4 percent egg yolk solids by weight of the food, exclusive of the weight of any bulky flavoring ingredients used. Frozen

§ 135.110 Ice cream and frozen custard., 21 C.F.R. § 135.110

custard shall contain 1.4 percent egg yolk solids by weight of the finished food: *Provided, however,* That when bulky flavors are added the egg yolk solids content of frozen custard may be reduced in proportion to the amount by weight of the bulky flavors added, but in no case is the content of egg yolk solids in the finished food less than 1.12 percent. A product containing egg yolk solids in excess of 1.4 percent, the maximum set forth in this paragraph for ice cream, may be marketed if labeled as specified by paragraph (e)(1) of this section.

(3) When calculating the minimum amount of milkfat and nonfat milk solids required in the finished food, the solids of chocolate or cocoa used shall be considered a bulky flavoring ingredient. In order to make allowance for additional sweetening ingredients needed when certain bulky ingredients are used, the weight of chocolate or cocoa solids used may be multiplied by 2.5; the weight of fruit or nuts used may be multiplied by 1.4; and the weight of partially or wholly dried fruits or fruit juices may be multiplied by appropriate factors to obtain the original weights before drying and this weight may be multiplied by 1.4.

(b) Optional dairy ingredients. The optional dairy ingredients referred to in paragraph (a) of this section are: Cream; dried cream; plastic cream (sometimes known as concentrated milkfat); butter; butter oil; milk; concentrated milk; evaporated milk; sweetened condensed milk; superheated condensed milk; dried milk; skim milk; concentrated skim milk; evaporated skim milk; condensed skim milk; superheated condensed skim milk; sweetened condensed skim milk; sweetened condensed part-skim milk; nonfat dry milk; sweet cream buttermilk; condensed sweet cream buttermilk; dried sweet cream buttermilk; skim milk, that may be concentrated, and from which part or all of the lactose has been removed by a safe and suitable procedure; skim milk in concentrated or dried form that has been modified by treating the concentrated skim milk with calcium hydroxide and disodium phosphate; and whey and those modified whey products (e.g., reduced lactose whey, reduced minerals whey, and whey protein concentrate) that have been determined by FDA to be generally recognized as safe (GRAS) for use in this type of food. Water may be added, or water may be evaporated from the mix. The sweet cream buttermilk and the concentrated sweet cream buttermilk or dried sweet cream buttermilk, when adjusted with water to a total solids content of 8.5 percent, has a titratable acidity of not more than 0.17 percent, calculated as lactic acid. The term "milk" as used in this section means cow's milk. Any whey and modified whey products used contribute, singly or in combination, not more than 25 percent by weight of the total nonfat milk solids content of the finished food. The modified skim milk, when adjusted with water to a total solids content of 9 percent, is substantially free of lactic acid as determined by titration with 0.1 N NaOH, and it has a Ph value in the range of 8.0 to 8.3.

(c) Optional caseinates. The optional caseinates referred to in paragraph (a) of this section that may be added to ice cream mix containing not less than 20 percent total milk solids are: Casein prepared by precipitation with gums, ammonium caseinate, calcium caseinate, potassium caseinate, and sodium caseinate. Caseinate may be added in liquid or dry form, but must be free of excess alkali.

(d) Optional hydrolyzed milk proteins. One or more of the optional hydrolyzed milk proteins referred to in paragraph (a) of this section may be added as stabilizers at a level not to exceed 3 percent by weight of ice cream mix containing not less than 20 percent total milk solids, provided that any whey and modified whey products used contribute, singly or in combination, not more than 25 percent by weight of the total nonfat milk solids content of the finished food. Further, when hydrolyzed milk proteins are used in the food, the declaration of these ingredients on the food label shall comply with the requirements of § 102.22 of this chapter.

(e) Methods of analysis. The fat content shall be determined by the method prescribed in "Official Methods of Analysis of the Association of Official Analytical Chemists," 13th Ed. (1980), sections 16.287 and 16.059, under "Fat, Roese-Gottlieb Method--Official Final Action," which is incorporated by reference. Copies may be obtained from the AOAC INTERNATIONAL, 481 North Frederick Ave., suite 500, Gaithersburg, MD 20877, or may be examined at the National

§ 135.110 Ice cream and frozen custard., 21 C.F.R. § 135.110

Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202-741-6030, or go to: http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.

(f) Nomenclature.

(1) The name of the food is “ice cream”; except that when the egg yolk solids content of the food is in excess of that specified for ice cream by paragraph (a) of this section, the name of the food is “frozen custard” or “french ice cream” or “french custard ice cream”.

(2)(i) If the food contains no artificial flavor, the name on the principal display panel or panels of the label shall be accompanied by the common or usual name of the characterizing flavor, e.g., “vanilla”, in letters not less than one-half the height of the letters used in the words “ice cream”.

(ii) If the food contains both a natural characterizing flavor and an artificial flavor simulating it, and if the natural flavor predominates, the name on the principal display panel or panels of the label shall be accompanied by the common name of the characterizing flavor, in letters not less than one-half the height of the letters used in the words “ice cream”, followed by the word “flavored”, in letters not less than one-half the height of the letters in the name of the characterizing flavor, e.g., “Vanilla flavored”, or “Peach flavored”, or “Vanilla flavored and Strawberry flavored”.

(iii) If the food contains both a natural characterizing flavor and an artificial flavor simulating it, and if the artificial flavor predominates, or if artificial flavor is used alone the name on the principal display panel or panels of the label shall be accompanied by the common name of the characterizing flavor in letters not less than one-half the height of the letters used in the words “ice cream”, preceded by “artificial” or “artificially flavored”, in letters not less than one-half the height of the letters in the name of the characterizing flavor, e.g., “artificial Vanilla”, or “artificially flavored Strawberry” or “artificially flavored Vanilla and artificially flavored Strawberry”.

(3)(i) If the food is subject to the requirements of paragraph (f)(2)(ii) of this section or if it contains any artificial flavor not simulating the characterizing flavor, the label shall also bear the words “artificial flavor added” or “artificial _____ flavor added”, the blank being filled with the common name of the flavor simulated by the artificial flavor in letters of the same size and prominence as the words that precede and follow it.

(ii) Wherever the name of the characterizing flavor appears on the label so conspicuously as to be easily seen under customary conditions of purchase, the words prescribed by this paragraph shall immediately and conspicuously precede or follow such name, in a size reasonably related to the prominence of the name of the characterizing flavor and in any event the size of the type is not less than 6-point on packages containing less than 1 pint, not less than 8-point on packages containing at least 1 pint but less than one-half gallon, not less than 10-point on packages containing at least one-half gallon but less than 1 gallon, and not less than 12-point on packages containing 1 gallon or over: *Provided, however*, That where the characterizing flavor and a trademark or brand are presented together, other written, printed, or graphic matter that is a part of or is associated with the trademark or brand, may intervene if the required words are in such relationship with the trademark or brand as to be clearly related to the characterizing flavor: *And provided further*, That if the finished product contains more than one flavor of ice cream subject to the requirements of this paragraph, the statements required by this paragraph need appear only once in each statement of characterizing flavors present in such ice cream, e.g., “Vanilla flavored, Chocolate, and Strawberry flavored, artificial flavors added”.

(4) If the food contains both a natural characterizing flavor and an artificial flavor simulating the characterizing flavor, any reference to the natural characterizing flavor shall, except as otherwise authorized by this paragraph, be accompanied by a reference to the artificial flavor, displayed with substantially equal prominence, e.g., "strawberry and artificial strawberry flavor".

(5) An artificial flavor simulating the characterizing flavor shall be deemed to predominate:

(i) In the case of vanilla beans or vanilla extract used in combination with vanillin if the amount of vanillin used is greater than 1 ounce per unit of vanilla constituent, as that term is defined in § 169.3(c) of this chapter.

(ii) In the case of fruit or fruit juice used in combination with artificial fruit flavor, if the quantity of the fruit or fruit juice used is such that, in relation to the weight of the finished ice cream, the weight of the fruit or fruit juice, as the case may be (including water necessary to reconstitute partially or wholly dried fruits or fruit juices to their original moisture content) is less than 2 percent in the case of citrus ice cream, 6 percent in the case of berry or cherry ice cream, and 10 percent in the case of ice cream prepared with other fruits.

(iii) In the case of nut meats used in combination with artificial nut flavor, if the quantity of nut meats used is such that, in relation to the finished ice cream the weight of the nut meats is less than 2 percent.

(iv) In the case of two or more fruits or fruit juices, or nut meats, or both, used in combination with artificial flavors simulating the natural flavors and dispersed throughout the food, if the quantity of any fruit or fruit juice or nut meat is less than one-half the applicable percentage specified in paragraph (e)(5)(ii) or (iii) of this section. For example, if a combination ice cream contains less than 5 percent of bananas and less than 1 percent of almonds it would be "artificially flavored banana-almond ice cream". However, if it contains more than 5 percent of bananas and more than 1 percent of almonds it would be "banana-almond flavored ice cream".

(6) If two or more flavors of ice cream are distinctively combined in one package, e.g., "Neapolitan" ice cream, the applicable provisions of this paragraph shall govern each flavor of ice cream comprising the combination.

(7) Until September 14, 1998, when safe and suitable sweeteners other than nutritive carbohydrate sweeteners are used in the food, their presence shall be declared by their common or usual name on the principal display panel of the label as part of the statement of identity in letters that shall be no less than one-half the size of the type used in the term "ice cream" but in any case no smaller than one-sixteenth of an inch. If the food purports to be or is represented for special dietary use, it shall bear labeling in accordance with the requirements of part 105 of this chapter.

(g) Label declaration. Each of the ingredients used shall be declared on the label as required by the applicable sections of parts 101 and 130 of this chapter, except that the sources of milkfat or milk solids not fat may be declared in descending order of predominance either by the use of all the terms "milkfat and nonfat milk" when one or any combination of two or more of the ingredients listed in § 101.4(b)(3), (b)(4), (b)(8), and (b)(9) of this chapter are used or, alternatively, as permitted in § 101.4 of this chapter. Under section 403(k) of the Federal Food, Drug, and Cosmetic Act, artificial color need not be declared in ice cream, except as required by § 101.22(c) or (k) of this chapter. Voluntary declaration of all colors used in ice cream and frozen custard is recommended.

§ 135.110 Ice cream and frozen custard., 21 C.F.R. § 135.110

Credits

[43 FR 4598, Feb. 3, 1978, as amended at 45 FR 63838, Sept. 26, 1980; 46 FR 44433, Sept. 4, 1981; 47 FR 11826, March 19, 1982; 49 FR 10096, March 19, 1984; 54 FR 24894, June 12, 1989; 58 FR 2896, Jan. 6, 1993; 59 FR 47079, Sept. 14, 1994; 59 FR 64572, Dec. 15, 1994; 63 FR 14818, March 27, 1998]

SOURCE: 54 FR 38514, Sept. 19, 1989; 54 FR 39633, Sept. 27, 1989; 59 FR 47079, Sept. 14, 1994; 62 FR 51514, Oct. 1, 1997, unless otherwise noted.

AUTHORITY: 21 U.S.C. 321, 341, 343, 348, 371, 379e.

Current through April 2, 2015; 80 FR 18033

End of Document

© 2015 Thomson Reuters. No claim to original U.S. Government Works.

and nonfat milk solids almost completely. Such a product can be prepared directly from milk or cream. (R. 5906, 5908, 6241, 6386, 6432, 6503, 6917, 6933, 7016-7013, 7443-7446, 9754)

5. A proposal was made to recognize as an optional ingredient of ice cream a product prepared from skim milk by the following process: The acidity of the skim milk is adjusted to about 0.05 percent. Then water is removed until the solids content reaches about 20 percent. To this concentrated skim milk a lactic acid starter is added, and the mixture is held at 70°-73° F. until the acidity reaches 1.5 percent. It is then sprayed. No satisfactory explanation was given of how a product of such high acidity could be used in ice cream making without causing the mix to curdle during pasteurization, unless the cultured skim milk powder were to be used in an ice cream mix that was neutralized. In experimental batches of ice cream that were neutralized the use of the cultured product was said to offer a means of producing a distinctive culture flavor in ice cream. It cannot be concluded that these manipulations are necessary or desirable or that the use of such a product would promote honesty and fair dealing in the interest of consumers. The abuses that might arise from neutralization of ice cream mixes are described in finding 37. (R. 7189-7190, 7210-7243)

6. Sweet cream buttermilk, in liquid or condensed or dried form, has substantially the same composition as the corresponding form of skim milk. Careful selection and handling of the product sold as sweet cream buttermilk are necessary to avoid some degree of souring. To be suitable for use in ice cream, the product is made from cream churned when it is fresh and sweet. No starter or neutralizer is used, and the resulting buttermilk is promptly used or is promptly evaporated or dried while it is still sweet. Such buttermilk, or the concentrated or dried product mixed with water to a total solids content of 8.5 percent, has a titratable acidity of not more than 0.17 percent, calculated as lactic acid. While there was evidence concerning the desirability of limiting the total bacteria count, this is impracticable at this time. (R. 275-277, 406,

commercial ice cream contain milk fat or nonfat milk solids or both in varying proportions and may also contain added sweetening agents. Such dairy products are evaporated cream, concentrated milk, evaporated milk, sweetened condensed milk, superheated condensed whole milk, dried milk, skim milk, concentrated (evaporated or condensed) skim milk, milk, superheated condensed skim milk, sweetened condensed skim milk (including sweetened condensed part skim milk), nonfat dry milk, liquid or condensed or dried sweet cream buttermilk (see findings 6), butter and butter oil. (Cream includes plastic cream and a so-called concentrated milk fat; butter oil includes milk fat prepared from milk, cream, or butter.) Combinations of two or more of these products may be used. Water is added if necessary. To produce the properties associated by consumers with ice cream, the proportions of the various products used in such combinations are so adjusted that the finished ice cream mix contains substantial amounts of both milk fat and nonfat milk solids. In recent years the proportion of nonfat milk solids to milk fat in ice cream has been generally increased, as compared with the proportion naturally present in cream or mixtures of cream and milk previously used as the dairy ingredient. The most important and expensive single constituent of ice cream, however, is milk fat, and ice cream cannot be made without a substantial proportion of this constituent. There is no evidence that any milk or milk product other than cow's milk or a cow's milk product is used in making ice cream. (R. 44, 46, 50, 402, 440, 532-533, 564, 606-607, 721-726, 732, 786, 1101, 4423, 5204, 5452-5491, 5909-5910, 5967, 5969, 6189, 6196, 6241, 6386, 6502-6504, 6912-6933, 6994-7013)

4. The fat of milk is sometimes separated from milk or from butter by processes that free it almost entirely from moisture and nonfat milk solids. Such fat from butter is usually referred to as butter oil. When prepared directly from milk or cream it may also be called dry butter or dry butterfat. Butter oil is the name commonly used to designate milk fat prepared from butter by processes which eliminate moisture

FINDINGS OF FACT¹

1. Ice cream is the common and usual name of the frozen food made from cream or a mixture of milk and cream, with or without water, having substantially an equivalent composition. The food is sweetened with sugar or other suitable sweetening agent and may contain natural or artificial flavoring or other food ingredients, such as cocoa, fruit, and nuts, to characterize it as a kind of ice cream. It may contain small amounts of added salt as seasoning. Substances described in later findings and often referred to as stabilizers are usually added to prevent formation of large ice crystals. Artificial coloring and certain other optional ingredients may be added. (R. 42-46, 52, 231-232, 397, 430, 528-530, 688, 800, 4834)

2. The usual household practices of preparing ice cream is to prepare it from sweet cream or a mixture of sweet milk and sweet cream.² However, a large portion of commercially produced ice cream is prepared from various dairy products, with or without water, so combined that in composition the mixture closely resembles cream or a mixture of milk and cream (see finding 3). When prepared for freezing, the sweetened dairy ingredient (with other ingredients used with or without the addition of flavoring or other characterizing ingredient) is known in the trade as ice cream mix. Certain characterizing ingredients such as fruit may be, and frequently are, added while the mix is being frozen. (R. 230-233, 402, 671-672, 689, 1049, 2252, 5236)

3. Milk and cream are composed of certain proportions of water, milk fat, and other constituents commonly referred to as nonfat milk solids or serum solids. The nonfat milk solids include proteins, milk sugar, various minerals, and certain water-soluble vitamins. The dairy products other than milk and cream (referred to in finding 2) that are used and are suitable for use in making

¹The citations following each finding of fact refer to the pages of the transcript of the testimony and the exhibits received in evidence at the hearing.

Title 21—FOOD AND DRUGS

Chapter I—Food and Drug Administration, Department of Health, Education, and Welfare

SUBCHAPTER B—FOOD AND FOOD PRODUCTS

[Docket Nos. 34, 34(a)]

PART 20—FROZEN DESSERTS; DEFINITIONS AND STANDARDS OF IDENTITY

Ice Cream, Ice Milk, Frozen Custard, Sherbet, Water Ices, and Related Foods; Order Establishing Standards of Identity

In the matter of fixing and establishing definitions and standards of identity for ice cream, frozen custard, ice milk, sherbet, water ices, and related foods:

After due notices published in the *FEDERAL REGISTER*, public hearings were held in the above-entitled matter in 1942, 1961, and 1952. Based upon evidence received at these hearings, the Commissioner of Food and Drugs, under authority delegated to him by the Secretary of Health, Education, and Welfare, published on March 26, 1958 (23 F.R. 1991) proposed findings of fact, conclusions, and proposed identity standards for these foods. After consideration of the exceptions and written arguments received, some of which were adopted in whole or in part and some of which were rejected, as is shown by marginal notations on the exceptions on file in the office of the Hearing Clerk, the Commissioner, pursuant to the authority provided in the Federal Food, Drug, and Cosmetic Act (secs. 401, 701(e), 52 Stat. 1046, 1066, as amended 70 Stat. 919; 21 U.S.C. 341, 371 (e)), and delegated to him by the Secretary of Health, Education, and Welfare (25 F.R. 5611), and on the basis of reliable, probative, and substantial evidence in the whole record, orders the promulgation of the following findings of fact, conclusions, and definitions and standards of identity for the subject foods.

Wednesday, July 27, 1960

FEDERAL REGISTER

7127

treated milk and sometimes as ion-exchange treated milk. The precise treatment encompassed by either of these terms is not clear from the record, although mention was made of passage through sodium aluminum silicate as one method of preparation. There are other ion-exchange reagents the effects of which on milk were not discussed. No testimony was given proposing any limitation on what ion-exchange reagents might be used in preparing the proposed ingredient. In the one process discussed, approximately 20 percent of the calcium in the milk is replaced with sodium, approximately 20 percent of the phosphorus is also removed, and the acidity is reduced. It is not known what effects other ion-exchange reagents might produce in the milk. Lactose crystallization or sandiness in ice cream containing more than 12 percent of nonfat milk solids is claimed to be less likely when base-exchange treated milk is used. Evidence used to support this contention by the witnesses may be interpreted differently. Substantial testimony had been previously offered by other witnesses that sandiness occurs with high levels of serum solids and may be prevented by adding ingredients in which the lactose content has been lowered. The so-called base- or ion-exchange treated milk has had no lactose removed. The use of such milk is also claimed to improve whipping properties of the ice cream mix. Such a product has been used in widely sold ice cream mix concentrates for preparing a frozen dessert in home refrigerators, but it is doubtful that such a product would be of significant advantage to an ice cream manufacturer.

Neither the substitution of sodium for calcium nor the partial elimination of phosphorus will promote the interests of consumers of ice cream. The evidence does not show that the only effects on the milk are the exchange of sodium for calcium, reduction of phosphorus, and reduction of acidity. It is not established that use of base-exchange or ion-exchange treated milk will promote the interests of the consumers. (R. 7091-7104, 9351-9353, 9373, 9449-9461, Ex. 80)

14. A milk protein product proposed as an optional ingredient was referred to in the testimony as "solubilized whole milk protein." This product is essentially sodium caseinate with some of the

9364-9369, 15600-15657, 15664-15668, 15677-15700)

12. The caseinates referred to in the previous findings of fact are derived by considerable manipulation of skim milk. Such manipulation leads to a product different from unaltered dairy ingredients. In the methods of preparation practically all the lactose and much of the minerals and vitamins present in skim milk are removed. To this extent, the expected nutritive value of the ice cream would be lessened if the caseinates were permitted to be substituted for the dairy ingredients. Witnesses who testified in the hearings said that the caseinates could be used in addition to the nonfat milk solids for the purpose of increasing the total solids content of ice cream without danger of sandiness. The use of sodium caseinate in ice cream is reported to result in a "wet ice cream" (see finding 38). The main use of caseinates has been as ingredients of special types of mixes, sold under trade names, for the preparation of some special types of frozen dessert. There is no need to manipulate the casein of milk for the commercial production of ice cream. Most of the caseinates are seldom used in the commercial preparation of ice cream. There was no evidence to justify the conclusion that substitution of these caseinates for the nonfat milk solids is in the interest of consumers of commercial ice cream. There is no justification for considering the caseinates as milk solids. The testimony does indicate that the caseinates may serve some useful purpose in increasing the protein value of ice cream if they are added to the permitted total milk solids. Use of such products in substitution for the nonfat milk solids of ice cream would not be in the interest of the consumer, but where these products are added to an ice cream mix already containing not less than 20 percent total milk solids, such ice cream could contain more solids without sandiness and would permit the attainment of the desirable qualities attributed to high-solids ice cream. (R. 7091-7096, 7045-7048, 9351-9353, 9394-9399, 11302-11303, 15600-15607, 15664-15668, 15677-15700)

13. There was testimony proposing as an optional ingredient a product said to be effective in combating sandiness in ice cream when high total solids are present. The testimony referred to this product sometimes as base-exchange

been added to hydrolyze the lactose in part to the more soluble sugars glucose and galactose. No exact description nor identification of the enzymes was furnished. It was stated that the enzyme was obtained by separating active enzymatic material from media prepared from milk and corn products on which a lactose-splitting yeast had been grown. Several yeasts are known to be capable of forming enzymes that hydrolyze lactose. Some are reported to form toxic products. The proponents of the recognition, as an optional ingredient of ice cream, of milk or skim milk treated with an enzyme prepared from a special lactose-splitting yeast did not name the yeast they used, as they considered this fact a trade secret. They did name a number of yeasts and implied that the yeast used was one of these. Feeding tests were reported on milk preparations in which the lactose had been in part hydrolyzed by an enzyme preparation from an unidentified yeast.

This testimony does not adequately identify the proposed optional ingredients. Accordingly, it is impossible to determine that their inclusion in ice cream would promote the interest of the consumer. (R. 6968-6989, 9405-9408, 15376-15397, 15412-15430, 21088-21140)

11. A number of products were offered as optional ingredients in ice cream which also fall in the category of casein compounds derived from the manipulation of skim milk. They were advocated to increase the solids content of ice cream without danger of sandiness. These caseinates were said to be prepared by the following basic procedure: The casein of skim milk is coagulated by the addition of an acid, usually hydrochloric, or by methods described in findings 8 and 9. The coagulated casein is separated from the other solids of the skim milk and is then treated with alkalizing reagents to yield products designated in the testimony as sodium caseinates, calcium caseinates, potassium caseinates, and ammonium caseinates. Excess alkali is washed out, and the resulting product is usually dried. These products consist mostly of casein or a compound of casein and the alkali used. They are suitable ingredients for addition to ice cream already having 20 percent total solids furnished by unaltered dairy ingredients. (R. 686-687, 927-932, 1640-1641, 2200, 7091-7096, 9351-9353,

626-628, 660-661, 989, 994, 1513-1514, 1517-1519, 1520-1530, 1532-1535, 1539-1546, 1548-1556, 1562-1563, 1570-1585, 1592-1606, 1607-1615, 1620-1622, 2064, 5408-5473, 5512-5527, 7023-7086, 10619-10623)

7. The tendency in recent years to use increasing amounts of nonfat milk solids in ice cream (see finding 3) has had the effect of improving the texture and, when the fat content is held at the same level, of enhancing the nutritive value of the ice cream. Lactose (milk sugar) constitutes about half or slightly more of the nonfat milk solids. It has a limited solubility in cold water, and when the nonfat milk solids of ice cream are raised to about 12 percent or above, the lactose tends to crystallize if the ice cream is held in storage. These crystals impart an undesirable grittiness known in the trade as sandiness. In order to incorporate larger amounts of nonfat milk constituents without danger of sandiness, several processes have been proposed. (R. 491-499, 668, 681-684, 906, 1819, 1844)

8. A product was proposed from which some of the lactose is removed from sweetened condensed skim milk by crystallization. The resulting product differs from sweetened condensed skim milk only in that it has a lower lactose content. It is a suitable ingredient for ice cream. (R. 491-499, 684)

9. Another product with less lactose proposed as an optional ingredient derived from skim milk is prepared by separating the casein from skim milk by the addition of a gum. Usually, calcium chloride is also added. The precipitated mass is collected and dried. The final product contains casein, gum, some calcium chloride if this salt is used to aid precipitation, and a part of the soluble constituents of the skim milk. The method of preparing this product also results in a very considerable loss of the vitamins and minerals of the original skim milk. Optional use of this product as an ingredient added to, but not in substitution for, required milk solids would help avoid sandiness and furnish some of the desired effects claimed for this ingredient. (R. 685-686, 728-729, 916, 1527-1550, 2200)

10. Other partially "de-lactosed" products were proposed as optional ingredients. These consisted of concentrated skim milks to which various enzymes had

binations. (R. 44-45, 407-409, 537, 693, 733, 831, 1126, 1706-1715, 1784-1787, 1799-1803, 1814-1820, 1835-1838, 1845-1846, 1863-1869, 1862, 1882-1897, 1939-1953, 11276-11295, 11312-11324, 11332-11374, 15040-15103, 15114-15126, 15148-15220)

18. Ground spices, ground vanilla beans, infusions of coffee or tea, and a large variety of natural food flavorings, such as extracts of lemon and vanilla, are used as characterizing flavors of ice cream and are suitable for such use. (R. 54-55, 237, 248, 400, 544, 1152, 3032; OP Ex. 3)

19. Various artificial food flavorings are also widely used to modify or characterize the flavor of ice cream. They may be added as such or as components of other ingredients. When so used that they do not create a misleading impression as to the presence of a natural ingredient or the amount of a natural ingredient present, artificial food flavorings are suitable ingredients of ice cream. Consumers quite generally prefer natural over artificial flavorings and desire to know when artificial flavorings are present in ice cream. To the extent that accurate information can be conveyed to consumers by labeling on ice cream, label statements of the use of artificial flavorings are in the consumer's interest. Label statements that comply with the requirements of the general provisions of the Federal Food, Drug, and Cosmetic Act are "artificially flavored," "artificially flavored," "with added artificial flavoring," or, if the artificial flavoring is not added as such but as a component of some other ingredient, the statement "----- artificially flavored," the blank being filled in with the name of such other ingredient. (R. 85-86, 416, 426-429, 1248, 1383-1384, 1391-1394, 1401-1402, 1963-1965, 1962, 1997, 2011-2012, 2903, 5095-5099, 5284, 21324-21326, 21371-21374; Ex. 413)

20. The kind of ice cream now produced in greatest quantity has a flavor derived from one or a combination of the substances vanilla beans and extract of vanilla beans (which are the sources of the flavoring recognized by consumers as "vanilla"), and from artificial flavoring substances such as synthetically produced vanillin, which simulate vanilla flavor. Persons interested in the vanilla bean industry advocated that standards for ice cream

16. There was evidence about a product sold under the trade name of Sanalac and the advantages of using it in ice cream. It was first said to be made by treating skim milk with an alkali to a point where some change occurred in the lactose. The mixture was then neutralized with an acid, concentrated, and dried. Further testimony indicated that this method was changed, and that the skim milk was treated in some other way. The evidence on the composition of this product is contradictory, and the record contains no substantial basis upon which its suitability for use in ice cream can be determined. The sponsors of this product later withdrew their proposal to have it recognized as an optional ingredient. (R. 729, 1428-1565, 1661-1675, 1677-1694, 2119-2720, 2729-2731, 5482-5484, 7313)

17. The sweetening agent most commonly used in ice cream is sugar (sucrose). It is often used in the form of a sugar sirup. Sirups containing various proportions of sugar and invert sugar are sometimes used. The term "liquid sugar" is used in the sugar trade to designate various sugar and invert sugar sirups or combinations thereof. Other products that impart sweetness are used and are suitable for such use. These are dextrose or corn sugar, corn sirup or dried corn sirup, glucose sirup or dried glucose sirup, and invert sugar in the form of paste or sirup. There are some sirups of which the sweetening ingredient is mainly maltose that may be described as "maltose sirup," and these are suitable ingredients for ice cream. Although lactose has little sweetening efficacy in comparison with sucrose, it is occasionally added in small amounts to ice creams having a relatively low content of nonfat milk solids. The amount of lactose that can be used is limited by the danger of "sandiness," which may occur if too much is used. For such use lactose should be considered a sweetening ingredient. It is unnecessary in definitions and standards of identity for ice cream, frozen custard, sherbets, etc., to prescribe rigid specifications for the sweetening ingredients designated by their common names. Additional products that serve the dual purpose of sweetening the ice cream and imparting to it their own characteristic taste and flavor are specified in finding 27. Sweetening ingredients may be used in various com-

minor protein fractions of the skim milk. The product is prepared by adding mild alkalinizing ingredients to skim milk and heating the mixture. Hydrochloric acid is added in an amount sufficient to effect precipitation of the protein fractions. Alkali is then added to the precipitated curd to adjust the pH to approximately 6.6 or 6.7. The product is spray-dried. The resultant powder is said to have extensive water-holding properties. The product appears to be essentially a caseinate and may properly be classed as sodium caseinate and permitted as an optional ingredient for addition to ice cream mix containing not less than 20 percent total milk solids. (R. 6447-6459, 15600-15657, 15664-15668, 15677-15700)

15. Cheese whey is the product from milk remaining after the removal of most of the fat and casein in the process of cheese making. It may contain some of the enzymatic or other material used for coagulating the casein and is often slightly acid in reaction. Cheese whey in ice cream, ice milk, and sherbet has been advocated, based largely on some experimental use of a dried cheese whey in replacing part of the nonfat milk solids normally used in preparing ice cream and sherbet. Dried whey is inferior in some respects to the common dairy products used in ice cream or ice milk. Dried cheese whey has had limited commercial testing, and there is no evidence in the record that would indicate that the consumer would expect ice cream or ice milk to contain even limited amounts of this byproduct from cheese-making in substitution for the customary ingredients. Milk solids are less important as characterizing factors in sherbet than in ice cream, and sherbets in which cheese whey has been substituted for skim milk are reported to have desirable properties and to have been used commercially for some time. If cheese whey is used as an optional ingredient in sherbet it would promote honesty and fair dealing in the interest of the consumer for such sherbets to bear informative labeling to properly distinguish them from ordinary fruit sherbets (see finding 52). (R. 5910-5912, 6671-6724, 6729, 6772-6791, 6800-6810, 6825-6829, 6851-6856, 6866-6867, 6887-6892, 6895, 6896, 6903-6904, 7111-7146, 7449-7450, 7646, 9401-9408, 9440-9446, 9657, 9753-9769, 10748, 12856)

should prescribe the type of flavor used and that for the food with the specified name "vanilla ice cream" the standard should require that only natural flavor from vanilla beans could be used. The notices of the hearing and the preponderance of the evidence as submitted by other persons support establishing a standard for the food "ice cream" and listing the characterizing ingredients and flavorings as optional ingredients. The testimony of the witnesses appearing in behalf of the vanilla bean industry pointed toward prescribing separate specific standards for each of the many kinds of ice cream. Aside from being inadequately supported by the record, regulations setting separate specific standards for the different kinds of ice cream would be more complex and restrictive than a standard listing the characterizing ingredients and flavorings as optional ingredients. The purpose sought to be served by prescribing the flavoring ingredients was the prevention of misleading labeling. It is concluded that a preferable way to achieve this purpose, and one which will promote honesty and fair dealing in the interest of consumers, is to provide, in designating artificial flavoring for label declaration, that where the label names the food as "vanilla ice cream" or "vanilla flavored ice cream" no artificial flavoring is used, and to provide further that in any ice cream where both natural and artificial flavors are used, any representation made on the label that the ice cream contains natural flavoring shall be accompanied immediately and conspicuously by labeling to show that artificial flavoring is also used. (R. 54-55, 237, 538, 540, 1394, 1395, 4451-4452, 4469, 4462-4465, 4468, 4471, 4473, 4478, 4511-4513, 4517, 4521, 4527, 4532-4535, 4553, 4566, 4578, 4587-4591, 4656, 4659, 4661, 4681-4683, 4688, 4710, 4713, 4728, 4730, 4756, 4782, 4796, 4801, 4912-4913, 4916-4917, 4943, 4952, 4971, 4980, 5094, 11101-11119, 11122-11123, 11129-11131, 11137, 15289, 15306, 15319, 15327; Ex. 228-232, 310)

21. Chocolate, various kinds of cocoas, the unpulverized residual material prepared by removing part of the fat from ground cacao beans, or mixtures of any two or more of these substances are used as characterizing ingredients of a kind of ice cream. These cacao ingredients may be added to the ice cream mix as

Wednesday, July 27, 1960

FEDERAL REGISTER

7129

- the dry substances or as suspensions in a syrup. When certain kinds of chocolate or cocoa are used they may cause undue thickening of the mix during pasteurization, which results in difficulties in subsequent steps of manufacture. This may be prevented by the use of a small quantity of disodium phosphate or sodium citrate. The quantity necessary and suitable for this purpose is not more than 0.2 percent by weight of disodium phosphate or sodium citrate. Sodium bicarbonate was also proposed as an optional ingredient for use in chocolate-flavored ice cream to reduce viscosity due to chocolate or cocoa. However, its use might lead to neutralization of a slightly sour mix which is undesirable, as explained in finding 37. Disodium phosphate and sodium citrate are much less likely to be used as neutralizers than sodium bicarbonate. (R. 56, 87, 238, 414-415, 546, 643, 692-693, 790-791, 1760, 1807-1808, 3072, 3076, 3102, 5826, 5858-5859, 5961, 6051-6062, 6235-6237, 6249-6253, 6501-6502, 6566-6570; finding 37)
22. When fruits are used to characterize ice cream it is customary to use the fresh fruits, when they are available. However, frozen and canned fruits are also extensively used and are suitable for such use. Dried fruits are suitable for use, as are fruits from which a part of the water is removed. Fruit juices, alone or in combination with fruits, are also suitable for use in ice cream. The fruit juice used may be fresh, canned, frozen, concentrated, or dried. In removing water from fruit and from fruit juices some volatile flavoring is usually lost. This may be recovered and added back to improve the flavor of such fruit and fruit juices. (R. 57, 288-240, 529, 1104, 1167-1168, 1278-1282, 12785-12795, 12960-12966, 13194-13196, 13257-13260)
23. To be suitable for use in ice cream, fruits should be mature and properly prepared by removal of pits, seeds, skins, and cores, where such removal is the usual procedure in preparing such fruit for consumption as fresh fruit. The fruit may be pureed or comminuted. In the case of some berry fruits, the seeds are usually removed in the pureeing process. In the case of citrus fruit, however, the whole fruit, except seeds, is often used in order to obtain the flavoring value of the peel. In the case of citrus juices, these may be prepared without the incorporation of any of the citrus oils found in the skin of the fruit. Most of the flavoring materials in the citrus fruits are found in the oil of the peel. The citrus oils may be recovered separately and added back to the juice to improve the flavor of the citrus juices. Addition of the citrus oils will not be suitable in excess of the amount that would have been obtained if the peel from the whole fruit had been used. Fruits are usually sweetened before addition to ice cream, and for some types of ice cream (ripple, variegated, marbleized) the fruit and sugar mixture is thickened with pectin or one of the ingredients named in finding 32. The proportion of sugars to fruits varies, but the sugar content of mixtures usually ranges from 30 percent to 50 percent of the weight of the fruit. Sometimes prepared fruits have been acidulated or are acidulated before use. Citric and ascorbic acids are suitable for the acidulation of such fruits. Ascorbic acid is sometimes used in frozen fruit to reduce discoloration due to enzymatic oxidation. (R. 57, 194-196, 415, 469, 543, 788, 1059, 1145, 1276-1284, 1304, 1967, 1966, 1973-1974, 2001, 2006, 2023, 2417, 2422-2425, 2460-2461, 2469-2472, 2490, 2502-2504, 3031, 3033-3084, 4265-4266, 4296, 4350-4360, 4393-4397, 5370-5374, 5386-5388, 5889-5891, 6637-6638, 13190-13261)
24. Coconut in several forms is used to characterize ice cream. The coconut ingredient may be shredded, comminuted, or in particles of varying sizes intermediate between shreds and the very fine particles of comminuted coconut. The shredded form of coconut is often sweetened. The comminuted form imparts a greater proportion of coconut flavor to ice cream than the other forms. On a moisture-free basis, the flesh of the coconut contains a high proportion (usually over 60 percent) of a fatty oil. When comminuted coconut is added to an ice cream mix, this fatty oil becomes commingled with the milk fat of the mix. When shredded coconut is so used, most of the coconut oil remains in the shreds. It is possible, however, by chemical analysis to estimate the quantity of coconut oil in the mixture. Coconuts are sometimes considered a fruit, and for the purposes of an ice cream standard it is reasonable to classify coconut as a fruit and permit a reduction in milk fat in proportion to the weight of coconut
- added, with the same allowance for sugar as added to the coconut ingredient as with other sweetened fruits. The use of coconut should be subject to the same minimum requirements for milk fat in the fruit ice cream as are required in the case of other fruits. (R. 11176-11286)
25. Substantial quantities of fruit must be added to ice cream to impart the definite fruit characteristics expected by consumers in a fruit type of ice cream. However, the evidence is insufficient to establish numerical minima for the content of the various fruits so used. (R. 58, 86, 188-192, 252-265, 269-271, 417-421, 1050-1059, 1091, 1097, 1105-1109, 1111-1113, 1128, 1144, 1147, 1152, 1161-1162, 1282-1286, 1304, 1330, 1365-1366, 1377, 1959-1960, 1973, 6936-6939; OPEx. 5; Govt. Ex. 8, 9, 10)
26. Properly prepared nuts are frequently used to characterize ice cream. The nuts used are sometimes roasted or cooked in butter or other food oil or fat and are sometimes preserved in a sirup. Substantial quantities of nuts must be added to ice cream to impart the definite characteristics expected by consumers in a nut-type ice cream. However, the record does not contain sufficient evidence to establish numerical minima for the contents of the various nuts so used. (R. 58-59, 86, 197, 241-242, 264-266, 271, 422-424, 545, 1080-1083, 1110, 1151, 1183, 1231-1232, 1288-1289, 1365, 1961-1963, 1976-1979, 1981, 2005, 2900, 2973-2974, 2994, 5095-5099, 5822, 5837, 5964-5985, 6193-6194; Govt. Ex. 8, 9, 10; OPEx. 5)
27. In addition to contributing sweetness, maple sirup, maple sugar, honey, brown sugar, malt sirup, dried malt sirup, malt extracts in liquid or dry form, and molasses (other than blackstrap) are frequently used to characterize ice cream or modify its flavor, and are suitable for such use. A product somewhat similar to molasses but obtained in the process of refining crude sugar is known under the general term "refiner's sirup." There was evidence that some refiner's sirups are suitable for sweetening ice cream. In addition to sweetness, refiner's sirup may impart some flavor. There was no evidence that any designation of a kind of ice cream has ever contained a reference to refiner's sirup, but there is no reason to conclude that refiner's sirup cannot be used in a special type of ice cream without jeopardizing the consumer's interest. (R. 43, 243, 406,
- 693, 1714, 1730, 1733, 1948-1951, 5891, 6313-6375, 11306-11312, 11321-11324, 11332, 11334-11373, 15040-15103, 15114-15126, 15147-15222)
28. Malted milk is used, and is suitable for use, as a characterizing ingredient of ice cream. Although malted milk contains substantial quantities of milk solids, its use by ice cream manufacturers is solely as a characterizing ingredient and not as a source of milk fat or nonfat milk solids. (R. 894, 901-902, 938-939, 1693-1697, 11326-11327)
29. Candy, cakes, cookies, cooked cereals, and glazed fruits also are used to characterize ice cream, and are suitable for such use. (R. 57, 59, 244-247, 424-425, 4926-4928)
30. Wines and distilled alcoholic beverages, including liqueurs, are used to characterize ice cream, and are suitable for such use. (R. 59, 426-426, 1183, 1338-1343)
31. Eggs or egg yolks (liquid, frozen, or dried) are often used in small quantities in ice cream, both in the home and in commercial manufacturing plants. Their use commercially is said to facilitate whipping or the incorporation of air into the ice cream. When eggs or egg yolks are used in sufficient quantity they impart their color and flavor and create a frozen product different from ice cream and which is known as frozen custard (see finding 50). The egg ingredient should be added before the mix is pasteurized. The quantity of eggs or egg yolk used in ice cream is such that the egg yolk solids in the finished ice cream are less than in frozen custard. (R. 65-741-742, 932-936, 997-998, 4834-4835)
32. A number of different substances used in ice cream for the same general purpose may be grouped into the class commonly known to ice cream manufacturers as stabilizers. The practice of using such substances began many years ago with the addition to ice cream mix of small amounts of gelatin. Other substances were also found to be helpful in retarding the formation of large ice crystals in ice cream, particularly when the ice cream is stored for some time under conditions that cause it to undergo changes in temperature. Effects on the properties of ice cream other than retardation of ice formation can be obtained with some of the stabilizers now used. The capacity of an ice cream mix

to hold incorporated air may be affected. The viscosity of the mix and of the melted ice cream may be increased. The use of some stabilizers may produce a smoothness suggestive of richness. Deception of consumers through use of some stabilizers appears possible; but aside from suggesting that a limit be set on the quantity of stabilizer used, the record affords insufficient basis for restricting the use of stabilizers to those that affect only ice of stabilization. A limit of not more than 0.5 percent of stabilizing substance has long been in effect in many State standards, and this limit is generally regarded by ice cream manufacturers as reasonable. In addition to using a stabilizer in the ice cream mix, a stabilizing substance, including pectin, is sometimes added separately to the fruit ingredient. A limit of 0.5 percent of pectin or other stabilizer is sufficient to include this additional use.

The following substances were, at one time or another prior to the hearing held in 1942, used as stabilizers: Gelatin, sodium alginate (often referred to as algin), extract of Irish moss, Irish moss, lecithin, pyllium seed husks, agar-agar, and several gums, including gum acacia, gum karaya, locust bean gum (carob bean gum), gum tragacanth. Quair seed often used as a carrier for such stabilizers. A substance derived from oat flour and referred to as oat gum is also apparently effective as a stabilizer. Oat flour has some stabilizing properties, but such large quantities are needed that, when used alone, it is not a satisfactory stabilizer. There was testimony that oat flour has antioxidant properties, but no need for the use of such an antioxidant in ice cream was established. Pectin may be used as a stabilizing ingredient in the fruit component of some ice cream. Since 1941, a substance prepared from cotton linters by treating them with sodium hydroxide and then reacting with monochloroacetic acid has been widely used as a stabilizer. The chemical name of the substance is sodium carboxymethylcellulose. It is often referred to by the rather misleading designation "cellulose gum." Pharmacological tests of this product were reported which

*Although this practice may be without deception when such fruit is used in ice cream, this finding has no application to thickeners added to fruit for other uses.

variable. In some instances only male rats were used; in others there were combinations of males and females, but predominantly males. In the Kelcoloid experiments, some rats died early on the lowest level (5 percent) fed; diarrhea was noted at times, but no attempt was made to establish whether the deaths were due to Kelcoloid or to ascertain the significance of the diarrhea. In the experimental feeding of Kelcoloid to chicks their growth was retarded at all levels used, but this was ascribed to the physical condition of the diet, without further experimental feeding using variable quantities of the test substance in the diets and of diets prepared to have different consistencies. (R. 9486, 9479-9474, 9486-9489, 9514, 9908-9909, 9909-9900-10017, 10180-10192, 10214-10240; Ex. 84, 86)

34. Calcium sulfate has been used in conjunction with some stabilizers for the purpose of making ice cream stiffer, drier, and slower melting. There was considerable testimony that its use imparted desirable characteristics to ice cream drawn from counter freezers for cups, cones, and some novelties. When calcium sulfate is used it supplements the other stabilizers, and their combined weight need not exceed 0.5 percent of the weight of the finished ice cream. (R. 10428-10430, 10432-10469, 15434-15447, 15453, 15459-15463, 15469-15476, 15498, 15495, 15503-15535, 15556-15564)

35. A proposal was made that a propylene glycol solution of butylated hydroxyanisole, propyl gallate, and citric acid be permitted as an antioxidant for dairy ingredients used in ice cream, but before testimony on this substance was completed the proposal was withdrawn. (R. 21146-21287)

36. A proposal was made to make nordihydroqualeic acid (NDGA) and citric acid dissolved in propylene glycol optional ingredients of any of the dairy products recognized in the definition and standard of identity adopted for ice cream, with limits of 0.005 percent for NDGA and 0.0025 percent for citric acid, calculated as percentages by weight of the butterfat (milk fat) content of such dairy product ingredients. The evidence indicated that in some instances where cream was frozen and stored for later use in ice cream, a type of off-flavor (referred to as oxidized flavor) developed in the cream, and that the development of this off-flavor could be pre-

vented or retarded by adding the solution of NDGA and citric acid to the cream before freezing. Citric acid was said to have a synergistic effect on the NDGA; propylene glycol was merely a convenient solvent. It was said that sweetened condensed milk also developed oxidized off-flavors at times and that this could be prevented or retarded by the addition of NDGA to the sweetened condensed milk. There was also evidence of the development of off-flavors in fluid milk, but little connection was shown between such milk and ice cream. Although there are rather voluminous reports in the literature on the subject of so-called oxidized flavors in dairy products, there is little real proof that flavors so noted are due to oxidation.

There are definitions and standards of identity for cream and sweetened condensed milk issued under the Federal Food, Drug, and Cosmetic Act (21 CFR, Part 18), and in neither standard is NDGA, citric acid, or propylene glycol listed as an optional ingredient. To provide in the standard for ice cream that NDGA, citric acid, and propylene glycol may be added to cream and sweetened condensed milk that are later to be used in ice cream would have the effect of amending the standards for cream and sweetened condensed milk or making separate standards for these foods for use in ice cream, without following the requirements of section 701 of the Federal Food, Drug, and Cosmetic Act. There was evidence concerning the pharmacological properties of NDGA, but in view of the finding of the inadequacy of this record as a basis for amending the standards for cream and sweetened condensed milk, no findings on evidence relative to pharmacological properties of NDGA will be made. (R. 13288-13371, 15567-15598)

37. Ice cream has traditionally been made from dairy ingredients that are fresh and sweet. Consumers, from their general knowledge of the composition of ice cream, would not expect the dairy ingredients used in ice cream to be otherwise. The development of lactic acid or souring in a dairy ingredient indicates that that dairy ingredient is not fresh, and consequently is not a proper ingredient in ice cream. Testimony was offered that neutralizing small amounts of developed lactic acid in souring milk would permit this milk to be used without the processing difficulties that are apt to

indicated that it passed through the body without being absorbed. (R. 45, 53, 90, 437-439, 549-551, 691, 733-741, 805-806, 824-830, 1860, 2031-2034, 2040-2047, 2007-2073, 2079-2119, 2124-2158, 2190-2192, 2202, 2208-2223, 2248-2259, 2271-2276, 2336-2339, 2374-2382, 2468, 2485-2486, 2515, 2537, 2558, 2691-2717, 2735-2753, 2761-2771, 2773-2793, 2802-2824, 2832-2873, 2953, 3203, 4888-4899, 4913, 5895-5896, 6023-6027, 6096-6076, 6224-6226, 6267-6268, 6274-6275, 6376-6386, 6398-6422, 6435-6438, 6493-6496, 6526-6535, 6542-6549, 6868-6870, 6943-6945, 7314-7317, 7558-7589, 9466-9540, 9549-9584, 9588-9607, 9615-9621, 9644-9650, 9651-9658, 9698-9723, 9746-9752, 9764-9770, 9772, 9814-9822, 9830-9831, 9833-9834, 9857-9887, 9890-9891, 10020-10053, 10079-10131, 10158-10166, 10176-10178, 10194-10203, 10208-10213, 10423-10428, 10430-10437, 10606, 10693-10715, 10720-10734, 10755-10756, 10761-10762, 10814-10829, 10831-10834, 10840-10844, 10850-10852, 10854-11007, 11053-11057, 11060-11091, 11634-11686, 15104-15114, 15127-15145, 15222-15284, 15466-15492; Ex. 90, 91)

33. Another product, developed since 1942, which was proposed as a stabilizer in ice cream, is a propylene glycol ester of alginic acid, sold under the trade name of Kelcoloid. The sodium salt of alginic acid (see finding 32, sodium alginate) was the subject of testimony at the earlier hearing held in 1942. Limited testimony at that time concerning the pharmacological properties of sodium alginate indicated that it was suitable for use in foods. Later, in 1951, reports of feeding experiments with both the sodium alginate (in preparations having the trade names Dariloid and Kelgin) and the alginic acid ester of propylene glycol (sold under the trade name Kelcoloid) were introduced into this record, and there was testimony about the experiments so reported. The reports of the completed experiments show that the experimental work was carried out in such a way that it is impossible to draw from the record reliable conclusions relative to the significance of the results. For example, the number of rats used in long-term experiments was so small that calculations of average life spans of control and experimental animals may be unreliable. In the experimental feeding of the product called Kelcoloid, rats of different breeds were used in some experiments, introducing an unnecessary

Wednesday, July 27, 1960

FEDERAL REGISTER

7131

be experienced when such milk is used without neutralizers in ice cream making. Neutralizers were also alleged to increase the whippability of the mix and retard sandiness. It was urged that if only milk with a slight development of acidity were used it would not be detrimental to the consumer's interest. Proponents of the use of neutralizers admitted that the use of highly acid dairy ingredients in ice cream would be detrimental to the consumer's interest. Accordingly, they proposed a complex recipe intended to limit the amount of developed lactic acid that would be permitted to be neutralized. The limitations proposed would not be effective in preventing the abuses inherent in permitting use of souring dairy ingredients.

To permit the inclusion of these neutralizing ingredients in the ice cream standard would give implicit recognition that dairy ingredients with developed acidity are proper for use in ice cream. The record does not permit such implicit recognition. R. 51-52, 183, 397, 404, 525, 571, 624, 701, 704, 792, 809-811, 822, 945-954, 975, 978, 1010, 1179, 1245, 1260, 1790, 1807-1808, 1867-1870, 2164, 2264, 2279, 2286, 2308-2323, 2487, 2522, 2882, 2897, 2944, 2965-2968, 3004-3006, 3012-3018, 3022, 3054-3058, 3071, 3189-3192, 3297-3300, 3317, 3371, 3374, 3570, 3637, 3640, 4016, 4495-4497, 4504, 4847, 4912, 5136-5140, 5181, 5239-5242, 5280, 5302-5303, 5336-5339, 5417-5462, 5492, 5501-5505, 5686, 5881, 5904-5906, 6269, 6270, 6294, 6443-6447, 6474-6482, 6498-6500, 6559-6566, 6626-6633, 6835-6836, 6869-6870, 6941-6942, 6945, 6952-6956, 7255, 7286-7291, 9517, 9608, 9824, 9893-9894, 10552-10554, 10618, 10647, 10747, 10769, 10853, 12346, 12413, 12420-12441, 12497-12567, 12571-12607, 12610-12619, 12625-12626, 12632-12653, 12656-12670; Ex. 7; Govt. Ex. 16-24, 37.

38. Batches of ice cream occasionally have the appearance of being "wet" or not fully frozen. Sometimes there is a partial separation of the casein in curd-like particles. Sometimes there is difficulty in cooling the mix after pasteurization and homogenization, because it is too thick to flow freely, a condition often ascribed to the clumping together of particles of fat. Occasionally, different batches of ice cream prepared by the same formula show differences in apparent smoothness and richness. These difficulties often arise from the improper adjustment of certain mechanical equip-

ment used in preparing the mix or in freezing the ice cream. Most, if not all, of these difficulties occur when dairy ingredients are used in which souring has progressed to some degree, and in such cases the use of small quantities of the neutralizing ingredients referred to in finding 37 will correct the trouble; but such use is subject to the objection expressed in that finding. Some persons advance the theory that these difficulties may arise when the mechanical equipment is in proper adjustment and the dairy ingredients used are sweet. In such circumstances these persons ascribe the difficulties to a condition of the mineral salts naturally present in milk, which condition they call lack of salt balance. They attribute this to abnormalities in the relative proportions of calcium and magnesium ions, on the one hand, to phosphate and citrate ions on the other. To compensate for a deficiency in calcium and magnesium ions these persons recommend the use of calcium chloride or calcium lactate, and for a deficiency in phosphate or citrate ions they recommend the use of sodium citrate, disodium phosphate, sodium pyrophosphate, or sodium metaphosphate. If salts are used that have an alkaline reaction in solution some neutralization will occur, and most of the testimony in support of the so-called salt-balancing ingredients referred to materials having an alkaline reaction in solution. It is not clear whether the alleged value of the mineral salts was due to the neutralizing properties or to other effects. A proposal was made to use sodium hexametaphosphate, for the purpose of altering the calcium concentration in the ice cream mix. This product has had limited use in ice cream mix, and the testimony was not clear as to the quantity of sodium hexametaphosphate needed or the action to be expected when used in ice cream preparation. The testimony indicated that sodium hexametaphosphate is not an alkaline-reacting salt and that it reacts with calcium ions to form a complex compound. It is not clear whether this action affects the acidity of the mix or whether the compound actually used in the ice cream mix contained an excess of alkali from the manufacturing process.

The use of any of the above-discussed salts, except disodium phosphate or sodium citrate, in a mix characterized by cacao ingredients has been limited. The

testimony in the record does not reveal sufficient facts to determine that the other uses of the mineral salts proposed as optional ingredients would be in the interest of consumers. (R. 624, 709-711, 748-763, 769-770, 809-822, 846-858, 860-874, 921-926, 980-977, 998-1000, 1790, 1876-1881, 2172, 2280-2296, 2499, 2520-2523, 3113-3150, 3152-3160, 3162-3170, 3205-3233, 5135, 5260-5267, 5332-5336, 5418, 5421, 5432, 6044-6045, 6121-6124, 6390-6391, 6438-6440, 6465-6473, 6482, 6484, 6498-6500, 6513-6519, 6570, 9766-9768, 12673-12712).

39. Several products have been made by adding alkalies to skim milk and concentrating the mixture or by first concentrating the skim milk and then adding the alkalies. The mixtures are dried to a powder and sold under various trade names with representations to ice cream manufacturers that use of the particular product will affect an ice cream in various desirable ways. The desirable effects claimed usually involve the adjustment of the viscosity of the mix, changing the whipping qualities, elevating the water-holding power of the protein, and increasing the quantity of nonfat milk solids in the mix without danger of sandiness.

There was testimony concerning a mixture of an alkali-treated dried skim milk and dried egg yolk, the claimed use of which would cause a change in the texture and whipping quality of the mix and permit a high overrun. There was considerable testimony about a product sold under the trade name of Nutrimix. Witnesses for the manufacturer gave different information concerning the composition of the product. Some of the testimony indicates that skim milk is evaporated to either 40 percent or 50 percent solids, and calcium hydroxide is added to one portion of the condensed skim milk and disodium phosphate is added to a second portion. The two portions are blended into a mixture containing approximately 1 percent calcium hydroxide and 0.35 percent disodium phosphate on a dry-weight basis. The resultant mixture may be used in either liquid or spray-dried form. Sometimes magnesium hydroxide and sodium citrate may be used. The principal claim made for this product was that the likelihood of sandiness from crystallization of lactose would be reduced by using Nutrimix as an ingredient of ice cream with high nonfat milk sol-

ids. It was also claimed that use of this product will enhance the whipping properties and the water-holding power of the protein in ice cream mixes.

The testimony shows that these various products have all had alkalies added to them and the effects claimed for these products are the same as those claimed by other witnesses who testified about direct addition by the ice cream manufacturers of these same alkalies for neutralization. The alkalies are discussed in finding 37 and their addition to ice cream directly or in admixture with other constituents is subject to the objections expressed in that finding.

The record contains conflicting testimony on the effect of alkalinized products in preventing sandiness caused by lactose crystallization. According to the testimony of competent investigators, the addition of calcium hydroxide and disodium phosphate to ice cream mix for the prevention of sandiness is not justified. The diversity in the testimony of record is such as to make unwarranted a finding of fact that Nutrimix or other alkali-treated products have significant effects on the formation of lactose crystals. (R. 44, 730, 3238-3280, 3557-3570, 3605-3616, 6564-6567, 7735-7880, 12355-12400, 12412-12438, 12444-12493, 12582, 12603-12608, 12656-12669; Ex. 20, 24, 37)

40. Carotene (provitamin A) was proposed by a manufacturer of this substance as an optional ingredient of ice cream for the purpose of enhancing its nutritive value. The evidence does not establish that carotene is stable and retains its potency in ice cream. It is not shown that, even if carotene retains its potency in ice cream, the quantity of vitamin A it would contribute to such diets would be of any substantial significance; nor was it shown that carotene would otherwise serve a useful purpose in ice cream. To avoid confusing and misleading consumers, the fortification of foods with vitamins should be restricted to a few staple foods that are effective carriers of the particular vitamins deficient in the diet of a significant segment of the population that regularly consumes the foods to be fortified. The quantities of carotene suggested for addition to ice cream would be of no substantial nutritional significance and would tend to mislead consumers. (R. 3850-3888, 3871-3897, 4892-5012, 5041-5048; OFEx. 100)

RULES AND REGULATIONS

Carolina, Tennessee, Virginia, Washington.

Minimum requirement of 12 percent milk fat: Colorado, Delaware, Illinois, Iowa, Maryland, Michigan, Minnesota, New Mexico, North Dakota, Oregon, South Dakota, Utah, Wyoming.

Minimum requirement of 13 percent milk fat: Wisconsin.

Minimum requirement of 14 percent milk fat: Idaho, Maine, Nebraska, Nevada, New Hampshire, Oklahoma, Vermont.

Because of short supplies during World War II, many States relaxed their requirements for a minimum milk fat content of ice cream. After the end of hostilities, most, but not all, States reinstated their former requirements for milk fat in ice cream. In 1951 the requirements of various States for minimum milk fat content of plain ice cream were as follows:

Minimum requirement of 8 percent milk fat: District of Columbia, Missouri, Rhode Island, Texas, West Virginia.

Minimum requirement of 10 percent milk fat: Alabama, Arizona, Arkansas, California, Connecticut, Florida, Georgia, Indiana, Kansas, Kentucky, Louisiana, Massachusetts, Mississippi, Montana, New Jersey, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, Tennessee, Virginia, Washington, Wyoming.

Minimum requirement of 12 percent milk fat: Colorado, Delaware, Idaho, Illinois, Iowa, Maine, Maryland, Michigan, Minnesota, Nebraska, New Mexico, North Dakota, Oregon, South Dakota, Utah.

Minimum requirement of 13 percent milk fat: Wisconsin.

Minimum requirement of 14 percent milk fat: Nevada, New Hampshire, Vermont.

In all States ice cream with a milk fat content higher than the minimum required by the State law are manufactured and sold. A survey made in 1947 by the International Association of Ice Cream Manufacturers among wholesale ice cream manufacturers indicated that about two-thirds of the so-called vanilla ice cream (including unflavored ice cream) made in the United States had a fat content of 12 percent or over. (R. 11395-11434; Ex. 135, 135A, 136, 137, 138, 139, 162, 415; Govt. Ex. 4)

45. In deciding upon what ice cream to purchase, the factors considered most important by consumers are the richness of the ice cream and satisfactory flavor. Although there are ice creams on the market with varying fat contents and with many kinds of flavors, the consumer at the present time has no practicable way of determining the fat content of an ice cream he purchases. The retail price of ice cream and of related frozen products such as ice milk and sherbet vary, and the price is not a reliable indication of the fat content. The fat content of ice cream sold in the United States is influenced by many factors, one of the most important factors probably being the minimum limits on fat content established by standards in several States. Probably, however, the most important factor is the desire of manufacturers to provide a fat content of ice cream that is generally acceptable to consumers at prices that return the maximum profit. When deciding upon the formula for an ice cream to be sold in a particular area, the manufacturer naturally chooses the one that he believes will bring him the greatest financial returns. Without increasing the fat content of ice cream, it is possible to increase the property referred to as smoothness (for lack of a better term) by the judicious use of nonfat milk solids and some stabilizing and emulsifying agents and by heat treatment of the mix before freezing. Smoothness and richness are closely related factors, probably not separated in the minds of most consumers. There is no question about the desirability of an adequate quantity of nonfat milk solids in ice cream. Due to the relatively low cost of nonfat milk solids in comparison with milk fat and to the fact that an increase in the quantity of nonfat milk solids tends to compensate in some ways for lowering the fat content of ice cream, there has been no serious problem from failure of ice cream manufacturers to use sufficient nonfat milk solids. It is therefore necessary to fix a minimum fat content to insure real richness in ice cream, and it is desirable to set a minimum limit on total milk solids.

In fixing such a minimum limit for fat and total milk solids, it is in the interest of consumers to consider the nutritive values of ice creams of varying compositions.

In some areas the milk fat content of the formula found most profitable is around 10 percent and in other areas is 12 percent or higher. In either case, the total milk solids content is usually 20 percent or more. Ice creams having a fat content ranging from 10 percent to about 14 percent do not vary so greatly in their richness that they are readily distinguishable from each other by merely tasting, particularly if the consistency of the melted ice cream is increased by use of a stabilizer or heat treatment of the mix; and ice cream manufacturers depend on consumers' acquiring a liking for a particular brand from continued use. When the fat content goes about 15 percent, however, an ice cream can be readily distinguished from ice cream with a fat content of around 10 percent.

Generally, the retail price of ice creams of a fat content higher than 15 percent is definitely more than that of ice creams around 10 and 12 percent. In the case of ice creams having 10 percent to a little over 12 percent milk fat, the retail prices overlap. In some areas consumers are able to purchase high-fat ice creams (14 percent or more fat) at an increased price; in many areas, however, no such ice creams are available. In some areas competition or other factors have brought the fat content of most of the ice creams down to nearly the State minimum, and the consumer has little choice insofar as the real richness of ice cream is concerned. The per capita consumption of ice cream seems to have been affected by the per capita income more than by any other factor.

A representative of the Food and Nutrition Board of the National Research Council testified that certain nutritive ingredients in ice cream are of great importance to the nutrition status of the population of the United States, and that an ice cream consisting of 10 percent milk fat and 20 percent total milk solids would better supply these essential ingredients than an ice cream consisting of 12 percent milk fat and 20 percent total milk solids.

It will promote honesty and fair dealing in the interest of consumers to provide that ice cream meeting minimum standards will have a fat and total milk solids content such that a reasonable degree of richness will be furnished while providing optimum nutritive value. It is concluded that a requirement for a mini-

Wednesday, July 27, 1980

FEDERAL REGISTER

7123

imum fat content of 10 percent in plain ice cream coupled with a requirement of not less than 20 percent milk solids is likely to achieve these objectives. Consumers wishing a less rich frozen dairy product should be able to obtain it by purchasing a very similar product with less fat under the name "ice milk." (R. 23-25, 27, 46, 50, 83-84, 440-443, 478-479, 564, 678-679, 1022-1025, 1101, 1158-1159, 1236-1244, 1269, 1283, 1834, 1865, 2230, 2231, 2240, 2489, 2908-2912, 2981-2982, 3175-3184, 3321-3323, 3349-3360, 3364, 4422, 4433-4447, 4487-4494, 4498-4500, 4836, 4914, 5133, 5482-5491, 5900-5903, 5915-5918, 5978, 6168-6177, 6191, 6270-6273, 6401-6403, 6427-6430, 6432, 6536-6549, 6603-6605, 6646-6648, 6857-6859, 7014-7016, 7257-7262, 7264-7273, 7579, 7636-7631, 7636-7645, 8278, 8508, 9759-9762, 9825-9828, 9841-9844, 9888-9889, 10139-10144, 10203-10206, 10535-10545, 10649-10650, 10610-10611, 10616, 10644-10647, 10655, 10740, 10746, 10757-10760, 10836, 10845-10846, 11277-11278, 11507-11548, 11567-11573, 11590, 11612-11624, 11681-11684, 11704-11714, 11720, 11745-11750, 11770-11776, 11787-11791, 11856-11858, 11960, 21295-21320, 21324-21348, 21371-21374, 21410-21428; Govt. Ex. 3, 5, 28-34; Ex. 137-140, 142, 143, 224, 408, 413-417)

46. The characterizing ingredients specified in findings 21, 22, 23, 24, 25, 26, and 29 are bulky; that is, they must be used in relatively large quantities in order to characterize ice cream. When such quantities are added to an ice cream mix, the fat content of the finished ice cream will be lowered in proportion to the quantity of such characterizing ingredients used. This provision for dilution is recognized in practically all State standards. A considerable number of States permit a reduction in fat content proportional to the quantity of such characterizing ingredients, but provide that in no case shall the reduction be more than 2 percent. Many States provide for a limit reduction of 2 percent. Most State standards limit the reduction to not more than 2 percent below the minimum prescribed for ice cream characterized by nonbulky ingredients. The characterizing ingredients specified in findings 18, 19, and 30 are used in relatively small quantities and do not significantly lower the fat content of the mix. In calculating the dilution from fruit and nuts, it is reasonable to allow for the dilution

caused by the sweetened fruit or nut product added, provided the sweetening ingredient of such product does not amount to more than 40 percent of the weight of the fruit or nuts used.

The extent of the dilution of a mix with chocolate or cocoa, when making a chocolate-flavored ice cream, depends on whether the chocolate or cocoa is added as such or suspended in a sirup. When dry cacao products are used, the total dilution from the chocolate product and from additional sugar is relatively small, but if a suspension of a cacao product in sirup is used the dilution may be much greater. A proposal was made that the standard for ice cream provide that "the components of a sirup made from chocolate or cocoa may be considered equivalent to such sirup and may be added prior to pasteurization." Since this proposal sets no limit on the content of water (the cheapest ingredient of such a sirup), the adoption of the proposal might result in abuses from the addition of water. The weight of dry cacao ingredients increased by 50 percent of such weight for additional sweetening agents should furnish a reasonable allowance for calculating a normal reduction in milk fat and milk solids from the use of cacao products to flavor a kind of ice cream. It would be illogical to consider water added in a sirup as part of the bulky flavoring ingredient in making such calculations. The characterizing and sweetening ingredients specified in finding 27 replace other sweetening agents and do not lower the fat content of the mix. (See page references under findings 18, 19, 21, 22, 23, 24, 25, 26, 27, 28, 29, and 30; also R. 440A, 766-788, 524-526, 568-569, 3399-3404, 5953-5954, 5970-5972, 6021-6022, 6062-6066, 6186-6189, 6239, 6254-6257, 6506-6508, 7419-7423, 11624-11626; Govt. Ex. 4)

47. Although there was no evidence of the use of insufficient nonfat milk solids in ice cream, attention was called to the possibility that abuses in this respect might arise unless a minimum nonfat milk solids content is required. The requirements of 20 percent total milk solids with milk fat levels equal to or slightly above the minimum of 10 percent provides for adequate nonfat milk solids (see finding 45). With ice creams containing higher fat levels the nonfat milk solids content tends to be lower but generally does not fall below about 6 percent

even in very high-fat ice creams. A minimum of 6 percent by weight of nonfat milk solids therein is a reasonable limitation. (R. 50, 681, 1717-1722, 1726-1728, 1745, 1763-1768, 1768-1767, 1771-1773, 1804-1805, 1824; Govt. Ex. 18)

48. When ice cream mix is frozen, air is whipped in and the volume of finished ice cream is greater than the volume of the original mix. This increase in volume is known in the trade as overrun. The amount of overrun depends on the vigor and duration of whipping, the kind of freezer, the temperature of freezing, and the composition of the mix. A certain amount of overrun is necessary to give ice cream some of its characteristic properties, but ice cream can be excessively inflated and thus cheapened, since it is commonly sold by volume. As the amount of air is increased the weight of a given volume of the ice cream decreases. In manufacturing ice cream it is practicable to control the quantity of overrun with either of the two types of freezers in general use; that is, the batch type and the continuous type. Most of the State standards limit the overrun by establishing a minimum weight per gallon for the finished ice cream or by other provisions. An overrun of more than approximately 100 percent is excessive. A requirement that the weight of ice cream be not less than 4.5 pounds per gallon, coupled with a minimum limit on solids per gallon (see finding 49), permits an overrun of about 100 percent, is effective in preventing the excessive incorporation of air, and is reasonable. (R. 60-62, 85, 443B-443C, 448-449, 765-768, 771-776, 2229, 4914, 10626-10627; Govt. Ex. 4)

49. Excessive water in ice cream mix dilutes its solids content and cheapens the product. A reasonable limitation against excessive dilution is a requirement that the solids content be not less than 1.6 pounds per gallon of finished ice cream. Such a requirement also serves as a desirable adjunct to the method of controlling overrun referred to in finding 48, since it allows higher overrun in the case of higher solids content and restricts overrun in the case of lower solids content. (R. 20, 60-61, 448, 528; Govt. Ex. 4)

50. Frozen custard, french ice cream, and french custard ice cream are common and usual names for the food that is identical with ice cream, except that it contains eggs or egg yolk in such quantity that the egg yolk solids are not less than 1.4 percent of the weight of the finished food. Findings 1 through 49 on ice cream, except that part of finding 1 on the name "ice cream" and that part of finding 31 limiting the egg yolk solids content of ice cream, are applicable to frozen custard. It is reasonable to provide that the minimum quantity of egg yolk solids prescribed for frozen custard or french ice cream may be lowered when bulky ingredients are used to characterize such foods, in the same manner as provided for lowering fat content in ice cream. (See page references under finding 31; also R. 523-524, 569; Govt. Ex. 4)

51. A frozen product closely resembling ice cream but containing less milk fat than ice cream is defined by the laws of several States. In 1941, the laws of 14 States defined such a product as "imitation ice cream," and 10 of these States prohibited the sale of imitation ice cream. Twelve States had laws which, among other things, defined a frozen milk product containing less milk fat than ice cream as "ice milk." These laws prescribed restrictions designed to prevent deception of purchasers through the sale of ice milk. Investigation in 1941 of local sales of ice milk showed that ice milk could be easily passed off as ice cream.

Since 1941, the sale of frozen products resembling ice cream but having less milk fat has increased, and additional States have defined such a product as "ice milk." A substantial proportion of the sales of this low-fat product is a product sold direct from the freezer and often referred to as "soft ice cream" to differentiate it from ice cream that has been hard-frozen by holding at around 0° F. after being withdrawn from the freezer. A large part of this soft-frozen low-fat product is sold from roadside stands that advertise their products under fanciful names. In States having laws requiring it, such stands display signs reading "Ice milk sold here." In several States the low-fat product is sold under fanciful names, without restrictions.

In addition to a low-fat product (soft or hard-frozen) sold direct to consumers, there is considerable traffic in a low-fat hard-frozen product used as a component of a semifrozen food sold at soda fountains. This is often unflavored. It seems probable that many consumers

cream, lower in total solids, and of somewhat coarser texture. (R. 22, 69-70, 203, 209, 392, 530, 1961, 2524, 4186, 4196, 4212, 4223-4224, 4291-4292, 4834)

54. Small quantities of frozen foods that contain no fruit or fruit juice but that are characterized by mint, wine, chocolate, vanilla, tea, coffee, spices, ginger ale, or pistachio have at times been sold as sherbets. Some of these are not acidulated and do not have the characteristic tartness of sherbet. Such products can be made to resemble ice cream or ice milk; and to the extent that they are so made they tend toward deception of consumers. The name "sherbet" so generally implies a frozen food of fruity characteristics that it is likely to be misleading when applied to a non-fruity food. Such so-called sherbets containing no fruit nor fruit juice are very similar to ice milk, and it is concluded that they should comply with the standard for ice milk. (R. 72, 411-412, 4219, 4238, 4241-4244, 4249, 4257, 4304, 4834, 4914-4915, 5146-5147, 5249)

55. The findings with respect to the preparation of fruit ingredients for use in ice cream are applicable to fruit ingredients for use in sherbet. Screened or crushed tomato and rhubarb may be considered as fruits when used to characterize sherbets. The quantity of fruit used in sherbets by wholesale manufacturers varies widely. The International Association of Ice Cream Manufacturers proposed as minimum limits for fruit or fruit juice in sherbets: 2 percent including the peel, in the case of citrus sherbets; 6 percent in the case of berry sherbets; and 10 percent in the case of other sherbets. Such limits will serve some useful purposes in the consumer's interest. The International Association of Ice Cream Manufacturers also proposed that in addition to fruit there might be used in sherbets artificial fruit flavorings and natural food flavoring derived from fruit.

At present many manufacturers of sherbets add flavoring materials to enhance the flavor imparted by the actual fruit or fruit juice used. Such flavorings, if added without label declaration, are misleading to consumers who feel that sherbets should be characterized by fruit or fruit juice. The record shows that there is dissatisfaction with some sherbets the flavor of which has been described by dissatisfied consumers as

ingredient in ice milk. The Federal Food, Drug, and Cosmetic Act requires food (with exceptions not here applicable) containing artificial coloring to bear labeling stating that fact. (R. 22, 68, 75-76, 80, 561, 2808-2811, 2513-2514, 2883-2988, 3000, 3037-3039, 3086-3096, 3325-3338, 3531-3556, 3976-3989, 3700-3704, 3732-3735, 3775-3786, 3791, 3835-3836, 3900-3904, 3908-3923, 3925-3964, 3969, 3970-3993, 4000-4005, 4007-4111, 4139-4140, 5141-5145, 5246-5248, 5252, 5287-5297, 5328, 5341-5350, 5473-5482, 5959, 6228-6229, 7363, 7393-7397, 7345-7418, 7462-7468, 7498, 7506-7530, 7644-7554, 7566-7576, 7616-7625, 7632, 7650, 7685-7712, 7714-7726, 7729-7734, 7683, 7894, 7898-7909, 7974-8019, 8031-8065, 8080-8085, 8100-8153, 8198-8221, 8245-8246, 8280-8300, 8337-8552, 8662-8645, 8648-8762, 8766-8828, 8881-8907, 8915-8917, 8925-9070, 9075-9195, 9197-9247, 9276-9308, 9332-9337, 9686, 9740-9741, 9847-9849, 9890-9898, 10341-10346, 10617, 10637-10640, 10663-10665, 10741-10743, 10847-10849, 11947-11948, 21050-21060, 21078-21082, 21346-21348, 21429-21481, 21498-21500; Ex. 62-63, 66-70; Govt. Ex. 16, 26, 27; OPEX. 98, 99, 101, 102, 106)

52. Sherbet is a frozen food having a number of characteristics that distinguish it from ice cream. The most outstanding characteristics of ice cream, even of the fruit types, are the smoothness, texture, and richness in taste and the food values arising from a relatively high content of milk fat and nonfat milk solids; whereas, the principal characteristic of most sherbet arises from its content of fruit or fruit juice. Sherbet contains milk-constituent solids, but in quantities much less than does ice cream, and these solids usually serve to impart to the frozen food no more than a slightly milky (not creamy) taste. Most States have standards or regulations limiting the milk fat and milk solids and requiring some acidity in sherbets, so as to enable consumers to distinguish sherbets from ice cream and ice milk. (R. 21-22, 69-70, 98, 398, 410, 443B, 539, 2504-3506, 4211, 4278-4279, 4834, 4914-4915, 5146-5147, 5249, 13064-13089, 13107-13162, 13150-13163, 21340-21368; Ex. 153, 184, 185, 188)

53. There are other significant differences between ice cream and sherbet. Sherbet has a tarter taste, due to its fruit content or to added acid or both; it is usually somewhat sweeter than ice

selling a low-fat frozen-milk product under the name "Dairy Queen." Their proposal was as follows:

Ice milk is the food prepared from the ingredients prescribed in § 20.1 for ice cream. The kind and quantity of optional dairy ingredients used, and the content of milk and non-fat milk solids therein, are such that the weight of milk fat is not less than 2 percent but not more than the lowest limits of ice cream by weight of finished ice milk. The weight of total milk solids is not less than 11 percent. Ice milk contains not less than 1.3 pounds of food solids per gallon and weighs not less than 4.5 pounds per gallon. In all other respects, ice milk conforms to the definition and standard of identity prescribed for ice cream under § 20.1.

Ice cream manufacturers in Pennsylvania, New Jersey, and New York, where the sale of low-fat frozen products resembling ice cream has been illegal under State laws, opposed the adoption of a definition and standard of identity for ice milk. It was shown that such a product is easily mistaken for ice cream. However, subsequent to these hearings the laws of Pennsylvania and New Jersey have been amended to permit the sale of ice milk.

It is concluded that the likelihood of correcting abuses in the sale of low-fat frozen products resembling ice cream by failing to adopt a standard for ice milk under the Federal Food, Drug, and Cosmetic Act is remote. The interest of consumers will be better served by giving the accurately descriptive name "ice milk" to such a product. The proposal to prohibit flavoring in ice milk packed in containers larger than a pint does not appear likely to correct suggested abuses in connection with the use of ice milk in preparing soda-fountain drinks, but rather to approve such use. With the minimum fat content of ice cream in a standard under the Federal Food, Drug, and Cosmetic Act fixed at 10 percent, a maximum fat content for ice milk that should differentiate ice milk from ice cream is 7 percent. The other limits suggested by the two major interested industries appear reasonable. Where coloring is used so as not to mislead consumers concerning the presence or amount of some other ingredient in the food it is reasonable for the standard of identity to permit coloring as an optional

expecting ice cream as a component of fanciful soda-fountain foods receive the lower fat product instead of ice cream as an ingredient of such foods.

The International Association of Ice Cream Manufacturers proposed that a definition and standard of identity for ice milk be adopted, although members of the Association in some States are opposed to the legal recognition of such a food. Many members of the Association manufacture both ice cream and ice milk. Although recognizing that the problems of regulating the sale of ice milk, to prevent its being sold as ice cream at retail, cannot be solved by the adoption of a standard for ice milk under the Federal Food, Drug, and Cosmetic Act, the various interests wishing to promote the sale of ice milk all seemed to believe that a Federal standard is desirable.

The interests of the large wholesale manufacturers and of the operators selling soft-frozen ice milk from the freezer diverge somewhat. The International Association of Ice Cream Manufacturers proposed the following standard for ice milk:

§ 20.5 *Ice milk; identity.* Ice milk is the food prepared from the ingredients prescribed in § 20.1 for ice cream. The kind and quantity of optional dairy ingredients used, and the content of milk and nonfat milk solids therein, are such that the weight of milk fat is not less than 2 percent but not more than 3.5 percent of the weight of the finished ice milk and the weight of milk-solids-non-fat is not less than 11 percent. Ice milk contains not less than 1.3 pounds of food solids per gallon and weighs not less than 4.5 pounds per gallon. In all other respects ice milk conforms to the definition and standard of identity prescribed for ice cream under § 20.1 except that no provision for permissive reduction of milk fat shall apply regardless of the presence of one or more of the optional ingredients indicated in subparagraphs (3) to (8) inclusive of § 20.1(b).

When ice milk is packaged in containers of greater than one pint in content, it does not contain color nor does it contain any of the optional ingredients indicated in subparagraphs (1) to (9) inclusive of § 20.1(b).

A somewhat different standard was advocated by operators of retail stores

Wednesday, July 27, 1960

FEDERAL REGISTER

7135

"artificial." Where such flavorings are added to sherbets containing fruit or fruit juice, label statements of their use are in the consumer's interest. Except in the case of citrus fruits, where the oils in the peel are suitable for use in flavoring sherbets, the evidence does not support the conclusion that so-called natural food flavoring derived from fruit was really what it purported to be. Most such flavorings contain materials derived from sources other than the fruit the name of which they bear. Use of any flavoring materials added to the fruit or fruit juice characterizing the particular sherbet should in the interest of consumers be declared on the label. Where the flavoring material added consists in whole or in part of any artificial flavor, label statements that comply with the requirements of the general provisions of the Federal Food, Drug, and Cosmetic Act are "artificially flavored," "artificial flavoring added," "with added artificial flavoring," or, if the artificial flavoring is not added as such but as a component of some other ingredient, the statement "-----artificially flavored," the blank being filled in with the name of such other ingredient. When the flavoring material added consists entirely of flavors other than artificial flavors, it will promote honesty and fair dealing in the interest of consumers for the label to bear the statement "flavoring added," "with added flavoring," or "-----flavoring added," the blank being filled in with the name of the flavoring used. (R. 70-270-271, 411, 417-418, 530, 543, 1960, 2504-2507, 2517-2518, 3031-3035, 4189-4190, 4192-4195, 4219, 4221-4222, 4246, 4261-4262, 4276-4279, 4289, 4295, 4303, 4336-4337, 4372, 4507, 5146-5147, 5917-5918, 5924-5931, 5972-5975, 6192, 6218-6223, 6243-6246, 6259-6266, 7426-7431, 9827-9828, 9849-9850, 11881-11882, 12765-12795, 12805-12876, 12904-12955; Ex. 180, 181)

56 Sherbet is frequently referred to as "milk sherbet," and this designation is used in many State laws defining the product. Some of the essential characteristics of fruit sherbet are imparted to it by its content of milk fat and nonfat milk solids. The milk-constituent solids of fruit sherbet are ordinarily obtained by adding unflavored ice cream mix, with or without one or more of the dairy products specified in finding 3 as suitable

for use in making ice cream. Sometimes milk is used alone or in combination with other dairy products. All the dairy ingredients found suitable for use in ice cream are also suitable for use in fruit sherbet, but the use of skim milk in any of its forms as the sole dairy ingredient would tend to mislead consumers. Milk solids are less important as characterizing factors in sherbet than in ice cream. There was testimony that cheese whey gives sherbets certain desirable properties, enhancing the fruity characteristics, and such sherbets have been commercially distributed. Cheese whey is a suitable optional ingredient of fruit sherbet. Honesty and fair dealing in the interest of the consumer will be promoted by designating this ingredient for label declaration. Label statements that are informative to the consumer are "-----added," or "with added -----," the blank being filled in with the appropriate name "whey," "concentrated whey," or "dried whey." (R. 70, 72, 400-402, 440, 443A, 530, 4186-4187, 4314, 4286)

57. The quantity of milk-constituent solids necessary to characterize fruit sherbet is at least 2 percent by weight of the finished product. More than 5 percent of such solids tends to make the product resemble ice cream or ice milk, as does a quantity of milk fat above 2 percent. Maxima of not more than 5 percent total milk-constituent solids and not more than 2 percent milk fat and minima of not less than 2 percent total milk-constituent solids and not less than 1 percent milk fat are reasonable limits to characterize fruit sherbet and to differentiate it from ice milk and water ice. (R. 440A, 4188, 4215-4217, 4286, 4281-4282, 4371-4373)

58. The sweetening agents that are used and are suitable for use in fruit sherbet are sugar, dextrose, invert sugar (as paste or sirup), corn sirup, glucose sirup, malt sirup, maltose sirup, and malt extract. The solids of such sirup and extract are also suitable for sweetening fruit sherbets. (R. 1786-1787, 1830, 1838, 1858, 1917, 1971, 4286)

59. Finding 3 is, in general, applicable to fruit sherbets, except that there is evidence indicating the use and suitability of egg white as a stabilizer for fruit sherbet. Peethin, in a quantity not more than 0.5 percent by weight, is also suitable for use for this purpose. (R. 70, 88,

439, 530, 2417, 2420-2421, 2430-2431, 2441, 2450-2460, 2478-2479, 2502, 4218, 4282-4285)

60. Most State laws defining sherbet are designed to prevent its manufacture in simulation of ice cream. One requirement of many such laws is that the acidity of the product be not less than 0.35 percent, calculated as lactic acid. The acidity of fruit sherbets averages about 0.5 percent to 0.6 percent. A minimum of 0.35 percent acidity, calculated as lactic acid, is a reasonable limit for fruit sherbet. (R. 22, 71-72, 2903-2904, 4257)

61. To reach the desired acidity, harmless acids may be added, in addition to fruit or fruit juice. Those generally used and suitable for use are citric, tartaric, lactic, and malic. Ascorbic acid is often an ingredient of the frozen fruit used. (R. 202-203, 207, 1978, 2006, 4197, 4223-4224, 4291-4292)

62. Salt and eggs or egg yolks are sometimes present in fruit sherbet as a result of the use of ice cream mix in its preparation. The quantity of egg yolk solids thus introduced is less than one-half of 1 percent. (R. 70, 409, 4211)

63. Much fruit sherbet is colored. When so used that they do not create a misleading impression as to the quantity of fruit or fruit juice present, colorings are suitable ingredients of fruit sherbet. The Federal Food, Drug, and Cosmetic Act requires food (with exceptions not here applicable) containing artificial coloring to bear labeling stating that fact. (R. 70, 1960, 2504-2506, 4200, 4211, 4261)

64. The dairy ingredient of fruit sherbet is pasteurized and may be homogenized either before or after addition to the fruit sherbet mix. Pasteurization of the dairy ingredient separately or pasteurization of the entire mix is generally recognized as an essential step in the preparation of commercial fruit sherbet, and consumers expect the protection from milk-borne diseases afforded by pasteurization. (R. 72, 314, 398, 401)

65. The normal overrun in fruit sherbet is less than in ice cream. A requirement that the weight of fruit sherbet be not less than 6 pounds per gallon is effective in preventing the excessive incorporation of air and is a reasonable limit. (R. 69, 72, 449, 4278, 4290, 4386)

66. It is concluded that the name that should be prescribed for each kind of

fruit sherbet is the word "sherbet," preceded by the common or usual name of the fruit or fruits from which the fruit ingredient used is obtained. When the names of two or more fruits are included such names shall be arranged in order of predominance, if any, by weight of the respective fruit ingredients used. (R. 76-77, 12382-12383, 12903)

67. Most of the commercially produced water ices are characterized by their fruit flavor and are of the same composition as the correspondingly flavored commercial fruit sherbets, except that no dairy ingredient is used therein. These products are herein designated as "water ices." Some nonfruit-flavored water ices are produced, but the record contains insufficient evidence to determine what the composition and characteristics of each of such various products should be, and they are not included in the term "water ice." (R. 72-73, 398-399, 4237, 4278, 4293-4369, 21368-21374)

68. Findings 32, 53, 58, and 59 are applicable to water ices for which standards are established. (R. 72-73, 401)

69. To obtain the desired tartness, the acids specified in finding 61 are frequently used and are suitable for use in water ice. (R. 72-73, 212, 1234-1235)

70. Finding 63 and 65 are also applicable to water ice. (R. 72-73, 89, 1234, 1235)

71. The common and usual name of each kind of water ice is the word "ice" preceded by the common or usual name of the fruit or fruits from which the fruit ingredient used is obtained. When the names of two or more fruits are included, such names shall be arranged in order of predominance, if any, by weight of the respective fruit ingredients used. (R. 73, 453)

72. There are other frozen foods that differ from ice cream, ice milk, fruit sherbet, and water ice. They are not sold under these names but usually are referred to collectively as "frozen confections." These "frozen confections" are distinguishable from the frozen desserts for which standards are being established on this record. Such "confections" are frozen without stirring whereas ice cream, ice milk, fruit sherbet, and water ices are all stirred while being frozen. The desserts frozen without stirring are often referred to as "quiescently frozen confections." They are not sold in bulk but are purveyed to the consumer in in-

RULES AND REGULATIONS

dividually labeled packages. A proposal was advanced that a definition and standard of identity be prescribed for these articles under the name "frozen confections." The composition and characteristics of these articles are so varied that no blanket requirements sufficiently definitive to be of substantial significance to consumers is presently practicable. (R. 552, 553, 563, 597-598, 6253, 5163)

73. There was a limited amount of testimony showing that in some parts of the country there were being sold frozen products resembling ice cream in taste and appearance but differing from ice cream in that instead of milk fat they contained a vegetable fat. Such products were designated with fanciful names. No proposal was made to include vegetable fats as optional ingredients of ice cream or to adopt a definition and standard of identity for frozen foods resembling ice cream but in which a vegetable fat was used instead of milk fat. (R. 10339-10341, 10348, 10350, 21411, 21416-21417, 21419-21428, 21487-21489)

74. Testimony at the first phase of these hearings in 1942 indicated that a recent development in the manufacture of ice cream was the addition of a surface-active agent to the stabilizing ingredient. This new ingredient was often called an emulsifier or emulsifying agent. At that time, the only combination of stabilizer and surface-active agent described was a mixture of mono- and diglycerides of fat-forming fatty acids and gelatin. No evidence explaining the effect of mono- and diglycerides alone on the properties of ice cream was presented. (R. 2115-2121, 2128-2160, 2169-2198)

75. Since 1942, there has been an increase in the number of surface-active agents used in the manufacture of ice cream. There was voluminous testimony in the later hearings in support of proposals to make surface-active agents optional ingredients. This was to the effect that the use in ice cream mix of from 0.1 to 0.2 percent of surface-active agents caused ice cream to come from the freezers in a slightly stiffer and "drier" state. The properties of ice cream to which manufacturers apply the terms "wet" and "dry" are difficult to describe and apparently difficult to measure objectively, but some objective tests designed to show the effect of surface-

active agents were described and the results reported. These suggested that surface-active agents might cause the homogenization of the mix to be more effective by aiding in the division of the fat into minute particles. Some possible shortening of the time required for freezing was indicated. Surface-active agents are said to aid in producing smoother ice cream. They also are said to have an effect on the physical properties of ice milk and sherbet but not to the same extent as on the physical properties of ice cream. (R. 6027-6036, 6041-6043, 6077-6120, 6248-6249, 6382-6386, 6488-6492, 6521-6525, 6579-6584, 6586, 6668, 7317-7321, 8105-8108, 9489-9498, 9542-9544, 9563, 9591, 9598-9600, 9603, 9617-9618, 9654-9655, 9737-9738, 9768, 9771-9772, 9815-9816, 9819-9820, 9834-9835, 9864, 9858-9864, 10133-10139, 10144-10147, 10150-10152, 10166-10168, 10250-10252, 10339-10339, 10359-10368, 10384-10388, 10403-10406, 10472-10507, 10518-10535, 10559-10575, 10586-10597, 10606-10609, 10631-10637, 10656-10656, 10668-10690, 10727-10731, 10733-10734, 10744-10745, 10763, 11009-11021, 11034-11037, 11038-11043, 11057-11058, 11071-11096, 11086-11089, 16112-16125; Ex. 5, 97-104)

76. Several types of synthetically prepared surface-active agents are used in stabilizing preparations sold to ice cream manufacturers and are thus incorporated into ice cream, ice milk, sherbets, etc. A few ice cream manufacturers buy surface-active agents directly from the primary manufacturers. Mono- and diglycerides of fat-forming fatty acids were accepted as food ingredients prior to this hearing. The other surface-active agents are substances in which a commercial fatty acid is combined with a polyhydric alcohol other than glycerin. These polyhydric alcohols are synthetic substances that the human body does not utilize as food. The pharmacological properties of such surface-active agents cannot be predicted from their chemical composition, but their chemical composition draws their pharmacology into question. There was a large amount of testimony about the composition and properties of several surface-active agents manufactured by the Atlas Powder Company. Similar (if not identical) preparations are to some extent manufactured, or may at any time be manufactured, by other companies. Since

most of the testimony about surface-active agents referred to them by their trade names, and since such products though similar may not be identical in composition, their trade names will be used here. A description of the methods of preparation and probable chemical composition of most of the substances referred to by trade names was furnished by their manufacturers. Other than to their manufacturers, however, the composition of the various surface-active agents was unknown, and often these manufacturers themselves have reliable information only as to the processes of manufacture and not as to exact chemical identity. The methods of preparation and something of the chemical composition of various surface-active agents proposed as optional ingredients are summarized below:

Mono- and diglycerides of fat-forming fatty acids. These preparations usually consist of mixtures of monoglycerides and diglycerides and some unchanged triglycerides in about the proportion of 40 parts of monoglycerides, 40 parts of diglycerides, and 20 parts of a mixture of unreacted triglycerides and glycerin. Such a product is usually made by heating a fatty substance such as lard or cottonseed oil (either of which may be hydrogenated) with glycerin, in the presence of a small amount of an alkali. Similar preparations containing larger proportions of the monoglycerides (sometimes as high as 90 percent) are sold under special names. Preparations containing more than 40 percent monoglycerides are usually made by a reaction between a fatty acid and glycerin. The monoglyceride is more effective as a surface-active agent than the diglyceride.

(R. 6381-6383, 6385-6386, 10158, 13566-13565, 16089-16766, 16726-16768, 16777-16781)

Aldo 33. Aldo 33 is the trade name applied by Glyco Products Company to a mixture of mono- and diglycerides prepared from a reaction between hydrogenated lard and glycerin. Presumably an alkaline catalyst is used. Details of the method of preparation were not furnished. (R. 16778, 16765-16768)

S 1096. S 1096 is the trade designation applied by Glyco Products Company to a substance said to consist substantially of glyceryl monooleate. Details of the method of preparation were not furnished. (R. 10778, 10787)

S 1097. S 1097 is the trade designation applied by Glyco Products Company to a product similar to S 1096, except that it was said to contain from 4 percent to 5 percent of potassium oleate. Details of the method of preparation were not furnished. (R. 10768, 10769)

Drew Mulse ME. Drew Mulse ME is the trade name applied by E. F. Drew Company to a substance said to be a glyceride containing 1 mol of stearic acid and 2 mols of lactic acid. It was said to be made by heating under vacuum a mixture of tristearin with glycerin and lactic acid or by heating a mixture of glycerin and stearic acid and lactic acid under vacuum until all fatty acid is combined. (R. 11050-11090, 11062-11064)

Glycerol Monostearate (Drew). This was said to be a mixture of mono- and diglycerides manufactured by the E. F. Drew Company and referred to as glyceryl monostearate. (R. 11067)

Span 60. Span 60 is the Atlas trade name for a substance prepared by a reaction, under controlled conditions, between sorbitol and commercial stearic acid. The crude product is decolorized and bleached.

Span 60 is said to consist mainly of sorbitan (sorbitol less 1 mol of water) monostearate. Upon saponification with an alkali, it will yield approximately 74 percent of fatty acids and 26 percent of polyhydric residue having a hydroxyl value in the range of 1,200 to 1,300.

Span 60 is a tan-colored, hard, waxy solid melting in the range of 49° C. to 56° C. It is insoluble in water but dispersible in warm water above its melting point. The manufacturing specifications for Span 60 are:

Acid number: 10 maximum.
Saponification number: 190-196.
Hydroxyl number: 238-266.

The water content should not be above 1 percent. There is some ash present, but no data on quantity were furnished. In the bleaching process there is a small amount of mineral acid present, so that any soap that may be present is converted to fatty acid and an inorganic salt; and since this salt is insoluble in the ester, the filtration step (when used in preparing Span 60) tends to remove ash-forming substances. (R. 13837-13840, 16074)

Tween 60. Tween 60 is Atlas' trade name for a substance prepared by reaction, under controlled conditions, be-

Wednesday, July 27, 1960

FEDERAL REGISTER

7137

method of manufacture are not described in the record.

Tween 80 is a lemon-colored, oily liquid having a viscosity of 300 to 475 centipoises at 25° C. It is completely soluble in water. It contains approximately 67 percent of oxyethylene units. Upon saponification with an alkali, it will yield approximately 25 percent of fatty acids and 77 percent of polyhydric residue having a hydroxyl value of approximately 160 and an oxyethylene content of approximately 87 percent. It was stated that the manufacturing specifications for Tween 80 call for:

Acid number: Not over 2.

Hydroxyl number: 88-93, inclusive.

Saponification number: 45-60, inclusive.
Water content: 2½ percent to 3 percent.

(R. 13845-13847)

Spans. Span 60 and the other compounds grouped under the class name of Spans are not chemical entities but each is a mixture of several compounds. For example, Span 60 will contain some unreacted sorbitol or sorbitol anhydrides or both, some unreacted fatty acids, reaction products of catalysts and fatty acids, and esters of varying degrees of dehydration and fatty-acid content. The fatty acids will consist mainly of one acid, but appreciable amounts of related fatty acids will be present. The commercial grade fatty acids commonly used will also introduce some unsaponifiable matter from the fats from which they are prepared. There are some sorbitol (sorbitol less 2 mols of water) esters as well as sorbitan esters and some di- and tri-esters. Spans contain small quantities of moisture and some ash. The ash results from neutralization of the alkaline catalysts that are not entirely removed in the manufacturing process. Spans may also contain traces of nickel used as a catalyst in preparing sorbitol. Whether Spans may at times contain some reducing sugars is not entirely clear. There is no analytical method available at the present time for accurately identifying the polyol portions of Span compounds and no method for detecting Spans in ice cream. (R. 13846, 16067, 16076-16078)

Tweens. The compounds grouped under the class designation of Tweens are not chemical entities but are mixtures of several compounds. Since they are prepared by reactions between Spans and ethylene oxide, they contain the

tween Span 60 and ethylene oxide. The reaction is planned to add 20 mols of ethylene oxide to 1 mol of Span 60. The reaction product is decolorized by steam. It is bleached with hydrogen peroxide at 100° C. and is filtered.

Tween 60 is a yellow- to orange-colored, oily liquid or semigel, that is completely soluble in water. It contains approximately 67 percent oxyethylene units. Upon saponification with alkali it will yield approximately 25 percent of fatty acids and approximately 71 percent of polyhydric residue having a hydroxyl value of approximately 160 and an oxyethylene content of approximately 86 percent. The manufacturing specifications for Tween 60 call for:

Acid number: Not over 2.

Hydroxyl value: 80-100, inclusive.

Saponification number: 45-60, inclusive.
Water content: 2½ percent to 3 percent.

(R. 13842-13848)

Tween 65. Tween 65 is Atlas' trade name for a substance prepared by a reaction, under controlled conditions, between sorbitan tristearate and ethylene oxide. The reaction is planned to add 20 mols of ethylene oxide to 1 mol of sorbitan tristearate. Methods of purification were not specifically described but are presumably the same as used with Tween 60.

Tween 65 is a yellow-colored, waxy solid, insoluble in water but dispersible in warm water. It melts in the range of 27° C. to 31° C. It contains approximately 48 percent of oxyethylene units. Upon saponification with an alkali it will yield approximately 45 percent of fatty acids and 58 percent of a polyhydric residue having a hydroxyl value of approximately 250 and an oxyethylene content of approximately 83 percent. It was stated that the manufacturing specifications for Tween 65 call for:

Acid number: Not over 2.

Hydroxyl number: 45-55, inclusive.

Saponification number: 90-105, inclusive.
Water content: 2½ percent to 3 percent.

(R. 13845-13848)

Tween 80. Tween 80 is Atlas' trade name for a substance prepared by a reaction, under controlled conditions, between Span 80 (sorbitan monooleate) and ethylene oxide. The reaction is planned to add 20 mols of ethylene oxide to 1 mol of Span 80. The details of the

various substances present in Spans as modified by reactions with ethylene oxide. The ethylene oxide does not react with a Span to form a compound containing a definite number of mols of ethylene oxide, but forms a range of compounds of varying molecular weights having, on the average, for the Tween compounds with which we are concerned, 20 mols of ethylene oxide to 1 mol of the Span used. When small quantities of water are present in the Spans used for making Tweens, this water will react with ethylene oxide to form glycols, including ethylene glycol and diethylene glycol. There are probably small quantities of unreacted ethylene oxide in the crude Tween-type compound before decolorization and bleaching. This is said to be removed before steam is applied. The polyol portions of different Tween-type compounds are not identical. The actual chemical structure of the polyols of Tween-type compounds is not known to chemists of the Atlas Powder Company. No satisfactory data concerning possible presence of ethylene glycol and diethylene glycol in Tween-type compounds were furnished.

Tween-type compounds can be separated from ice cream in an impure state and the quantity of oxyethylene determined in the products removed. This procedure would not distinguish one Tween from another or distinguish a Tween-type compound from a Myrj-type compound, which would also be removed, if present, by the procedure used for separating Tweens. (R. 13846, 16079-16085, 16089-16091)

Myrj 52. Myrj 52 is Atlas' trade name for a substance prepared by a reaction, under controlled conditions, between commercial stearic acid and ethylene oxide. The reaction is planned to add 40 mols of ethylene oxide to 1 mol of stearic acid. The reaction product is decolorized with steam and bleached with hydrogen peroxide at 100° C.

Myrj 52 is a hard, brittle, waxy solid melting in the range of 42° C. to 47° C. It contains approximately 86 percent of oxyethylene units. Upon saponification with alkali it yields approximately 15 percent of fatty acid and 86 percent of polyhydric residue containing 99 percent oxyethylene and having a hydroxyl value of about 70. The manufacturing specifications for Myrj 52 call for:

Acid number: Not over 2.
Hydroxyl number: 25-45, inclusive.
Saponification number: 25-35.
Water content: Not given.

Myrj 52 contains some free fatty acid. What becomes of the unreacted ethylene oxide that may remain after termination of the reaction with stearic acid is not clear. Small amounts of ethylene glycol or diethylene glycol may get into the product from this and possibly other sources. The stearic acid used carries some impurities into the Myrj 52, including unsaponifiable matter in the fat from which the stearic acid was prepared. Although the theoretical composition of Myrj 52 calls for 40 mols of ethylene oxide, examination of an actual sample of the product indicated about 36 mols. (R. 13851, 16098, 16100, 17150-17154)

Myrj 45. Myrj 45 is the trade name applied by the Atlas Powder Company to a substance somewhat similar to Myrj 52 but containing 8 mols of ethylene oxide to 1 mol of commercial stearic acid. (R. 13867)

Emulgent 45 and 52. Emulgent 45 and 52 are trade names applied by the General Emulsifier Corporation to substances prepared for them which should be about the same products as Myrj 45 and 52. (R. 13966-13968)

E-4CS. E-4CS is the trade designation applied by Process Chemicals Company to a substance prepared, under controlled conditions, by a reaction between polyethylene glycol 400-W and commercial stearic acid. The reaction is planned to give an end product consisting of a mono-stearate of the polyethylene glycol. The final products of reaction contain some uncombined reactants and impurities present in the starting materials. The testimony indicates the likelihood that the glycol used contains small quantities of ethylene glycol and diethylene glycol. The possibility that the glycol used may contain impurities consisting of products similar to aldehydes is suggested. (R. 9776-9809)

PEG 42. PEG 42 is the name applied by Glyco Products Company to a substance formed by a reaction of stearic acid with a polyethylene glycol or mixture of such glycols known by the trade name Carbowax 1500. A substance referred to as gray phosphoric acid was said to be used as a catalyst. Conditions

RULES AND REGULATIONS

PART 20—FROZEN DESSERTS; DEFINITIONS AND STANDARDS OF IDENTITY

- Sec. 20.1 Ice cream; Identity: label statement of optional ingredients.
- 20.2 Frozen custard, french ice cream, french custard ice cream; Identity: label statement of optional ingredients.
- 20.3 Ice milk; Identity: label statement of optional ingredients.
- 20.4 Fruit sherbet; Identity: label statement of optional ingredients.
- 20.5 Water ices; Identity: label statement of optional ingredients.

AUTHORITY: §§ 20.1 to 20.5 issued under sec. 701, 52 Stat. 1046; 21 U.S.C. 371. Interpret or apply sec. 401, 52 Stat. 1046, as amended; 21 U.S.C. 341.

§ 20.1 Ice cream; Identity: label statement of optional ingredients.

(a) Ice cream is the food prepared by freezing, while stirring, a pasteurized mix composed of one or more of the optional dairy ingredients specified in paragraph (c) of this section, sweetened with one or more of the optional sweetening ingredients specified in paragraph (d) of this section. One or more of the optional characterizing ingredients specified in paragraph (b) of this section and one or more of the optional ingredients specified in paragraphs (d) (8) to (10) may be used to characterize the ice cream. One or more of the optional caseinates specified in paragraph (e) and one or more of the optional ingredients specified in paragraph (f) of this section may be used, subject to the conditions hereinafter set forth. Coloring may be added. The mix may be seasoned with salt, and may be homogenized. The kind and quantity of optional dairy ingredients used, as specified in paragraph (c) of this section, and the content of milk fat and nonfat milk solids therein, are such that the weights of milk fat and total milk solids are not less than 10 percent and 20 percent, respectively, of the weight of the finished ice cream; but in no case shall the content of milk solids not fat be less than 6 percent, except that when one or more of the bulky optional ingredients as specified in paragraph (b) (8) to (10), inclusive, of this section, are used, the weights of milk fat and total milk solids (exclusive of such fat and solids in any

and regulations will have to be established. This record does not contain the needed information and will not support the establishment of regulations or exemptions. (See findings 76 and 78 of the proposed order (23 F.R. 1991).) Petitions have been filed for polyoxyethylene (20) sorbitan monooleate and polyoxyethylene (20) sorbitan triacetate and extensions of the March 6, 1960, effective date have been granted for polyoxyethylene (20) sorbitan monooleate and polyoxyethylene (20) sorbitan triacetate, in frozen desserts (other than water ices). 78. Mono- and diglycerides of fat-forming fatty acids are known to be present in small quantities in fats and oils used for food purposes; they are formed to some extent when some foods containing triglycerides are cooked; in metabolic tests, utilizing small test animals, mono- and diglycerides appear to be metabolized and furnish approximately the same energy as triglycerides; and in the process of the human metabolism of triglycerides, mono- and diglycerides are formed, to some extent at least, from triglycerides before absorption of the triglycerides occurs.

An experiment reported by one investigator, in which rats did not do well on a diet containing a preparation said to be high in monoglyceride, was not considered by him to give an accurate indication of the properties of the monoglyceride. That the preparation fed had become rancid before use and the effects noted were due to rancidity appears possible. From the data available on the subject at the present time, mono- and diglycerides of fat-forming fatty acids appear suitable for incorporation in foods containing substantial quantities of triglycerides. (R. 1264-1335, 1667-1668, 1783-1788, 1789, 1793-17918, 1793-1793, 18017-18020, 18026-18028, 18034-18037, 18063-18066; Ex. 239, 243, 248-255, 260-264, 346, 347, 360-361, 364.)

Conclusion. Upon consideration of the whole record and the foregoing findings of fact, it is concluded that it will promote honesty and fair dealing in the interest of consumers to fix and establish the definitions and standards of identity hereinafter set forth for the following foods: Ice cream, frozen custard, french ice cream, french custard ice cream; Ice milk; fruit sherbet; and water ices.

for controlling the reaction were not described. (R. 10795-10803) S 1169, S 1169, S 1169 and S 1193 are designations applied by Glyco Products Company to substances said to be formed by a reaction between polyethylene glycol 400-W and glyceryl trioleate. The term "glyceryl trioleate" was used to describe an oil such as cottonseed oil or corn oil. The reaction is said to be catalyzed by a small amount of potassium hydroxide. Conditions necessary to bring about a reaction between these products were not described nor was there a satisfactory explanation of what substances are present after the reaction is completed. (R. 10780, 10799, 10804-10808)

Dri Freeze. Dri Freeze is the trade name applied by the E. F. Drew Company to a substance said to be a monoester of 400 polyoxyethylene glycol and stearic acid. The glycol and stearic acid, in definite proportions, are said to be heated together under vacuum to cause a reaction between them to take place. No description of the method for removing any impurities was given. Presumably this substance is similar to Myrj 45 in composition, if the reaction takes place as planned. (R. 11079-11080)

Analytical methods for the determination of polyhydric-alcohol emulsifiers in frozen desserts are not furnished.

77. The complex chemistry of the polyhydric-alcohol type of surface-active agents, their method of manufacture, the presence of impurities, and their relationship to substances known to be toxic all combine to draw into question the safety of these materials for use in foods so widely consumed in substantial quantities as are these frozen desserts. The voluminous record establishes that the polyhydric-alcohol type of surface-active agents are substances that are not generally recognized, among experts qualified by scientific training and experience to evaluate their safety, as having been adequately shown through scientific procedures or through experience based on common use in food to be safe for their intended use. They are "food additives" within the meaning of the food additives amendment of 1958. Before they can be used lawfully in frozen desserts, petitions must be filed to supply information required by section 409 of this amendment,

malted milk used) are not less than 10 percent and 20 percent, respectively, of the remainder obtained by subtracting the weight of such optional ingredients, modified as prescribed below, from the weight of the finished ice cream; but in no case is the weight of milk fat or total milk solids less than 8 percent and 16 percent, respectively, of the weight of the finished ice cream. The optional caseinates specified in paragraph (e) of this section are not deemed to be milk solids. In calculating the reduction of milk fat and total milk solids from the use of bulky optional ingredients, chocolate and cocoa solids used shall be considered the bulky ingredients of paragraph (b) (8) of this section. In order to make allowance for additional sweetening ingredients needed when bulky ingredients are used, the weight of chocolate or cocoa solids may be multiplied by 1.5; the weight of fruit or nuts used may be multiplied by 1.4; and the weight of partially or wholly dried fruits or fruit juices may be multiplied by appropriate factors to obtain the original weights before drying and this weight multiplied by 1.4. The finished ice cream contains not less than 1.6 pounds of total solids to the gallon and weighs not less than 4.5 pounds to the gallon. Any artificial flavoring in any chocolate, cocoa, confectionery, or other ingredient used is an optional ingredient of the finished ice cream.

(b) The optional characterizing ingredients referred to in paragraph (a) of this section are:

(1) Ground spice, ground vanilla beans, infusion of coffee or tea, or any natural food flavoring.

(2) Any artificial food flavoring.

(3) Chocolate or cocoa, which may be added as such or as a suspension in sirup, and which may contain disodium phosphate or sodium citrate in such quantity that the finished ice cream contains not more than 0.2 percent by weight of disodium phosphate or sodium citrate. For the purposes of this section, the term "cocoa" means one or any combination of two or more of the following: Cocoa, breakfast cocoa, low-fat cocoa, and the unpulverized residual material prepared by removing part of the fat from ground cacao nibs.

(4) Mature fruit or the juice of mature fruit, either of which may be fresh, frozen, canned, concentrated, or partially or wholly dried. The fruit may be

Wednesday, July 27, 1960

FEDERAL REGISTER

7159

whole, shredded, or comminuted; it may be sweetened, thickened with pectin or with one or more of the ingredients named in paragraph (1) (2) of this section, subject to the restriction on the total quantity of such substances in ice cream prescribed in that paragraph, and it may be acidulated with citric or ascorbic acid. The fruit is prepared by the removal of pits, seeds, skins, and cores, where such removal is usual in preparing that kind of fruit for consumption as fresh fruit. In the case of fruit or fruit juice from which part of the water is removed, the substances contributing flavor volatilized during water removal may be condensed and reincorporated in the concentrated fruit or fruit juice. In the case of the citrus fruits the whole fruit, including the peel but excluding the seeds, may be used, and in the case of citrus juice or concentrated citrus juice, cold-pressed citrus oil may be added in an amount not exceeding that which would have been obtained if the peel from the whole fruit had been used. For the purposes of this section, the flesh of the coconut shall be considered a fruit.

(5) Nut meats, which may be roasted, cooked in an edible fat or oil, or preserved in sirup, and which may be salted.

(6) Malted milk.

(7) Confectionery. For the purposes of this section, the term "confectionery" means candy, cakes, cookies, and glacé fruits.

(8) Properly prepared and cooked cereal.

(9) Any distilled alcoholic beverage, including liqueurs, or any wine, or mixtures of two or more of these.

be evaporated from the mix. The sweet cream buttermilk and the concentrated sweet cream buttermilk or dried sweet cream buttermilk, when adjusted with water to a total solids content of 8.5 percent, has a titratable acidity of not more than 0.17 percent, calculated as lactic acid. The term "milk" as used in this section means cow's milk.

(d) The optional sweetening ingredients referred to in paragraph (a) of this section are:

- (1) Sugar (sucrose) or sugar sirup.
- (2) Dextrose.
- (3) Invert sugar (in paste or sirup form).
- (4) Corn sirup, dried corn sirup, glucose sirup, dried glucose sirup.
- (5) Maple sirup, maple sugar.
- (6) Honey.
- (7) Brown sugar.
- (8) Malt sirup, maltose sirup, malt extract.
- (9) Dried malt sirup, dried maltose sirup, dried malt extract.
- (10) Refiner's sirup.
- (11) Molasses (other than blackstrap).
- (12) Lactose.

(e) The optional caseinates referred to in paragraph (a) of this section which may be added to ice cream mix containing not less than 20 percent total milk solids are: Casein prepared by precipitation with gums, ammonium caseinate, calcium caseinate, potassium caseinate, and sodium caseinate. Caseinates may be added in liquid or dry form, but must be free of excess alkali.

(f) Other optional ingredients referred to in paragraph (a) of this section are:

- (1) Liquid eggs, frozen eggs, dried eggs, egg yolks, frozen egg yolks, and dried egg yolks. Any egg ingredient used is added to the mix before it is pasteurized. The total weight of egg yolk solids in the finished ice cream from one or a combination of two or more such ingredients is less than the minimum prescribed for frozen custard by § 20.2 of this chapter (1.4 percent).
- (2) Agar-agar, algin (sodium alginate), calcium sulfate, gelatin, gum acacia, guar seed gum, gum karaya, locust bean gum, oat gum, gum tragacanth, Irish moss, extract of Irish moss, lecithin, psyllium seed husk, sodium carboxymethylcellulose. The total weight of the solids of any such ingredi-

ent used singly or of any combination of two or more such ingredients used (including any such ingredient and pectin added separately to the fruit ingredient) is not more than 0.5 percent of the weight of the finished ice cream. Such ingredients may be added in admixture with ingredients.

(3) Monoglycerides or diglycerides or both from the glycerolysis of edible fats. The total weight of such ingredient is not more than 0.2 percent of the weight of the finished ice cream.

(g) (1) The name of the food is "ice cream." All statements permitted or required by this section relating to principal characterizing ingredient shall appear in written or printed words of equal size and prominence as those used for the name of the food, and shall appear on the label so as to be easily read by the consumer under customary conditions of purchase.

(2) When only natural flavoring is used as the sole principal characterizing ingredient, the label shall bear, as the characterizing ingredient statement, the common or usual name of the natural flavor: e.g., "vanilla ice cream, or vanilla-flavored ice cream."

(3) When any artificial flavoring is used as the sole principal characterizing ingredient in ice cream, the label shall bear, as the characterizing ingredient statement, "artificially flavored _____," the blank being filled in with the common or usual name of the flavor simulated; e.g., "artificially flavored vanilla."

(4) When both natural and artificial flavorings are used as the principal characterizing ingredients and the natural flavor ingredient constitutes the predominant flavor of any one of the principle flavoring ingredients, the label shall bear as the characterizing ingredient statement for that ingredient the common or usual name of the natural flavoring together with the statement "and artificial _____" or "and artificial _____ flavor," the blank being filled in with the common or usual name of the flavor simulated; e.g., "vanilla and artificial vanilla flavor." Where the artificial flavoring constitutes the predominant flavor of any one of the principal flavoring ingredients, the label shall bear as the sole characterizing statement for that ingredient, "artificial _____ flavor," the blank being filled in with

the common or usual name of the flavor simulated; e.g., "artificial vanilla flavor."

(5) Whenever a characterizing ingredient is used with an artificial flavor which does not simulate the principal flavor, the label shall include the statement "artificial flavor added" or "artificial _____ flavor added," the blank being filled in with the common or usual name of the flavor simulated; e.g., "chocolate; artificial flavoring added," "chocolate, artificial vanilla flavor added."

§ 20.2 Frozen custard, french ice cream, french custard ice cream; identity; label statement of optional ingredients.

Frozen custard, french ice cream, french custard ice cream conforms to the definition and standard of identity, and is subject to the requirements for label statement of optional ingredients, prescribed for ice cream by § 20.1, except that one or more of the optional egg ingredients permitted by § 20.1(f) (1) are used in such quantity that the total weight of egg yolk solids therein is not less than 1.4 percent of the weight of the finished frozen custard: *Provided, However*, That when the ingredients named in § 20.1(b) (3) through (8), inclusive, are used the content of egg yolk solids may be reduced in proportion to the bulky ingredient or ingredients added, under the conditions prescribed by § 20.1(a) for reduction in milk fat and total milk solids; but in no case is the content of egg yolk solids less than 1.12 percent.

§ 20.3 Ice milk; identity; label statement of optional ingredients.

Ice milk is the food prepared from the same ingredients and in the same manner prescribed in § 20.1 for ice cream and complies with all the provisions of § 20.1 (including the requirements for label statement of optional ingredients), except that:

- (a) Its content of milk fat is more than 2 percent but not more than 7 percent.
- (b) Its content of total milk solids is not less than 11 percent.
- (c) Caseinates may be added when the content of total milk solids is not less than 11 percent.
- (d) The provision for reduction in milk fat and total milk solids from the addition of bulky ingredients in § 20.1(a) does not apply.

RULES AND REGULATIONS

- (e) The quantity of food solids per gallon is not less than 1.3 pounds.
- (f) When any artificial coloring is used in ice milk, directly or as a component of any other ingredient, the label shall bear the statement "artificially colored," "artificial coloring added," "with added artificial color," or "-----, an artificial color added," the blank being filled in with the common or usual name of the artificial color; or in lieu thereof, in case the artificial color is a component of another ingredient, "----- artificially colored."
- (g) The name of the food is "ice milk."
- (h) If both artificial color and artificial flavorings are used, the label statements may be combined.
- § 20.4 Fruit sherbets: Identity; label statement of optional ingredients.**
- (a) Fruit sherbets are the foods each of which is prepared by freezing, while stirring, a mix composed of one or more of the optional characterizing fruit ingredients specified in paragraph (b) of this section and one or more of the optional dairy ingredients specified in paragraph (c) of this section, sweetened with one or more of the optional sweetening ingredients specified in paragraph (d) of this section. One or more of the optional ingredients specified in paragraph (e) of this section may be used, subject to the conditions hereinafter set forth. The mix of combined dairy ingredients, with or without other ingredients, is pasteurized. The titratable acidity of the finished fruit sherbet, calculated as lactic acid, is not less than 0.35 percent. Coloring may be added. The mix with or without added water may be seasoned with salt, and may be homogenized. The optional dairy ingredients used and the content of milk fat and nonfat milk solids therein are such that the weight of milk fat is not less than 1 percent and not more than 2 percent, and the weight of total milk solids is not less than 2 percent and not more than 5 percent of the weight of the finished fruit sherbet. The optional caseinates specified in paragraph (e) (3) of this section are not deemed to be milk solids. The finished fruit sherbet weighs not less than 6 pounds to the gallon.
- (b) The optional fruit characterizing ingredients referred to in paragraph (a) of this section are any mature fruit or the juice of any mature fruit. The fruit or fruit juice used may be fresh, frozen, canned, concentrated, or partially or wholly dried. The fruit may be thickened with pectin or other of the optional ingredients named in paragraph (e) (3) of this section, subject to the restriction on the total quantity of such substances in fruit sherbets prescribed in that paragraph. The fruit is prepared by the removal of pits, seeds, skins, and cores, where such removal is usual in preparing that kind of fruit for consumption as fresh fruit. The fruit may be screened, crushed, or otherwise comminuted. It may be acidulated with citric or ascorbic acid. In the case of concentrated fruit or fruit juices, from which part of the water is removed, substances contributing flavor volatilized during water removal may be condensed and reimporporated in the concentrated fruit or fruit juice. In the case of citrus fruits, the whole fruit, including the peel but excluding the seeds, may be used, and in the case of citrus juice or concentrated citrus juices, cold-pressed citrus oil may be added thereto in an amount not exceeding that which would have been obtained if the whole fruit had been used. The quantity of fruit ingredients used is such that, in relation to the weight of the finished sherbet, the weight of fruit or fruit juice, as the case may be (including water necessary to reconstitute partially or wholly dried fruits or fruit juices to their original moisture content), is not less than 2 percent in the case of citrus sherbets, 6 percent in the case of berry sherbets, and 10 percent in the case of sherbets prepared with other fruits. For the purposes of this section, tomatoes and rhubarb are considered as kinds of fruit.
- (c) The optional dairy ingredients referred to in paragraph (a) of this section are: Cream, dried cream, plastic cream (sometimes known as concentrated milk fat), butter, butter oil, milk, concentrated condensed milk, sweetened condensed milk, dried milk, skim milk, concentrated skim milk, evaporated skim milk, condensed skim milk, superheated condensed skim milk, sweetened condensed skim milk, sweetened condensed skim milk, nonfat dry milk, sweet cream buttermilk, condensed sweet cream buttermilk, dried sweet cream buttermilk, skim milk that has been con-
- centrated and from which part of the lactose has been removed after crystallization, cheese whey, concentrated cheese whey, dried cheese whey. Water may be added. The sweet cream buttermilk, concentrated sweet cream buttermilk, or dried sweet cream buttermilk, adjusted with water to a total solids content of 8.5 percent in each case, has a titratable acidity of not more than 0.17 percent, calculated as lactic acid. The term "milk" as used in this section means cow's milk.
- (d) The optional sweetening ingredients referred to in paragraph (a) of this section are: Sugar (sucrose), dextrose, invert sugar (paste or sirup), glucose sirup, dried glucose sirup, corn sirup, dried corn sirup, malt sirup, malt extract, dried malt sirup, dried malt extract, maltose sirup, dried maltose sirup.
- (e) Other optional ingredients referred to in paragraph (a) of this section are:
- (1) Liquid eggs, frozen eggs, dried eggs, egg yolks, frozen yolks, dried yolks; but the weight of egg yolk solids therein is less than $\frac{1}{4}$ of 1 percent of the weight of the finished fruit sherbet.
 - (2) Agar-agar, algin (sodium alginate), calcium sulfate, egg white, gelatin, gum acacia, guar seed gum, gum karaya, locust bean gum, oat gum, gum tragacanth, Irish moss, extract of Irish moss, lecithin, pectin, pectinylum seed husk, sodium carboxymethylcellulose. The total weight of the solids of any such ingredient used singly or of any combination of two or more such ingredients used (including any such ingredient added separately to the fruit ingredient) is not more than 0.5 percent of the weight of the finished fruit sherbet. Such ingredients may be added in admixture with dextrin.
 - (3) Monoglycerides or diglycerides or both from the glycerolysis of edible fats. The total weight of such ingredient is not more than 0.3 percent of the weight of the finished fruit sherbet.
 - (4) Citric acid, tartaric acid, malic acid, lactic acid, ascorbic acid, or any combination of two or more of these in such quantity as seasons the finished food.
 - (5) Casein prepared by precipitation with gums, ammonium caseinate, calcium caseinate, potassium caseinate, sodium caseinate.
 - (6) Any natural food flavoring.
- (7) Any artificial flavoring.
- (f) The name of each such fruit sherbet is "----- sherbet," the blank being filled in with the common name of the fruit or fruits from which the fruit ingredients used are obtained. When the names of two or more fruits are included, such names shall be arranged in order of predominance, if any, by weight of the respective fruit ingredients used.
- (g) (1) When the optional ingredients artificial coloring, artificial flavoring, or natural flavoring are used in fruit sherbet they shall be named on the labels as follows:
- (i) The label shall designate artificial coloring by the statement "artificially colored," "artificial coloring added," "with added artificial coloring," or "----- an artificial color added," the blank being filled in with the name of the artificial coloring used.
 - (ii) The label shall designate artificial flavoring by the statement "artificially flavored," "artificial flavoring added," "with added artificial flavoring," or "----- an artificial flavor added," the blank being filled in with the name of the artificial flavoring used.
 - (iii) The label shall designate natural flavoring by the statement "flavoring added," "with added flavoring," or "----- flavoring added," the blank being filled in with the name of the flavoring used.
 - (iv) Whenever artificial flavoring is not added as such but as a component of some other ingredient, the label shall include the statement "----- artificially flavored," the blank being filled in with the name of such other ingredient.
- Label statements may be combined, as for example, "with added flavoring and artificial coloring."
- (2) When cheese whey, concentrated cheese whey, or dried cheese whey is used in fruit sherbet the label shall bear the statement "----- added," or "with added -----," the blank being filled in with the appropriate name "whey," "concentrated whey," or "dried whey."
- (h) Where one or more of the optional ingredients artificial coloring, artificial flavoring, or natural flavoring are used and there appears on the label any representation as to the fruit or fruits in the sherbet, such representation shall be immediately and conspicuously accompanied by appropriate label statements

Wednesday, July 27, 1960

FEDERAL REGISTER

7141

as prescribed in paragraph (g)(1) of this section, showing the optional ingredients used.

(1) Wherever the name of the food appears on the label so conspicuously as to be easily seen under customary conditions of purchase the statements specified in this section, showing the optional ingredients used, shall immediately and conspicuously precede or follow such name without intervening written, printed, or graphic matter.

§ 20.5 Water ices; identity; label statement of optional ingredients.

(a) Water ices are the foods, each of which is prepared by freezing, while stirring, a mix composed of one or more of the optional characterizing fruit ingredients specified in paragraph (b) of this section, sweetened with one or more of the optional sweetening ingredients specified in paragraph (c) of this section. One or more of the optional ingredients specified in paragraph (d) of this section may be used, subject to the conditions hereinafter set forth. The titratable acidity of the finished water ice, calculated as lactic acid, is not less than 0.36 percent. Coloring may be added. The mix, with or without added water, may be seasoned with salt, and may be homogenized. The finished water ice weighs not less than 6 pounds to the gallon.

(b) The optional fruit ingredients referred to in paragraph (a) of this section are any mature fruit or the juice of any mature fruit. The fruit or fruit juice used may be fresh, frozen, canned, concentrated, or partially or wholly dried. The fruit may be thickened with pectin or other of the optional ingredients named in paragraph (d)(1) of this section.

tion subject to the restriction on the total quantity of such substances in water ices prescribed in that paragraph. The fruit is prepared by the removal of pits, seeds, skins, and cores where such removal is usual in preparing that kind of fruit for consumption as fresh fruit. The fruit may be screened, crushed, or otherwise comminuted. It may be adulterated with citric or ascorbic acid. In the case of fruit or fruit juices from which part of the water is removed, substances contributing flavor volatilized during water removal may be condensed and reincorporated in the concentrated fruit or fruit juice. In the case of citrus fruits, the whole fruit, including the peel but excluding the seeds, may be used, and in the case of citrus juice or concentrated citrus juices, cold-pressed citrus oil may be added thereto in an amount not exceeding that which would have been obtained if the whole fruit had been used. The quantity of fruit ingredients used is such that in relation to the weight of the finished water ice, the weight of fruit or fruit juice as the case may be (including water necessary to reconstitute partially or wholly dried fruits or fruit juices to their original moisture content) is not less than 3 percent in the case of citrus ices, 6 percent in the case of berry ices, and 10 percent in the case of ices prepared with other fruits.

(c) The optional sweetening ingredients referred to in paragraph (a) of this section are: Sugar (sucrose), dextrose, invert sugar (paste or syrup), glucose syrup, dried glucose syrup, corn sirup, dried corn sirup, malt sirup, malt extract, dried malt sirup, dried malt extract, maltose sirup, dried maltose sirup.

(d) Other optional ingredients referred to in paragraph (a) of this section are:

(1) Agar-agar, algin (sodium alginate), egg white, gelatin, gum acacia, guar seed gum, gum karaya, locust bean gum, oat gum, gum tragacanth, Irish moss, extract of Irish moss, pectin, pectin seed husk, sodium carboxymethylcellulose. The total weight of the solids of any such ingredient used singly, or of any combination of two or more such ingredients used (including any such ingredient added separately to the fruit ingredient), is not more than 0.5 percent of the weight of the finished water ice. Such ingredients may be added in admixture with dextrin.

(2) Citric acid, tartaric acid, malic acid, lactic acid, ascorbic acid, or any combination of two or more of these in such quantity as seasons the finished food.

(3) Any natural flavoring.

(4) Any artificial flavoring.

(5) "Ice," the blank being filled in with the common name of the fruit or fruits from which the fruit ingredient used is obtained. When the names of two or more fruits are included, such names shall appear in the order of predominance, if any, by weight of the respective fruit ingredients used.

(6) When the optional ingredients artificial coloring, artificial flavoring, or natural flavoring are used in water ices they shall be named on the labels as follows:

(1) The label shall designate artificial coloring by the statement "artificially colored," "artificial coloring added," "with added artificial coloring," or "----- an artificial color added," the blank being filled in with the name of the artificial coloring used.

(2) The label shall designate artificial flavoring by the statement "artificially

flavored," "artificial flavoring added," "with added artificial flavoring," or "----- an artificial flavor added," the blank being filled in with the name of the artificial flavoring used.

(3) The label shall designate natural flavoring by the statement "flavoring added," "with added flavoring," or "----- flavoring added," the blank being filled in with the name of the flavoring used.

Label statements may be combined, as for example, "flavoring and artificial coloring added."

(g) Where one or more of the optional ingredients artificial coloring, artificial flavoring, or natural flavoring are used and there appears on the labeling any representation as to the fruit or fruits in the ice, such representation shall be immediately and conspicuously accompanied by appropriate label statements as prescribed in paragraph (f) of this section, showing the optional ingredients used.

(h) Wherever the name of the food appears on the label so conspicuously as to be easily seen under customary conditions of purchase, the statements set out in this section, showing the optional ingredients used, shall immediately and conspicuously precede or follow such name, without intervening written, printed, or graphic matter.

Effective date. This order shall become effective 90 days from the date of its publication in the Federal Register.

Dated: July 19, 1960.

[SEAL]

Geo. P. LARICK,

Commissioner of Food and Drugs.

[F.R. Doc. 60-6879; Filed, July 28, 1960; 8:45 a.m.]

7014 1200 0000 9951 0739

U.S. Postal Service™	
CERTIFIED MAIL™ RECEIPT	
(Domestic Mail Only; No Insurance Coverage Provided)	
For delivery information visit our website at www.usps.com	
OFFICIAL USE	
Postage	\$ 2.24
Certified Fee	3.30
Return Receipt Fee (Endorsement Required)	2.70
Restricted Delivery Fee (Endorsement Required)	8.24
Total Postage & Fees	\$
Sent To	Tracey Massey
Street, or PO	President
City, State	Mars Chocolate North America, LLC
PS Form	800 High Street
	Hackettstown, NJ 07840

7014 1200 0000 9951 0753

U.S. Postal Service™	
CERTIFIED MAIL™ RECEIPT	
(Domestic Mail Only; No Insurance Coverage Provided)	
For delivery information visit our website at www.usps.com	
OFFICIAL USE	
Postage	\$ 2.24
Certified Fee	3.30
Return Receipt Fee (Endorsement Required)	2.70
Restricted Delivery Fee (Endorsement Required)	8.24
Total Postage & Fees	\$
Sent To	John Donofrio
Street, or PO	Vice President, Secretary, and General Counsel
City, State	Mars, Incorporated
PS Form	6885 Elm Street
	McLean, VA 22101

7014 1200 0000 9951 0760

U.S. Postal Service™	
CERTIFIED MAIL™ RECEIPT	
(Domestic Mail Only; No Insurance Coverage Provided)	
For delivery information visit our website at www.usps.com	
OFFICIAL USE	
Postage	\$ 2.24
Certified Fee	3.30
Return Receipt Fee (Endorsement Required)	2.70
Restricted Delivery Fee (Endorsement Required)	8.24
Total Postage & Fees	\$
Sent To	John Donofrio
Street, or PO	Vice President, Secretary, General Counsel
City, State	Mars, Incorporated
PS Form	c/o CT Corporation
	818 West Seventh Street, 2nd Floor
	Los Angeles, CA 90017

7014 1200 0000 9951 0746

U.S. Postal Service™	
CERTIFIED MAIL™ RECEIPT	
(Domestic Mail Only; No Insurance Coverage Provided)	
For delivery information visit our website at www.usps.com	
OFFICIAL USE	
Postage	\$ 2.24
Certified Fee	3.30
Return Receipt Fee (Endorsement Required)	2.70
Restricted Delivery Fee (Endorsement Required)	8.24
Total Postage & Fees	\$
Sent To	Tracey Massey, President
Street, or PO	Mars Chocolate North America, LLC
City, State	c/o CT Corporation System
PS Form	818 West Seventh Street, 2nd Floor
	Los Angeles, CA 90017

USPS FOURTH AVE STATION
 PITTSBURGH, Pennsylvania
 152222006
 4166050071-0096
 04/29/2015 (800)275-8777 03:35:50 PM

Sales Receipt		
Product Description	Sale Unit Qty Price	Final Price
HACKETTSTOWN NJ 07840-1552 Zone-4		\$2.24
First-Class Mail Large Env 6.50 oz.		
Expected Delivery: Sat 05/02/15		
Return Rcpt (Green Card)		\$2.70
00 Certified		\$3.30
USPS Certified Mail #: 70141200000099510739		
Customer Postage		-\$8.24
Subtotal:		\$0.00
LOS ANGELES CA 90017-3407 Zone-8		\$2.24
First-Class Mail Large Env 6.60 oz.		
Expected Delivery: Sat 05/02/15		
Return Rcpt (Green Card)		\$2.70
00 Certified		\$3.30
USPS Certified Mail #: 70141200000099510746		
Customer Postage		-\$8.24
Subtotal:		\$0.00
MC LEAN VA 22101-6031 Zone-3		\$2.24
First-Class Mail Large Env 6.50 oz.		
Expected Delivery: Fri 05/01/15		
Return Rcpt (Green Card)		\$2.70
00 Certified		\$3.30
USPS Certified Mail #: 70141200000099510753		
Customer Postage		-\$8.24
Subtotal:		\$0.00
LOS ANGELES CA 90017-3407 Zone-8		\$2.24
First-Class Mail Large Env 6.50 oz.		
Expected Delivery: Sat 05/02/15		
Return Rcpt (Green Card)		\$2.70
00 Certified		\$3.30
USPS Certified Mail #: 70141200000099510760		
Customer Postage		-\$8.24
Subtotal:		\$0.00
Total:		\$0.00

Paid by:

00 For tracking or inquiries go to
 USPS.com or call 1-800-222-1811.

Order stamps at usps.com/shop or
 call 1-800-Stamp24. Go to
 usps.com/clicknship to print
 shipping labels with postage. For
 other information call
 1-800-ASK-USPS.

 Get your mail when and where you
 want it with a secure Post Office
 Box. Sign up for a box online at
 usps.com/poboxes.

Bill#:1000404146705
Clerk:15

All sales final on stamps and postage
Refunds for guaranteed services only
Thank you for your business

HELP US SERVE YOU BETTER

TELL US ABOUT YOUR RECENT
POSTAL EXPERIENCE

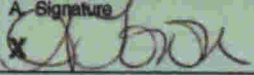

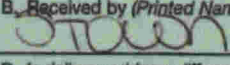
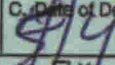
Go to:
<https://postalexperience.com/Pos>

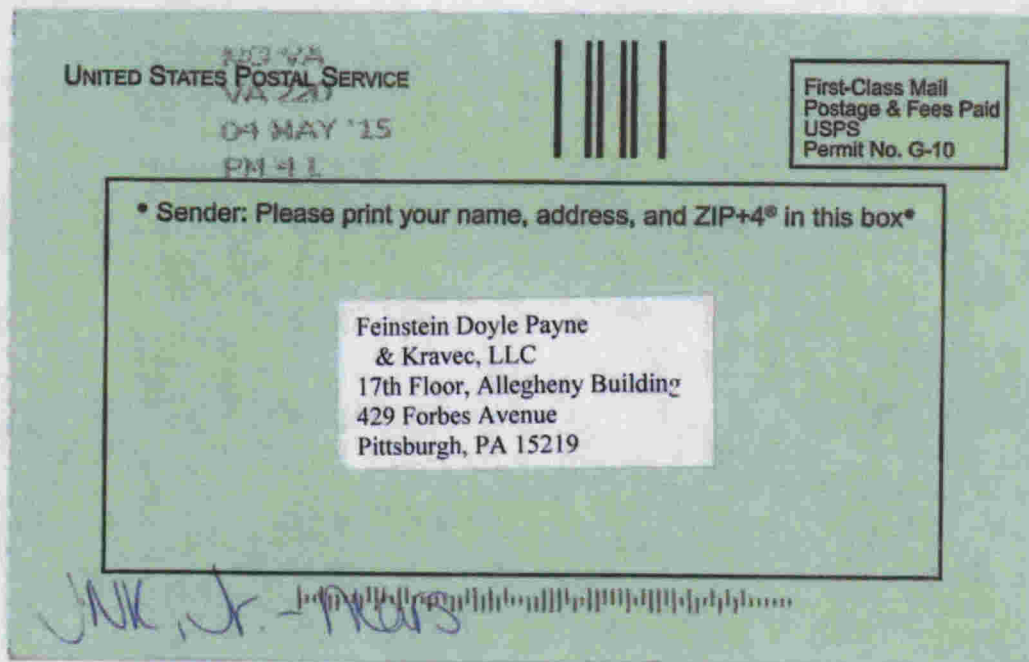
Or scan this code with your mobile
device.



YOUR OPINION COUNTS

Customer Copy

SENDER: COMPLETE THIS SECTION		COMPLETE THIS SECTION ON DELIVERY	
<ul style="list-style-type: none"> ■ Complete Items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired. ■ Print your name and address on the reverse so that we can return the card to you. ■ Attach this card to the back of the mailpiece, or on the front if space permits. 		<p>A. Signature  <input type="checkbox"/> Agent <input type="checkbox"/> Addressee</p>	
<p>1. Article Addressed to:</p> <p> President, Secretary, and General Counsel Mars, Incorporated 6885 Elm Street McLean, VA 22101</p>		<p>B. Received by (Printed Name) </p>	<p>C. Date of Delivery </p>
		<p>D. Is delivery address different from item 1? <input type="checkbox"/> Yes <input type="checkbox"/> No If YES, enter delivery address below:</p>	
		<p>Service Type</p> <p><input type="checkbox"/> Certified Mail® <input type="checkbox"/> Priority Mail Express™ <input type="checkbox"/> Registered <input type="checkbox"/> Return Receipt for Merchandise <input type="checkbox"/> Insured Mail <input type="checkbox"/> Collect on Delivery</p>	
		<p>4. Restricted Delivery? (Extra Fee) <input type="checkbox"/> Yes</p>	
<p>2. Article Number (Transfer from)</p> <p>17014 1200 0000 9951 0753</p>			
PS Form 3811, July 2013		Domestic Return Receipt	



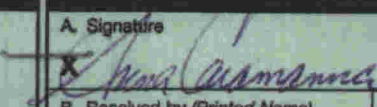
SENDER: COMPLETE THIS SECTION		COMPLETE THIS SECTION ON DELIVERY	
<ul style="list-style-type: none"> ■ Complete Items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired. ■ Print your name and address on the reverse so that we can return the card to you. ■ Attach this card to the back of the mailpiece, or on the front if space permits. 		A. Signature  <input type="checkbox"/> Agent <input type="checkbox"/> Addressee	
1. Article Addressed to: <div style="border: 1px solid black; padding: 5px; margin: 5px;"> Tracey Massey President Mars Chocolate North America, LLC 800 High Street Hackettstown, NJ 07840 </div>		B. Received by (Printed Name)	C. Date of Delivery 8/5
		D. Is delivery address different from Item 1? <input type="checkbox"/> Yes If YES, enter delivery address below: <input type="checkbox"/> No	
		3. Service Type <input type="checkbox"/> Certified Mail® <input type="checkbox"/> Priority Mail Express™ <input type="checkbox"/> Registered <input type="checkbox"/> Return Receipt for Merchandise <input type="checkbox"/> Insured Mail <input type="checkbox"/> Collect on Delivery	
		4. Restricted Delivery? (Extra Fee) <input type="checkbox"/> Yes	
2. Article Number (Transfer from service)		7014 1200 0000 9951 0739	
PS Form 3811, July 2013		Domestic Return Receipt	

EXHIBIT B

SUMMONS (CITACION JUDICIAL)

FOR COURT USE ONLY
(SOLO PARA USO DE LA CORTE)

NOTICE TO DEFENDANT: (AVISO AL DEMANDADO):

MARS, INCORPORATED and MARS CHOCOLATE NORTH AMERICA, LLC,

YOU ARE BEING SUED BY PLAINTIFF: (LO ESTÁ DEMANDANDO EL DEMANDANTE):

LINDA CHESLOW and MIKE XAVIER, on behalf of themselves and all others similarly situated,

NOTICE! You have been sued. The court may decide against you without your being heard unless you respond within 30 days. Read the information below.

You have 30 CALENDAR DAYS after this summons and legal papers are served on you to file a written response at this court and have a copy served on the plaintiff. A letter or phone call will not protect you. Your written response must be in proper legal form if you want the court to hear your case. There may be a court form that you can use for your response. You can find these court forms and more information at the California Courts Online Self-Help Center (www.courtinfo.ca.gov/selfhelp), your county law library, or the courthouse nearest you. If you cannot pay the filing fee, ask the court clerk for a fee waiver form. If you do not file your response on time, you may lose the case by default, and your wages, money, and property may be taken without further warning from the court.

There are other legal requirements. You may want to call an attorney right away. If you do not know an attorney, you may want to call an attorney referral service. If you cannot afford an attorney, you may be eligible for free legal services from a nonprofit legal services program. You can locate these nonprofit groups at the California Legal Services Web site (www.lawhelpcalifornia.org), the California Courts Online Self-Help Center (www.courtinfo.ca.gov/selfhelp), or by contacting your local court or county bar association. **NOTE:** The court has a statutory lien for waived fees and costs on any settlement or arbitration award of \$10,000 or more in a civil case. The court's lien must be paid before the court will dismiss the case. **AVISO!** Lo han demandado. Si no responde dentro de 30 días, la corte puede decidir en su contra sin escuchar su versión. Lea la información a continuación.

Tiene 30 DÍAS DE CALENDARIO después de que le entreguen esta citación y papeles legales para presentar una respuesta por escrito en esta corte y hacer que se entregue una copia al demandante. Una carta o una llamada telefónica no lo protegen. Su respuesta por escrito tiene que estar en formato legal correcto si desea que procesen su caso en la corte. Es posible que haya un formulario que usted pueda usar para su respuesta. Puede encontrar estos formularios de la corte y más información en el Centro de Ayuda de las Cortes de California (www.sucorte.ca.gov), en la biblioteca de leyes de su condado o en la corte que le quede más cerca. Si no puede pagar la cuota de presentación, pida al secretario de la corte que le dé un formulario de exención de pago de cuotas. Si no presenta su respuesta a tiempo, puede perder el caso por incumplimiento y la corte le podrá quitar su sueldo, dinero y bienes sin más advertencia.

Hay otros requisitos legales. Es recomendable que llame a un abogado inmediatamente. Si no conoce a un abogado, puede llamar a un servicio de remisión a abogados. Si no puede pagar a un abogado, es posible que cumpla con los requisitos para obtener servicios legales gratuitos de un programa de servicios legales sin fines de lucro. Puede encontrar estos grupos sin fines de lucro en el sitio web de California Legal Services, (www.lawhelpcalifornia.org), en el Centro de Ayuda de las Cortes de California, (www.sucorte.ca.gov) o poniéndose en contacto con la corte o el colegio de abogados locales. **AVISO:** Por ley, la corte tiene derecho a reclamar las cuotas y los costos exentos por imponer un gravamen sobre cualquier recuperación de \$10,000 ó más de valor recibida mediante un acuerdo o una concesión de arbitraje en un caso de derecho civil. Tiene que pagar el gravamen de la corte antes de que la corte pueda desechar el caso.

The name and address of the court is:
(El nombre y dirección de la corte es): Superior Court of California;
County of San Francisco; 400 McAllister Street;
San Francisco, CA 94102

CASE NUMBER:
(Número del Caso):

CGC-15-547631

The name, address, and telephone number of plaintiff's attorney, or plaintiff without an attorney, is:
(El nombre, la dirección y el número de teléfono del abogado del demandante, o del demandante que no tiene abogado, es):
Rosemary M. Rivas; One California Street, Suite 900, San Francisco, CA 94111; (415) 398-8700

DATE:
(Fecha) AUG 26 2015

CLERK OF THE COURT
Clerk, by
(Secretario)

DENNIS TOYAMA , Deputy
(Adjunto)

(For proof of service of this summons, use Proof of Service of Summons (form POS-010).)

(Para prueba de entrega de esta citación use el formulario Proof of Service of Summons, (POS-010)).

[SEAL]

NOTICE TO THE PERSON SERVED: You are served

1. ☐ as an individual defendant.
2. ☐ as the person sued under the fictitious name of (specify):
3. ☒ on behalf of (specify): **MARS, INCORPORATED**
under: ☒ CCP 416.10 (corporation) ☐ CCP 416.60 (minor)
☐ CCP 416.20 (defunct corporation) ☐ CCP 416.70 (conservatee)
☐ CCP 416.40 (association or partnership) ☐ CCP 416.90 (authorized person)
☐ other (specify):
4. ☒ by personal delivery on (date): **8-28-15**

SUMMONS

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address): Rosemary M. Rivas (State Bar No. 209147) Finkelstein Thompson LLP One California Street, Suite 900 San Francisco, CA 94111 TELEPHONE NO.: (415) 398-8700 FAX NO.: (415) 398-8704 ATTORNEY FOR (Name): Plaintiffs LINDA CHESLAW and MIKE XAVIER		FOR COURT USE ONLY ENDORSED FILED San Francisco County Superior Court AUG 26 2015 CLERK OF THE COURT BY: DENNIS TOYAMA Deputy Clerk	
SUPERIOR COURT OF CALIFORNIA, COUNTY OF San Francisco STREET ADDRESS: 400 McAllister Street MAILING ADDRESS: 400 McAllister Street CITY AND ZIP CODE: San Francisco, CA 94102 BRANCH NAME: Civic Center		CASE NAME: LINDA CHESLAW, et al. v. MARS, INCORPORATED, et al.	
CIVIL CASE COVER SHEET <input checked="" type="checkbox"/> Unlimited (Amount demanded exceeds \$25,000)		<input type="checkbox"/> Limited (Amount demanded is \$25,000 or less)	
<input type="checkbox"/> Complex Case Designation <input type="checkbox"/> Counter <input type="checkbox"/> Joinder Filed with first appearance by defendant (Cal. Rules of Court, rule 3.402)		CASE NUMBER: C6C-15-547631 JUDGE: DEPT:	

Items 1–6 below must be completed (see instructions on page 2).

1. Check one box below for the case type that best describes this case:

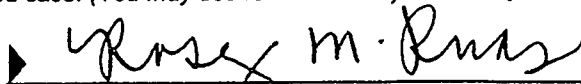
Auto Tort <input type="checkbox"/> Auto (22) <input type="checkbox"/> Uninsured motorist (46) Other PI/PD/WD (Personal Injury/Property Damage/Wrongful Death) Tort <input type="checkbox"/> Asbestos (04) <input type="checkbox"/> Product liability (24) <input type="checkbox"/> Medical malpractice (45) <input type="checkbox"/> Other PI/PD/WD (23) Non-PI/PD/WD (Other) Tort <input checked="" type="checkbox"/> Business tort/unfair business practice (07) <input type="checkbox"/> Civil rights (08) <input type="checkbox"/> Defamation (13) <input type="checkbox"/> Fraud (16) <input type="checkbox"/> Intellectual property (19) <input type="checkbox"/> Professional negligence (25) <input type="checkbox"/> Other non-PI/PD/WD tort (35) Employment <input type="checkbox"/> Wrongful termination (36) <input type="checkbox"/> Other employment (15)	Contract <input type="checkbox"/> Breach of contract/warranty (06) <input type="checkbox"/> Rule 3.740 collections (09) <input type="checkbox"/> Other collections (09) <input type="checkbox"/> Insurance coverage (18) <input type="checkbox"/> Other contract (37) Real Property <input type="checkbox"/> Eminent domain/Inverse condemnation (14) <input type="checkbox"/> Wrongful eviction (33) <input type="checkbox"/> Other real property (26) Unlawful Detainer <input type="checkbox"/> Commercial (31) <input type="checkbox"/> Residential (32) <input type="checkbox"/> Drugs (38) Judicial Review <input type="checkbox"/> Asset forfeiture (05) <input type="checkbox"/> Petition re: arbitration award (11) <input type="checkbox"/> Writ of mandate (02) <input type="checkbox"/> Other judicial review (39)	Provisionally Complex Civil Litigation (Cal. Rules of Court, rules 3.400–3.403) <input type="checkbox"/> Antitrust/Trade regulation (03) <input type="checkbox"/> Construction defect (10) <input type="checkbox"/> Mass tort (40) <input type="checkbox"/> Securities litigation (28) <input type="checkbox"/> Environmental/Toxic tort (30) <input type="checkbox"/> Insurance coverage claims arising from the above listed provisionally complex case types (41) Enforcement of Judgment <input type="checkbox"/> Enforcement of judgment (20) Miscellaneous Civil Complaint <input type="checkbox"/> RICO (27) <input type="checkbox"/> Other complaint (not specified above) (42) Miscellaneous Civil Petition <input type="checkbox"/> Partnership and corporate governance (21) <input type="checkbox"/> Other petition (not specified above) (43)
---	--	---

2. This case ☐ is ☒ is not complex under rule 3.400 of the California Rules of Court. If the case is complex, mark the factors requiring exceptional judicial management:
- | | |
|--|--|
| a. <input type="checkbox"/> Large number of separately represented parties
b. <input type="checkbox"/> Extensive motion practice raising difficult or novel issues that will be time-consuming to resolve
c. <input type="checkbox"/> Substantial amount of documentary evidence | d. <input type="checkbox"/> Large number of witnesses
e. <input type="checkbox"/> Coordination with related actions pending in one or more courts in other counties, states, or countries, or in a federal court
f. <input type="checkbox"/> Substantial postjudgment judicial supervision |
|--|--|
3. Remedies sought (check all that apply): a. ☒ monetary b. ☒ nonmonetary; declaratory or injunctive relief c. ☐ punitive
4. Number of causes of action (specify):
5. This case ☒ is ☐ is not a class action suit.
6. If there are any known related cases, file and serve a notice of related case. (You may use form CM-015.)

Date: 08/26/2015

Rosemary M. Rivas

(TYPE OR PRINT NAME)



(SIGNATURE OF PARTY OR ATTORNEY FOR PARTY)

NOTICE

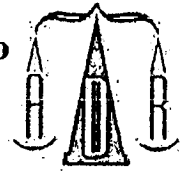
- Plaintiff must file this cover sheet with the first paper filed in the action or proceeding (except small claims cases or cases filed under the Probate Code, Family Code, or Welfare and Institutions Code). (Cal. Rules of Court, rule 3.220.) Failure to file may result in sanctions.
- File this cover sheet in addition to any cover sheet required by local court rule.
- If this case is complex under rule 3.400 et seq. of the California Rules of Court, you must serve a copy of this cover sheet on all other parties to the action or proceeding.
- Unless this is a collections case under rule 3.740 or a complex case, this cover sheet will be used for statistical purposes only.

Page 1 of 2



Superior Court of California, County of San Francisco

Alternative Dispute Resolution Program Information Package



The plaintiff must serve a copy of the ADR Information package on each defendant along with the complaint. (CRC 3.221(c))

WHAT IS ADR?

Alternative Dispute Resolution (ADR) is the term used to describe the various options available for settling a dispute without a trial. There are many different ADR processes, the most common forms of which are mediation, arbitration and settlement conferences. In ADR, trained, impartial people decide disputes or help parties decide disputes themselves. They can help parties resolve disputes without having to go to court.

WHY CHOOSE ADR?

"It is the policy of the Superior Court that every noncriminal, nonjuvenile case participate either in an early settlement conference, mediation, arbitration, early neutral evaluation or some other alternative dispute resolution process prior to trial." (Local Rule 4)

ADR can have a number of advantages over traditional litigation:

- **ADR can save time.** A dispute often can be resolved in a matter of months, even weeks, through ADR, while a lawsuit can take years.
- **ADR can save money,** including court costs, attorney fees, and expert fees.
- **ADR encourages participation.** The parties may have more opportunities to tell their story than in court and may have more control over the outcome of the case.
- **ADR is more satisfying.** For all the above reasons, many people participating in ADR have reported a high degree of satisfaction.

HOW DO I PARTICIPATE IN ADR?

Litigants may elect to participate in ADR at any point in a case. General civil cases may voluntarily enter into the court's ADR programs by any of the following means:

- Filing a Stipulation to ADR: Complete and file the Stipulation form (attached to this packet)
- Indicating your ADR preference on the Case Management Statement (also attached to this packet); or
- Contacting the court's ADR office (see below) or the Bar Association of San Francisco's ADR Services at 415-782-8905 or www.sfbar.org/adr for more information.

For more information about ADR programs or dispute resolution alternatives, contact:

Superior Court Alternative Dispute Resolution
400 McAllister Street, Room 103, San Francisco, CA 94102
415-551-3869

Or, visit the court ADR website at www.sfsuperiorcourt.org

The San Francisco Superior Court offers different types of ADR processes for general civil matters; each ADR program is described in the subsections below:

1) SETTLEMENT CONFERENCES

The goal of settlement conferences is to provide participants an opportunity to reach a mutually acceptable settlement that resolves all or part of a dispute early in the litigation process.

(A) THE BAR ASSOCIATION OF SAN FRANCISCO (BASF) EARLY SETTLEMENT PROGRAM (ESP): ESP remains as one of the Court's ADR programs (see Local Rule 4.3) but parties must select the program – the Court no longer will order parties into ESP.

Operation: Panels of pre-screened attorneys (one plaintiff, one defense counsel) each with at least 10 years' trial experience provide a minimum of two hours of settlement conference time, including evaluation of strengths and weakness of a case and potential case value. On occasion, a panelist with extensive experience in both plaintiff and defense roles serves as a sole panelist. BASF handles notification to all parties, conflict checks with the panelists, and full case management. The success rate for the program is 78% and the satisfaction rate is 97%. Full procedures are at: www.sfbar.org/esp.

Cost: BASF charges an administrative fee of \$295 per party with a cap of \$590 for parties represented by the same counsel. Waivers are available to those who qualify. For more information, call Marilyn King at 415-782-8905, email adr@sfbar.org or see enclosed brochure.

(B) MANDATORY SETTLEMENT CONFERENCES: Parties may elect to apply to the Presiding Judge's department for a specially-set mandatory settlement conference. See Local Rule 5.0 for further instructions. Upon approval of the Presiding Judge, the court will schedule the conference and assign the case for a settlement conference.

2) MEDIATION

Mediation is a voluntary, flexible, and confidential process in which a neutral third party facilitates negotiations. The goal of mediation is to reach a mutually satisfactory agreement that resolves all or part of a dispute after exploring the interests, needs, and priorities of the parties in light of relevant evidence and the law.

(A) MEDIATION SERVICES OF THE BAR ASSOCIATION OF SAN FRANCISCO, in cooperation with the Superior Court, is designed to help civil litigants resolve disputes before they incur substantial costs in litigation. While it is best to utilize the program at the outset of litigation, parties may use the program at any time while a case is pending.

Operation: Experienced professional mediators, screened and approved, provide one hour of preparation time and the first two hours of mediation time. Mediation time beyond that is charged at the mediator's hourly rate. BASF pre-screens all mediators based upon strict educational and experience requirements. Parties can select their mediator from the panels at www.sfbar.org/mediation or BASF can assist with mediator selection. The BASF website contains photographs, biographies, and videos of the mediators as well as testimonials to assist with the selection process. BASF staff handles conflict checks and full case management. Mediators work with parties to arrive at a mutually agreeable solution. The success rate for the program is 64% and the satisfaction rate is 99%.

Cost: BASF charges an administrative fee of \$295 per party. The hourly mediator fee beyond the first three hours will vary depending on the mediator selected. Waivers of the administrative fee are available to those who qualify. For more information, call Marilyn King at 415-782-8905, email adr@sfbay.org or see the enclosed brochure.

(B) JUDICIAL MEDIATION provides mediation with a San Francisco Superior Court judge for civil cases, which include but are not limited to, personal injury, construction defect, employment, professional malpractice, insurance coverage, toxic torts and industrial accidents. Parties may utilize this program at anytime throughout the litigation process.

Operation: Parties interested in judicial mediation should file a Stipulation to Judicial Mediation indicating a joint request for inclusion in the program. A preference for a specific judge may be indicated. The court will coordinate assignment of cases for the program. There is no charge for the Judicial Mediation program.

(C) PRIVATE MEDIATION: Although not currently a part of the court's ADR program, parties may elect any private mediator of their choice; the selection and coordination of private mediation is the responsibility of the parties. Parties may find mediators and organizations on the Internet. The cost of private mediation will vary depending on the mediator selected.

3) ARBITRATION

An arbitrator is neutral attorney who presides at a hearing where the parties present evidence through exhibits and testimony. The arbitrator applies the law to the facts of the case and makes an award based upon the merits of the case.

(A) JUDICIAL ARBITRATION: When the court orders a case to arbitration it is called "judicial arbitration". The goal of arbitration is to provide parties with an adjudication that is earlier, faster, less formal, and usually less expensive than a trial.

Operation: Pursuant to CCP 1141.11, all civil actions in which the amount in controversy is \$50,000 or less, and no party seeks equitable relief, shall be ordered to arbitration. (Upon stipulation of all parties, other civil matters may be submitted to judicial arbitration.) An arbitrator is chosen from the court's arbitration panel. Arbitrations are generally held between 7 and 9 months after a complaint has been filed. Judicial arbitration is not binding unless all parties agree to be bound by the arbitrator's decision. Any party may request a trial within 60 days after the arbitrator's award has been filed. Local Rule 4.2 allows for mediation in lieu of judicial arbitration, so long as the parties file a stipulation to mediate after the filing of a complaint. There is no cost to the parties for judicial arbitration.

(B) PRIVATE ARBITRATION: Although not currently a part of the court's ADR program, civil disputes may also be resolved through private arbitration. Here, the parties voluntarily consent to arbitration. If all parties agree, private arbitration may be binding and the parties give up the right to judicial review of the arbitrator's decision. In private arbitration, the parties select a private arbitrator and are responsible for paying the arbitrator's fees.

TO PARTICIPATE IN ANY OF THE COURT'S ADR PROGRAMS, PLEASE COMPLETE THE ATTACHED STIPULATION TO ADR AND SUBMIT IT TO THE COURT. YOU MUST ALSO CONTACT BASF TO ENROLL IN THE LISTED BASF PROGRAMS. THE COURT DOES NOT FORWARD COPIES OF STIPULATIONS TO BASF.



Superior Court of California County of San Francisco



HON. JOHN K. STEWART
PRESIDING JUDGE

Judicial Mediation Program

JENIFFER B. ALCANTARA
ADR ADMINISTRATOR

The Judicial Mediation program offers mediation in civil litigation with a San Francisco Superior Court judge familiar with the area of the law that is the subject of the controversy. Cases that will be considered for participation in the program include, but are not limited to personal injury, professional malpractice, construction, employment, insurance coverage disputes, mass torts and complex commercial litigation. Judicial Mediation offers civil litigants the opportunity to engage in early mediation of a case shortly after filing the complaint in an effort to resolve the matter before substantial funds are expended. This program may also be utilized at anytime throughout the litigation process. The panel of judges currently participating in the program includes:

The Honorable Michael I. Begert
The Honorable Suzanne R. Bolanos
The Honorable Angela Bradstreet
The Honorable Andrew Y.S. Cheng
The Honorable Samuel K. Feng
The Honorable Charles F. Haines

The Honorable Harold E. Kahn
The Honorable Curtis E.A. Karnow
The Honorable Charlene P. Kiesselbach
The Honorable James Robertson, II
The Honorable Richard B. Ulmer, Jr.
The Honorable Mary E. Wiss

Parties interested in Judicial Mediation should file a Stipulation to Judicial Mediation indicating a joint request for inclusion in the program and deliver a courtesy copy to Department 610. A preference for a specific judge may be indicated on the request, and although not guaranteed, every effort will be made to fulfill the parties' choice. Please allow at least 30 days from the filing of the form to receive the notice of assignment. The court's Alternative Dispute Resolution Administrator will facilitate assignment of cases that qualify for the program.

Note: Space and availability is limited. Submission of a stipulation to Judicial Mediation does *not* guarantee inclusion in the program. You will receive written notification from the court as to the outcome of your application.

Alternative Dispute Resolution
400 McAllister Street, Room 103, San Francisco, CA 94102
(415) 551-3869

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name and address)	FOR COURT USE ONLY
TELEPHONE NO.:	
ATTORNEY FOR (Name):	
SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN FRANCISCO 400 McAllister Street San Francisco, CA 94102-4514	
PLAINTIFF/PETITIONER:	
DEFENDANT/RESPONDENT:	
STIPULATION TO ALTERNATIVE DISPUTE RESOLUTION (ADR)	CASE NUMBER: DEPARTMENT 610

1) The parties hereby stipulate that this action shall be submitted to the following ADR process:

- ☐ **Early Settlement Program of the Bar Association of San Francisco (BASF)** - Pre-screened experienced attorneys provide a minimum of 2 hours of settlement conference time for a BASF administrative fee of \$295 per party. Waivers are available to those who qualify. BASF handles notification to all parties, conflict checks with the panelists, and full case management. www.sfbar.org/esp
- ☐ **Mediation Services of BASF** - Experienced professional mediators, screened and approved, provide one hour of preparation and the first two hours of mediation time for a BASF administrative fee of \$295 per party. Mediation time beyond that is charged at the mediator's hourly rate. Waivers of the administrative fee are available to those who qualify. BASF assists parties with mediator selection, conflicts checks and full case management. www.sfbar.org/mediation
- ☐ **Private Mediation** - Mediators and ADR provider organizations charge by the hour or by the day, current market rates. ADR organizations may also charge an administrative fee. Parties may find experienced mediators and organizations on the Internet.
- ☐ **Judicial Arbitration** - Non-binding arbitration is available to cases in which the amount in controversy is \$50,000 or less and no equitable relief is sought. The court appoints a pre-screened arbitrator who will issue an award. There is no fee for this program. www.sfsuperiorcourt.org
- ☐ **Judicial Mediation** - The Judicial Mediation program offers mediation in civil litigation with a San Francisco Superior Court judge familiar with the area of the law that is the subject of the controversy. There is no fee for this program. www.sfsuperiorcourt.org

Judge Requested (see list of Judges currently participating in the program): _____

Date range requested for Judicial Mediation (from the filing of stipulation to Judicial Mediation):

☐ 30-90 days ☐ 90-120 days ☐ Other (please specify) _____☐ Other ADR process (describe) _____

2) The parties agree that the ADR Process shall be completed by (date): _____

3) Plaintiff(s) and Defendant(s) further agree as follows:

Name of Party Stipulating_____
Name of Party Stipulating_____
Name of Party or Attorney Executing Stipulation_____
Name of Party or Attorney Executing Stipulation_____
Signature of Party or Attorney_____
Signature of Party or Attorney☐ Plaintiff ☐ Defendant ☐ Cross-defendant☐ Plaintiff ☐ Defendant ☐ Cross-defendant

Dated: _____

Dated: _____

☐ Additional signature(s) attached

INSTRUCTIONS: All applicable boxes must be checked, and the specified information must be provided.

- Page 1 of 5

CM-110

PLAINTIFF/PETITIONER:	CASE NUMBER:
DEFENDANT/RESPONDENT:	

4. b. Provide a brief statement of the case, including any damages. *(If personal injury damages are sought, specify the injury and damages claimed, including medical expenses to date [indicate source and amount], estimated future medical expenses, lost earnings to date, and estimated future lost earnings. If equitable relief is sought, describe the nature of the relief.)*

☐ *(If more space is needed, check this box and attach a page designated as Attachment 4b.)*

5. **Jury or nonjury trial**
The party or parties request ☐ a jury trial ☐ a nonjury trial. *(If more than one party, provide the name of each party requesting a jury trial):*

6. **Trial date**
a. ☐ The trial has been set for (date):
b. ☐ No trial date has been set. This case will be ready for trial within 12 months of the date of the filing of the complaint *(if not, explain):*

c. Dates on which parties or attorneys will not be available for trial *(specify dates and explain reasons for unavailability):*

7. **Estimated length of trial**
The party or parties estimate that the trial will take *(check one):*
a. ☐ days *(specify number):*
b. ☐ hours *(short causes) (specify):*

8. **Trial representation *(to be answered for each party)***
The party or parties will be represented at trial ☐ by the attorney or party listed in the caption ☐ by the following:
a. Attorney:
b. Firm:
c. Address:
d. Telephone number:
e. E-mail address:
f. Fax number:
g. Party represented:
☐ Additional representation is described in Attachment 8.

9. **Preference**
☐ This case is entitled to preference *(specify code section):*

10. **Alternative dispute resolution (ADR)**

- a. **ADR information package.** Please note that different ADR processes are available in different courts and communities; read the ADR information package provided by the court under rule 3.221 for information about the processes available through the court and community programs in this case.
(1) For parties represented by counsel: Counsel ☐ has ☐ has not provided the ADR information package identified in rule 3.221 to the client and reviewed ADR options with the client.
(2) For self-represented parties: Party ☐ has ☐ has not reviewed the ADR information package identified in rule 3.221.
- b. **Referral to judicial arbitration or civil action mediation (if available).**
(1) ☐ This matter is subject to mandatory judicial arbitration under Code of Civil Procedure section 1141.11 or to civil action mediation under Code of Civil Procedure section 1775.3 because the amount in controversy does not exceed the statutory limit.
(2) ☐ Plaintiff elects to refer this case to judicial arbitration and agrees to limit recovery to the amount specified in Code of Civil Procedure section 1141.11.
(3) ☐ This case is exempt from judicial arbitration under rule 3.811 of the California Rules of Court or from civil action mediation under Code of Civil Procedure section 1775 et seq. *(specify exemption):*

CM-110

PLAINTIFF/PETITIONER:	CASE NUMBER:
DEFENDANT/RESPONDENT:	

10. c. Indicate the ADR process or processes that the party or parties are willing to participate in, have agreed to participate in, or have already participated in (*check all that apply and provide the specified information*):

	The party or parties completing this form are willing to participate in the following ADR processes (<i>check all that apply</i>):	If the party or parties completing this form in the case have agreed to participate in or have already completed an ADR process or processes, indicate the status of the processes (<i>attach a copy of the parties' ADR stipulation</i>):
(1) Mediation	<input type="checkbox"/>	<input type="checkbox"/> Mediation session not yet scheduled <input type="checkbox"/> Mediation session scheduled for (date): <input type="checkbox"/> Agreed to complete mediation by (date): <input type="checkbox"/> Mediation completed on (date):
(2) Settlement conference	<input type="checkbox"/>	<input type="checkbox"/> Settlement conference not yet scheduled <input type="checkbox"/> Settlement conference scheduled for (date): <input type="checkbox"/> Agreed to complete settlement conference by (date): <input type="checkbox"/> Settlement conference completed on (date):
(3) Neutral evaluation	<input type="checkbox"/>	<input type="checkbox"/> Neutral evaluation not yet scheduled <input type="checkbox"/> Neutral evaluation scheduled for (date): <input type="checkbox"/> Agreed to complete neutral evaluation by (date): <input type="checkbox"/> Neutral evaluation completed on (date):
(4) Nonbinding judicial arbitration	<input type="checkbox"/>	<input type="checkbox"/> Judicial arbitration not yet scheduled <input type="checkbox"/> Judicial arbitration scheduled for (date): <input type="checkbox"/> Agreed to complete judicial arbitration by (date): <input type="checkbox"/> Judicial arbitration completed on (date):
(5) Binding private arbitration	<input type="checkbox"/>	<input type="checkbox"/> Private arbitration not yet scheduled <input type="checkbox"/> Private arbitration scheduled for (date): <input type="checkbox"/> Agreed to complete private arbitration by (date): <input type="checkbox"/> Private arbitration completed on (date):
(6) Other (<i>specify</i>):	<input type="checkbox"/>	<input type="checkbox"/> ADR session not yet scheduled <input type="checkbox"/> ADR session scheduled for (date): <input type="checkbox"/> Agreed to complete ADR session by (date): <input type="checkbox"/> ADR completed on (date):

CM-110

PLAINTIFF/PETITIONER:	CASE NUMBER:
DEFENDANT/RESPONDENT:	

11. Insurance

- a. ☐ Insurance carrier, if any, for party filing this statement (*name*):
- b. Reservation of rights: ☐ Yes ☐ No
- c. ☐ Coverage issues will significantly affect resolution of this case (*explain*):

12. Jurisdiction

Indicate any matters that may affect the court's jurisdiction or processing of this case and describe the status.

☐ Bankruptcy ☐ Other (*specify*):

Status:

13. Related cases, consolidation, and coordination

- a. ☐ There are companion, underlying, or related cases.
- (1) Name of case:
- (2) Name of court:
- (3) Case number:
- (4) Status:
- ☐ Additional cases are described in Attachment 13a.
- b. ☐ A motion to ☐ consolidate ☐ coordinate will be filed by (*name party*):

14. Bifurcation

- ☐ The party or parties intend to file a motion for an order bifurcating, severing, or coordinating the following issues or causes of action (*specify moving party, type of motion, and reasons*):

15. Other motions

- ☐ The party or parties expect to file the following motions before trial (*specify moving party, type of motion, and issues*):

16. Discovery

- a. ☐ The party or parties have completed all discovery.
- b. ☐ The following discovery will be completed by the date specified (*describe all anticipated discovery*):
- | <u>Party</u> | <u>Description</u> | <u>Date</u> |
|--------------|--------------------|-------------|
| | | |
- c. ☐ The following discovery issues, including issues regarding the discovery of electronically stored information, are anticipated (*specify*):

CM-110

PLAINTIFF/PETITIONER:	CASE NUMBER:
DEFENDANT/RESPONDENT:	

17. Economic litigation

- a. ☐ This is a limited civil case (i.e., the amount demanded is \$25,000 or less) and the economic litigation procedures in Code of Civil Procedure sections 90-98 will apply to this case.
- b. ☐ This is a limited civil case and a motion to withdraw the case from the economic litigation procedures or for additional discovery will be filed (if checked, explain specifically why economic litigation procedures relating to discovery or trial should not apply to this case):

18. Other issues

- ☐ The party or parties request that the following additional matters be considered or determined at the case management conference (specify):

19. Meet and confer

- a. ☐ The party or parties have met and conferred with all parties on all subjects required by rule 3.724 of the California Rules of Court (if not, explain):
- b. After meeting and conferring as required by rule 3.724 of the California Rules of Court, the parties agree on the following (specify):

20. Total number of pages attached (if any): _____

I am completely familiar with this case and will be fully prepared to discuss the status of discovery and alternative dispute resolution, as well as other issues raised by this statement, and will possess the authority to enter into stipulations on these issues at the time of the case management conference, including the written authority of the party where required.

Date:

(TYPE OR PRINT NAME)_____
(SIGNATURE OF PARTY OR ATTORNEY)_____
(TYPE OR PRINT NAME)_____
(SIGNATURE OF PARTY OR ATTORNEY)☐ Additional signatures are attached.



Superior Court of California County of San Francisco

Expedited Jury Trial Information Sheet

What is an expedited jury trial?

An expedited jury trial is a trial that is much faster and has a smaller jury than a traditional jury trial. An expedited jury trial differs from a regular jury trial in several ways:

- **The trial will be shorter.** Each side has 3 hours to make opening statements, present witnesses and evidence, and make closing statements.
- **The jury will be smaller.** There will be 8 jurors instead of 12.
- **Choosing the jury will be faster.** The parties will exercise fewer preemptory challenges.
- **Parties will waive some post trial motions and rights to appeal.** Appeals are allowed only if there is: (1) Misconduct of the judicial officer that materially affected substantial rights of a party; (2) Jury misconduct; or (3) Corruption or fraud or some other bad act that prevented a fair trial.

In addition, parties may not ask the judge to set the jury verdict aside, except on those same grounds.

Does the jury have to reach a unanimous decision?

No. Just as in a traditional civil jury trial, only three-quarters of the jury must agree in order to reach a decision in an expedited jury trial. With 8 people on the jury, that means that at least 6 of the jurors must agree on the verdict in an expedited jury trial.

Is the decision of the jury binding on the parties?

Generally, yes. A verdict from a jury in an expedited jury trial is like a verdict in a traditional jury trial. However, parties who take part in expedited jury trials are allowed to make an agreement before the trial that guarantees that the defendant will pay a certain amount to the plaintiff even if the jury decides on a lower payment or no payment. That agreement may also impose a cap, or maximum, on the highest amount that a defendant has to pay, even if the jury decides on a higher amount. These agreements are commonly known as "high/low agreements."

How do I qualify for an expedited jury trial?

The process can be used in any civil case. To have an expedited jury trial, both sides must want one. Each side must agree that it will use only three hours to put on its case and agree to the other rules described above. This agreement must be put in writing in a Stipulation and submitted along with a Proposed Consent Order Granting an Expedited Jury Trial, which is given to the court for approval. The court will usually agree to the Consent Order.

How do I request an expedited jury trial?

To have an expedited jury trial, both sides must submit a Stipulation and Proposed Consent Order for Expedited Jury Trial to the court for approval. This may happen at three stages of litigation:

- 1) **At Filing and Prior to Setting of a Trial Date:** Parties may submit a Stipulation to Expedited Jury Trial to Dept. 610 using the attached short form (see below). Parties must

also submit a Proposed Consent Order for Expedited Jury Trial to Dept. 610.

2) **After a Trial Date has been Set:** Parties submit a Stipulation and Proposed Consent Order for Expedited Jury Trial directly to Dept. 206 at least 30 days prior to the assigned trial date.

3) **After Trial Assignment:** A Proposed Consent Order for Expedited Jury Trial may be submitted immediately to the assigned trial department not less than 30 days prior to the assigned trial date.

Also, after a case is assigned to a particular judge for trial, the parties may ask the trial judge to have an Expedited Jury Trial, and the judge may permit the parties to then sign the appropriate Stipulation and Proposed Consent Order for Expedited Jury Trial.

Can I change my mind after agreeing to an expedited jury trial?

No, unless the other side or the court agrees. Once you and the other side have agreed to take part in an expedited jury trial the agreement is binding on both sides.

Expedited Jury Trial Request
Please submit a copy of this request to Dept. 610.

Case No. _____

Case Name: _____ v: _____

The parties would like this action to be submitted to an Expedited Jury Trial.

The parties shall submit a consent order to the Court on or by: _____

Name of Party _____	Name of Party/Attorney _____	Signature of Party _____
		Dated: _____

Name of Party _____	Name of Party/Attorney _____	Signature of Party _____
		Dated: _____

Name of Party _____	Name of Party/Attorney _____	Signature of Party _____
		Dated: _____

Please note: a [Proposed] Consent Order for Expedited Jury Trial is still required in addition to this stipulation form.

You can find the law and rules governing expedited jury trials in Code of Civil Procedure sections 630.01–630.12 and in rules 3.1545–3.1552 of the California Rules of Court. You can find these at any county law library or online. The statutes are online at www.leginfo.ca.gov/calaw.html. The rules are at www.courts.ca.gov/rules.

NOTICE TO PLAINTIFF

A Case Management Conference is set for:

DATE: JAN-27-2016

TIME: 10:30AM

**PLACE: Department 610
400 McAllister Street
San Francisco, CA 94102-3680**

All parties must appear and comply with Local Rule 3.

CRC 3.725 requires the filing and service of a case management statement form CM-110 no later than 15 days before the case management conference. However, it would facilitate the issuance of a case management order **without an appearance** at the case management conference if the case management statement is filed, served and lodged in Department 610 twenty-five (25) days before the case management conference.

Plaintiff must serve a copy of this notice upon each party to this action with the summons and complaint. Proof of service subsequently filed with this court shall so state. **This case is eligible for electronic filing and service per Local Rule 2.10. For more information, please visit the Court's website at www.sfsuperiorcourt.org under Online Services.**

ALTERNATIVE DISPUTE RESOLUTION POLICY REQUIREMENTS

**IT IS THE POLICY OF THE SUPERIOR COURT THAT EVERY CIVIL CASE PARTICIPATE IN EITHER MEDIATION, JUDICIAL OR NON-JUDICIAL ARBITRATION, THE EARLY SETTLEMENT PROGRAM OR SOME SUITABLE FORM OF ALTERNATIVE DISPUTE RESOLUTION PRIOR TO A TRIAL.
(SEE LOCAL RULE 4)**

Plaintiff must serve a copy of the Alternative Dispute Resolution Information Package on each defendant along with the complaint. All counsel must discuss ADR with clients and opposing counsel and provide clients with a copy of the Alternative Dispute Resolution Information Package prior to filing the Case Management Statement.

[DEFENDANTS: Attending the Case Management Conference does not take the place of filing a written response to the complaint. You must file a written response with the court within the time limit required by law. See Summons.]

Superior Court Alternative Dispute Resolution Coordinator
400 McAllister Street, Room 103
San Francisco, CA 94102
(415) 551-3869

See Local Rules 3.3, 6.0 C and 10 B re stipulation to judge pro tem.

EXHIBIT C

Attorney or Party without Attorney: ROSEMARY M RIVAS ESQ., Bar #209147 FINKELSTEIN THOMPSON LLP ONE CALIFORNIA STREET SUITE 900 SAN FRANCISCO, CA 94111 Telephone No: 415-398-8700 FAX No: 415-398-8704				For Court Use Only ELECTRONICALLY FILED Superior Court of California, County of San Francisco 09/10/2015 Clerk of the Court BY: VANESSA WU Deputy Clerk	
Attorney for: Plaintiffs				Ref. No. or File No.:	
Insert name of Court, and Judicial District and Branch Court: SAN FRANCISCO County SUPERIOR Court					
Plaintiffs: LINDA CHESLOW, et al. Defendant: MARS, INCORPORATED, et al.					
PROOF OF SERVICE SUMMONS		Hearing Date: Wed, Jan, 27, 2016	Time: 10:30AM	Dept/Div: 610	Case Number: CGC-15-547631

1. At the time of service I was at least 18 years of age and not a party to this action.
2. I served copies of the CIVIL SUMMONS; CLASS ACTION COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF; DEMAND FOR JURY TRIAL; CIVIL CASE COVER SHEET; COUNTY OF SAN FRANCISCO ALTERNATIVE DISPUTE RESOLUTION PROGRAM INFORMATION PACKAGE; JUDICIAL MEDIATION PROGRAM; [BLANK] STIPULATION TO ALTERNATIVE DISPUTE RESOLUTION (ADR); [BLANK] CASE MANAGEMENT STATEMENT; EXPEDITED JURY TRIAL INFORMATION SHEET; NOTICE TO PLAINTIFF
3. a. Party served: MARS, INCORPORATED
 b. Person served: AMANDA GARCIA, PROCESS SPECIALIST, AUTHORIZED TO ACCEPT FOR REGISTERED AGENT CT CORPORATION SYSTEM
4. Address where the party was served: AGENT FOR SERVICE: CT CORPORATION SYSTEM
 818 WEST SEVENTH STREET
 SUITE 930
 LOS ANGELES, CA 90017
5. I served the party:
 - a. by personal service. I personally delivered the documents listed in item 2 to the party or person authorized to receive process for the party (1) on: Fri., Aug. 28, 2015 (2) at: 2:35PM
6. The "Notice to the Person Served" (on the Summons) was completed as follows:
 on behalf of: MARS, INCORPORATED
 Under CCP 416.10 (corporation)
7. Person Who Served Papers:
 - a. BRUCE ANDERSON

Recoverable Cost Per CCP 1033.5(a)(4)(B)

d. The Fee for Service was: \$105.00

e. I am: (3) registered California process server

(i) Independent Contractor

(ii) Registration No.: 6416

(iii) County: LOS ANGELES



1280 BOULEVARD WAY #205
 WALNUT CREEK, CA 94595
 (925) 947-3470
 FAX (925) 947-3480
 WWW.ONEHOUR.NET

8. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: Wed, Sep. 02, 2015

Bruce Anderson
 (BRUCE ANDERSON)

Attorney or Party without Attorney: ROSEMARY M RIVAS ESQ., Bar #209147 FINKELSTEIN THOMPSON LLP ONE CALIFORNIA STREET SUITE 900 SAN FRANCISCO, CA 94111 Telephone No: 415-398-8700 FAX No: 415-398-8704				For Court Use Only ELECTRONICALLY FILED Superior Court of California, County of San Francisco 09/10/2015 Clerk of the Court BY: VANESSA WU Deputy Clerk	
Attorney for: Plaintiffs				Ref. No. or File No.:	
Insert name of Court, and Judicial District and Branch Court: SAN FRANCISCO County SUPERIOR Court					
Plaintiffs: LINDA CHESLOW, et al. Defendant: MARS, INCORPORATED, et al.					
PROOF OF SERVICE SUMMONS		Hearing Date: Wed, Jan. 27, 2016	Time: 10:30AM	Dept/Div: 610	Case Number: CGC-15-547631

1. At the time of service I was at least 18 years of age and not a party to this action.
2. I served copies of the CIVIL SUMMONS CLASS ACTION COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF; DEMAND FOR JURY TRIAL; CIVIL CASE COVER SHEET; COUNTY OF SAN FRANCISCO ALTERNATIVE DISPUTE RESOLUTION PROGRAM INFORMATION PACKAGE; JUDICIAL MEDIATION PROGRAM; [BLANK] STIPULATION TO ALTERNATIVE DISPUTE RESOLUTION (ADR); [BLANK] CASE MANAGEMENT STATEMENT; EXPEDITED JURY TRIAL INFORMATION SHEET; NOTICE TO PLAINTIFF
3. a. Party served: MARS CHOCOLATE NORTH AMERICA, LLC
 b. Person served: AMANDA GARCIA, PROCESS SPECIALIST, AUTHORIZED TO ACCEPT FOR REGISTERED AGENT CT CORPORATION SYSTEM
4. Address where the party was served: AGENT FOR SERVICE: CT CORPORATION SYSTEM
 818 WEST SEVENTH STREET
 SUITE 930
 LOS ANGELES, CA 90017
5. I served the party:
 - a. by personal service. I personally delivered the documents listed in item 2 to the party or person authorized to receive process for the party (1) on: Fri., Aug. 28, 2015 (2) at: 2:35PM
6. The "Notice to the Person Served" (on the Summons) was completed as follows:
 on behalf of: MARS CHOCOLATE NORTH AMERICA, LLC
 Under CCP 416.40 (association or partnership)
7. Person Who Served Papers:
 - a. BRUCE ANDERSON
 - d. The Fee for Service was: \$62.50
 Recoverable Cost Per CCP 1033.5(a)(4)(B)
 - e. I am: (3) registered California process server
 - (i) Independent Contractor
 - (ii) Registration No.: 6416
 - (iii) County: LOS ANGELES



1280 BOULEVARD WAY #205
 WALNUT CREEK, CA 94595
 (925) 947-3470
 FAX (925) 947-3480
 WWW.ONEHOUR.NET

8. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: Wed, Sep. 02, 2015

B. Anderson
 (BRUCE ANDERSON)

Stephen D. Raber (State Bar No. 121958)
 David M. Horniak (State Bar No. 268441)
 Joelle S. Perry (State Bar No. 275244)
 WILLIAMS & CONNOLLY LLP
 725 Twelfth Street, N.W.
 Washington, DC 20005
 Telephone: (202) 434-5000
 Facsimile: (202) 434-5029
 E-mail: sraber@wc.com
 E-mail: dhorniak@wc.com
 E-mail: jperry@wc.com

*Attorneys for Defendants Mars, Inc. and Mars
 Chocolate North America, LLC*

UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA
 SAN FRANCISCO DIVISION

<p>LINDA CHESLOW and MIKE XAVIER, on behalf of themselves and all others similarly situated, Plaintiffs, v. MARS, INC. and MARS CHOCOLATE NORTH AMERICA, LLC, Defendants.</p>	<p>Case No.: DECLARATION OF SAHAR AMIR IN SUPPORT OF NOTICE OF REMOVAL CLASS ACTION</p>
--	--

Pursuant to 28 U.S.C. § 1746, I, Sahar Amir, hereby testify and declare as follows:

- I am over the age of eighteen and competent to testify to the matters contained herein, which are based on my experience, my personal knowledge and/or my familiarity with and review of records prepared and kept in the ordinary course of regularly conducted business.
- I am currently employed by Mars Chocolate North America, LLC as Senior Manager of Category Insights. I have had this position for 9 months.
- In my current position, I am responsible for managing Mars's use of syndicated data, including data Mars obtains from The Nielsen Company ("Nielsen"). Among other things, I am

1 responsible for tracking and analyzing the performance of Mars's products in the marketplace using
2 these data.

3 **A. Background on Nielsen Data**

4 4. Syndicated data is information collected by companies like Nielsen. Companies like
5 Nielsen collect information from scanners at supermarkets, retail establishments, and in-home
6 scanners showing how many units of each product are sold to consumers. Some data collected at
7 the point of purchase also show the price paid by the consumer. Nielsen aggregates these data and
8 makes them available to third parties for purchase using a licensing/subscription model.
9

10 5. Nielsen collects and aggregates these data from a wide variety of retailers, including
11 Walmart, Target, and Kroger. However, its data are not comprehensive. For example, Nielsen does
12 not collect data from all retailers, such as Costco or HEB. Likewise, Nielsen surveys reflect a
13 sampling of consumer households; Nielsen obviously does not survey all consumers' households.
14

15 6. Mars has a subscription for Nielsen data. The data Mars subscribes to includes data
16 reflecting the Mars products purchased in retail transactions and, when available, the actual retail
17 prices of those products.

18 7. Mars and companies like it use these data for a variety of business planning and
19 tracking purposes, such as to assess a product's relative success in a market or at specific retail
20 chains. Nielsen data is useful to Mars because Mars does not sell its products directly to consumers.
21 The prices Mars charges the wholesalers and retailers with whom it does business are not the retail
22 prices actually paid by consumers to purchase Mars's products. Retail prices paid by consumers are
23 higher than the prices Mars charges its customers. As a result, Mars does not collect independently
24 data about individual consumers' purchases of its products at the retail level.
25

26 8. In my experience, syndicated data, including data aggregated by Nielsen, is widely
27 used across the manufactured food industry and other industries in order to gain insight into
28

1 consumer purchases of retail products. Mars relies on syndicated data from Nielsen every day as
2 part of the company's ordinary course of business. To my knowledge, every large chocolate and
3 confectionary company uses syndicated data from either Nielsen or another syndicated data
4 provider (such as Information Resources, Inc.) to determine how many units it is selling and to see
5 how its products are performing in the marketplace.

6 **B. Analysis of Nielsen Data Regarding M&Ms and Twix Ice Cream Products**

7 9. I understand that Plaintiff Linda Cheslow alleges she has purchased "M&M's Ice
8 Cream Cookies" and "Twix Ice Cream Bars," and that Plaintiff Mike Xavier alleges he has
9 purchased "M&M's Ice Cream Cones" and "Twix Ice Cream Bars."

10 10. I queried Mars's Nielsen database to determine the total dollars spent by consumers
11 in the San Francisco, Los Angeles, Sacramento and San Diego, California metropolitan areas (to the
12 extent that data has been collected by Nielsen) on six count boxes of M&M's Ice Cream Cookies,
13 M&M's Ice Cream Cones, and Twix Ice Cream Bars since September 6, 2014. I selected these
14 metropolitan areas because Mars's Nielsen database is organized by region and major metropolitan
15 area. By limiting my query to these three areas, I ensured that I only captured sales occurring in
16 California. I selected September 6, 2014 as the starting date because of the way Nielsen collects
17 and aggregates data. Using a starting date of September 6, 2014 ensured that my query included
18 sales for a period of twelve months. The results of my query are reflected below in paragraph 12.
19

20 11. In order to perform this query, I first had to identify a Universal Product Code
21 ("UPC") for each of the products at issue. Every type of Mars product sold in supermarkets and
22 other retail establishments carries a unique UPC. Mars's Nielsen database is organized using these
23 UPCs. I understand that exemplars of the product labels Plaintiffs attached to their Complaint bear
24 the following UPCs: 004767720431 (box of six M&Ms Ice Cream Cones); 004767747381 (box of
25 six M&Ms Ice Cream Cookies); and 004767730123 (box of six Twix Ice Cream Bars).
26
27
28

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

Cheslow, Linda; Xavier, Mike

(b) County of Residence of First Listed Plaintiff Sonoma County
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number)

Finkelstein Thompson LLP

One California Street, Suite 900, San Francisco, CA 94111

Tel: (415) 398-8700

DEFENDANTS

Mars, Inc.; Mars Chocolate North America, LLC

County of Residence of First Listed Defendant
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

Williams & Connolly LLP

725 Twelfth Street, NW, Washington, DC 20005

Tel: (202) 434-5000

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff
- ☒ 3 Federal Question (U.S. Government Not a Party)
- ☐ 2 U.S. Government Defendant
- ☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- | | PTF | DEF | | PTF | DEF |
|---|----------------------------|----------------------------|---|----------------------------|----------------------------|
| Citizen of This State | <input type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business In This State | <input type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| Citizen of Another State | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business In Another State | <input type="checkbox"/> 5 | <input type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS		FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excludes Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Personal Injury - Medical Malpractice	PERSONAL INJURY <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 690 Other LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Management Relations <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Employee Retirement Income Security Act IMMIGRATION <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 465 Other Immigration Actions	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g))	<input type="checkbox"/> 375 False Claims Act <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 850 Securities/Commodities/Exchange <input checked="" type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 896 Arbitration <input type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision <input type="checkbox"/> 950 Constitutionality of State Statutes
REAL PROPERTY <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	CIVIL RIGHTS <input type="checkbox"/> 440 Other Civil Rights <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 448 Education	PRISONER PETITIONS Habeas Corpus: <input type="checkbox"/> 463 Alien Detainee <input type="checkbox"/> 510 Motions to Vacate Sentence <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty Other: <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition <input type="checkbox"/> 560 Civil Detainee - Conditions of Confinement		FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	

V. ORIGIN (Place an "X" in One Box Only)

- ☐ 1 Original Proceeding
- ☒ 2 Removed from State Court
- ☐ 3 Remanded from Appellate Court
- ☐ 4 Reinstated or Reopened
- ☐ 5 Transferred from Another District (specify)
- ☐ 6 Multidistrict Litigation

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):
 21 U.S.C. 301 (FDCA); 28 U.S.C. 1332 (CAFA)

Brief description of cause:

California state law claims based on alleged violations of federal food-labeling laws.

VII. REQUESTED IN COMPLAINT:

☒ CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P.

DEMAND \$
injunction

CHECK YES only if demanded in complaint:

JURY DEMAND: ☒ Yes ☐ No

VIII. RELATED CASE(S) IF ANY

(See instructions):

JUDGE

DOCKET NUMBER

DATE

9/28/2015

SIGNATURE OF ATTORNEY OF RECORD

s/Stephen D. Raber

IX. DIVISIONAL ASSIGNMENT (Civil L.R. 3-2)

(Place an "X" in One Box Only)



SAN FRANCISCO/OAKLAND



SAN JOSE



EUREKA

INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS 44

Authority For Civil Cover Sheet

The JS 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

- I.(a) Plaintiffs-Defendants.** Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.
 - (b) County of Residence.** For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the location of the tract of land involved.)
 - (c) Attorneys.** Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section "(see attachment)".
- II. Jurisdiction.** The basis of jurisdiction is set forth under Rule 8(a), F.R.Cv.P., which requires that jurisdictions be shown in pleadings. Place an "X" in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.
- United States plaintiff. (1) Jurisdiction based on 28 U.S.C. 1345 and 1348. Suits by agencies and officers of the United States are included here.
- United States defendant. (2) When the plaintiff is suing the United States, its officers or agencies, place an "X" in this box.
- Federal question. (3) This refers to suits under 28 U.S.C. 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.
- Diversity of citizenship. (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below; **NOTE: federal question actions take precedence over diversity cases.**)
- III. Residence (citizenship) of Principal Parties.** This section of the JS 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.
- IV. Nature of Suit.** Place an "X" in the appropriate box. If the nature of suit cannot be determined, be sure the cause of action, in Section VI below, is sufficient to enable the deputy clerk or the statistical clerk(s) in the Administrative Office to determine the nature of suit. If the cause fits more than one nature of suit, select the most definitive.
- V. Origin.** Place an "X" in one of the six boxes.
- Original Proceedings. (1) Cases which originate in the United States district courts.
- Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441. When the petition for removal is granted, check this box.
- Remanded from Appellate Court. (3) Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.
- Reinstated or Reopened. (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.
- Transferred from Another District. (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.
- Multidistrict Litigation. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Section 1407. When this box is checked, do not check (5) above.
- VI. Cause of Action.** Report the civil statute directly related to the cause of action and give a brief description of the cause. **Do not cite jurisdictional statutes unless diversity.** Example: U.S. Civil Statute: 47 USC 553 Brief Description: Unauthorized reception of cable service
- VII. Requested in Complaint.** Class Action. Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P.
- Demand. In this space enter the actual dollar amount being demanded or indicate other demand, such as a preliminary injunction.
- Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.
- VIII. Related Cases.** This section of the JS 44 is used to reference related pending cases, if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases.

Date and Attorney Signature. Date and sign the civil cover sheet.