

BORISON FIRM, LLC.

Scott C. Borison (State Bar No. 289456)

scott@borisonfirm.com

1900 S. Norfolk St Ste 350

San Mateo CA 94403

Telephone: (301) 620-1016

Facsimile: (301) 620-1018

SHEEHAN & ASSOCIATES, P.C.

Spencer Sheehan (Pro Hac Vice)

spencer@spencersheehan.com

60 Cuttermill Rd Ste 409

Great Neck, NY 11021

Telephone: (516) 303-0552

Facsimile: (516) 234-7800

Counsel for Plaintiff and the Proposed Class

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Eugina Harris, individually, and on behalf
of those similarly situated,

Plaintiff,

v.

McDonald's Corporation,

Defendant.

CASE NO. 3:20-cv-06533-RS

**FIRST AMENDED CLASS ACTION
COMPLAINT**

Demand for Jury Trial

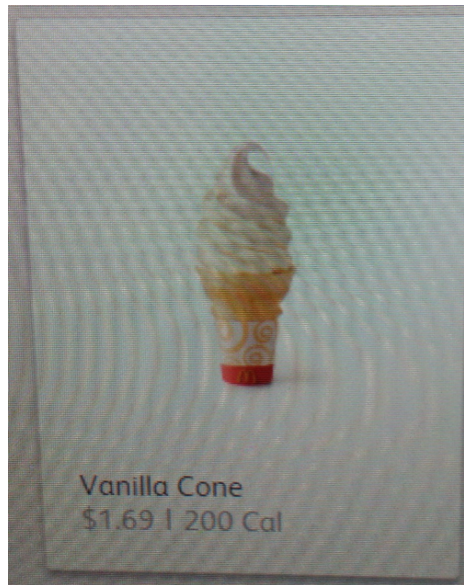
Plaintiff Eugina Harris (“Plaintiff”), on behalf of herself and others similarly situated brings this Class Action Complaint against McDonald’s Corporation (“Defendant” or “McDonald’s”), and on the basis of personal knowledge, information and belief, and investigation of counsel, allege as follows:

INTRODUCTION

1. Defendant manufactures distributes, markets, labels and sells “soft serve” ice cream or reduced fat ice cream purporting to be flavored by real vanilla under their “McDonald’s” brand (“Product,” “Products,” or “Vanilla Soft Serve Ice Cream”).

2. During the Class Period (as defined below), Plaintiff Eugina Harris purchased the Products in California.

3. McDonald’s falsely and misleadingly markets the Products to consumers as being flavored predominantly with real vanilla - derived from vanilla beans - through representations of its soft serve ice cream as “Vanilla Cone.”



4. McDonald’s vanilla representations lead a significant number of consumers to believe that real vanilla is the primary ingredient that flavors the Products.

5. This belief is consistent not only with the studies referenced herein but also with the strict federal regulations concerning vanilla which were passed to protect vanilla consumers from being deceived about the ingredients which flavor consumer products.

6. Rather, in stark contrast to Defendant’s representations and reasonable consumers’ reliance, the Product contains non-vanilla, artificial flavors, not disclosed to consumers and far less vanilla than consumers expect.

7. McDonald’s menu boards in its restaurants, drive through displays, self-service kiosks, website, conventional and digital advertising, social media marketing and point-of-sale displays identify the Product as “Vanilla.”

8. The Product’s representation of “Vanilla” “leads consumers to believe that it is flavored primarily with real vanilla.”¹

9. McDonald’s markets its company as a values based company focused on “quality food.”²

10. For example, in its most SEC filing, McDonald’s puts a great emphasis on its “quality ingredients.” In fact, it is mentioned multiple times as being part of the company’s purpose:³

- a. “The safety and quality of our food is a top priority and we are constantly innovating to strive to meet and exceed our customers’ expectations. This also includes sourcing **quality ingredients** in responsible ways, supporting farming communities and evolving the Happy Meal to make balanced meals more accessible to families around the globe.”
- b. McDonald’s partners with a global network of suppliers and farmers to provide **quality ingredients** and packaging materials. By engaging our supply chain, we have greater visibility and together work toward commitments that support more sustainable production, so we can continue to serve our customers delicious meals they know and love.

¹ Hallagan and Drake at 54; *See also* 21 U.S.C. §343(g) (requiring ingredients to be listed with “the name of the food specified in the definition and standard”); 21 C.F.R. § 101.4(a)(1) (requiring ingredients “be listed by common or usual name”).

² <https://www.mcdonalds.com/us/en-us/about-us/values-in-action.html>

³ McDonald’s 2021 Notice of Annual Shareholders’ Meeting and Proxy Statement, “Our Impact and Brand Purpose” at 10. https://www.sec.gov/Archives/edgar/data/63908/000120677421001039/mcd_courtesy-pdf.pdf (filed April 8, 2021).

11. This message is a core theme disseminated by Defendant's executives to the public.

12. For example, Alistair Macrow, McDonald's Global Chief Marketing Officer makes "quality ingredients" his mantra which he projects to the public at almost every opportunity:

a. "We want people to leave our restaurants feeling good about eating our food – not just because it's delicious, but also we source **quality ingredients** and give customers options."⁴

b. "...to the farmers who supply **quality ingredients** for our menu."⁵

13. Rather than delivering quality, authentic vanilla ice cream in each Product, Defendant delivers an artificially boosted flavor purporting to be primarily sourced from real vanilla.

14. By deceptively representing the source of its vanilla flavoring, Defendant is able to generate a greater number of sales and produce a larger profit than it would if it didn't make its deceptive vanilla representations.

15. Plaintiff seeks damages and an injunction to stop Defendant's false and misleading marketing practices with regards to its Vanilla Soft Serve Ice Cream.

⁴ McDonald's website, "Food Quality and Sourcing," <https://corporate.mcdonalds.com/corpmcd/our-purpose-and-impact/food-quality-and-sourcing.html> (emphasis added).

⁵ Little Black Book News, "Leo Burnett Pays Tribute to the Green Guardians of the Farm in New McDonald's Spot," August 18, 2014, <https://www.lbbonline.com/news/leo-burnett-pays-tribute-to-the-green-guardians-of-the-farm-in-new-mcdonalds-spot> (emphasis added).

JURISDICTION

1 16. This Court has jurisdiction over this action under the Class Action Fairness Act,
2 28 U.S.C. § 1332(d).

3 17. The amount in controversy exceeds the sum or value of \$5,000,000, exclusive of
4 interest and costs, and the parties are citizens of different states.

5 18. Venue is proper in this Court pursuant to 28 U.S.C. § 1391 because a substantial
6 part of the events and misrepresentations giving rise to Plaintiff's claims occurred in this District,
7 and Defendant (1) is authorized to conduct business in this District and has intentionally availed
8 itself of the laws and markets of this District through the promotion, marketing, distribution and
9 sale of its products here, (2) resides in this District, and (3) is subject to personal jurisdiction in
10 this District.

PARTIES

11
12 19. Plaintiff Eugina Harris is a resident of the City of Oakland and County of
13 Alameda, California. During the Class Period (as defined below), in California, she purchased
14 the Product for personal, family, or household consumption and/or use regularly and consistently
15 during at least 2019 and 2020.

16 20. Plaintiff Eugina Harris purchased the Product at McDonald's locations including
17 but not necessarily limited to the location at 6300 E 14th St, Oakland, CA 94621.

18 21. Plaintiff would not have purchased - or would have paid less for - the Product had
19 Plaintiff realized that much of the vanilla flavor came from non-vanilla plant sources.

20 22. Defendant advertised the Product as "Vanilla."

21 23. Plaintiff relied upon these representations when she purchased the Product. She
22 believed that the vanilla flavor in the Product was primarily sourced from real vanilla (i.e.
23 primarily from vanilla beans and the vanilla plant). Plaintiff would not have purchased the
24 Product had Plaintiff understood the true flavor composition of the Product. Plaintiff would
25 purchase the Product again in the future if the Product were remedied to reflect Defendant's
26 labeling and marketing claims for it.

24. Defendant McDonald's Corporation is a Delaware corporation, with its principal place of business in Chicago, Illinois.

BACKGROUND

25. According to recent industry reports, "Food companies are dropping artificial flavors, coloring, preservatives and other additives with scary names and focusing more on natural, wholesome and fresh ingredients."⁶

26. Nielsen has reported that 62% of consumers say they try to avoid artificial flavors.⁷

27. New Hope Network concluded that "71% of consumers today are avoiding artificial flavors."⁸

28. Label Insight determined that 76% of consumers avoid artificial flavors.⁹

29. Consumers are seeking products which obtain their flavor from their characterizing food ingredients, i.e., strawberry shortcake which contains sufficient strawberries to provide flavor to the food or flavor obtained from the characterizing food ingredient, i.e., strawberry flavor from strawberries as opposed to strawberry flavor synthesized from cherries.¹⁰

30. As "natural, organic and better-for-you trends proliferate, demand has flourished for naturally sourced vanilla."¹¹

31. Manufacturers have responded, "by transitioning from artificial to natural ingredients," including "natural vanilla ingredients."¹²

⁶ Jeff Daniels, [Why your favorite foods may be getting new recipes](#), CNBC, September 19, 2016

⁷ Nielsen, [Reaching For Real Ingredients: Avoiding The Artificial](#), Sept. 6, 2016.

⁸ Alex Smolokoff, [Natural color and flavor trends in food and beverage](#), Natural Products Insider, Oct. 11, 2019.

⁹ Thea Bourianne, [Exploring today's top ingredient trends and how they fit into our health-conscious world](#), March 26-28, 2018.

¹⁰ David Andrews, [Synthetic ingredients in Natural Flavors and Natural Flavors in Artificial flavors](#), Environmental Working Group (EWG).

¹¹ Amanda Del Buono, [Suppliers utilize cost-effective vanilla ingredient solutions](#), Beverage Industry (last updated Oct. 14, 2016).

¹² *Id.*

**SPECIFIC MISREPRESENTATIONS,
MATERIAL OMISSIONS, AND DECEPTIVE ACTS**

Misleading and Deceptive Flavor Designation and Product Name

A. Vanilla Marketplace

32. Global climate disruptions resulting in natural disasters befalling the primary vanilla producing country of Madagascar, have caused vanilla shortages.

33. This disruption in available vanilla has caused companies to cut corners when it comes to their premium vanilla ice cream products.

34. The approximate cost of using real vanilla to flavor an ice cream cone is 7 cents per unit. In contrast, a similar amount of synthetic vanilla costs about 1.5 cents per unit.

35. Because reasonable consumers do not follow the commodities markets – nor are they expected to follow – they are unaware of the shifting price of vanilla and cost-cutting company shortcuts which provide an inferior vanilla experience for customers.¹³

36. As one vanilla expert summarizes:¹⁴

The problem of adulteration of vanilla with vanillin and a few other components has always plagued the vanilla market and the pricing. After 35 years of work and study of natural products, I am convinced that we are not yet able to do a better job than Nature. There is really nothing like the pure unadulterated vanilla extract or various folded and concentrated vanilla extracts that are available. It is always a shame when users try to stretch the use and performance of vanilla with the adulteration by vanillin or other mixtures to make an economic price point or performance point. When this happens, it affects the overall market by introducing unfair competitive pricing that can drive honest growers and manufacturers of vanilla extracts to their breaking points, or at worst put them out of business permanently. The supply is then cut, the prices go up and the demand for good quality extracts goes down, thus creating a spiral downwards in supply and upwards in pricing of good quality material.

¹³ Further, even if a reasonable consumer was required to have an intimate knowledge of the vanilla market, the reasonable consumer would have no idea what amount of real vanilla is required to flavor a vanilla cone.

¹⁴Buccellato, Felix, Daphna Havkin-Frenkel & Faith C. Belanger (Eds.). (2019). *Handbook of Vanilla Science and Technology* (2nd Ed) (p. 373). Wiley (emphasis added).

B. Regulatory Guidance

37. Because of the high demand for real vanilla and the likelihood of confusion concerning vanilla representations made by companies, vanilla is one of the most regulated flavors in the marketplace.

38. These regulations provide guidance on consumer expectations for “vanilla” products and the necessary boundaries required to ensure that products are properly represented to satisfy these expectations.

39. Vanilla flavors are the only flavorings subject to a standard of identity. *See* 21 C.F.R. § 169.

40. These standards were promulgated to end practices which “deprive the consumer of value the product is represented to have, and for which the consumer pays,” such as “the widespread and exceedingly serious adulteration of vanilla extracts that are now labeled ‘pure.’”¹⁵

41. Industry leaders supported vanilla standards to “insure, for the protection of both the consumers and our industry, that all vanilla products are correctly labeled and meet at least minimum standards.”¹⁶

42. To correctly label foods with a characterizing flavor of vanilla, Hallagan and Drake stress two key points:

1. “The federal standards of identity for vanilla flavorings at 21 CFR Section 169 and ice cream at 21 CFR Section 135, and their labeling requirements, take precedence over the general flavor and food labeling regulations at 21 CFR Section 101.22;” and
2. “The federal standard of identity for vanilla flavorings at 21 CFR Section 169 applies to both the flavorings sold directly to consumers and to food manufacturers [for use in finished food products].”¹⁷

¹⁵ Letter from McCormick & Company Inc. to HEW Secretary, January 15, 1960.

¹⁶ Letter from McCormick & Company Inc. to HEW Secretary, January 15, 1960.

¹⁷ Hallagan at 35.

43. Ice cream flavor regulations distinguish between three categories, with Category 1 referring to ice cream which gets its flavor only from its natural characterizing flavor – i.e., vanilla from vanilla beans, strawberry from strawberries, etc. *See* 21 C.F.R. §135.110(f)(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’”).

44. All flavors from sources other than a natural characterizing flavor are considered “artificial flavors” in the context of ice cream, according to the International Dairy Foods Association (“IDFA”) (describing artificial flavors as “derived from natural sources other than the characterizing flavor and simulate, resemble or reinforce the characterizing flavor”).¹⁸

45. According to John B. Hallagan and Joanna Drake, the former and current legal advisors for The Flavor and Extract Manufacturers Association of the United States (“FEMA”):

When consumers purchase ice cream labeled as “vanilla ice cream” they expect it to be flavored with vanilla flavoring derived from vanilla beans *unless labeled otherwise*. As we shall see, this expectation is codified in two U.S. federal standards of identity, one for vanilla flavorings and one for ice cream.¹⁹ (emphasis added).

46. The IDFA, Hallagan and Drake and FEMA point out that the regulations for vanilla products and ice cream “are supplemented by a formal FDA Advisory Opinion, and a collection of FDA-issued regulatory correspondence,” which support this conclusion.²⁰

47. That the ice cream regulations are meant to be read “together with the vanilla standard of identity means that the characterizing flavor for this [Category 1] ice cream must be provided only by vanilla extract complying with the standard at 21 CFR Section 169.175, or another standardized vanilla flavoring derived solely from vanilla beans.”²¹

¹⁸ IDFA, Ice Cream & Frozen Desserts Labeling Manual, 2019 Ed.

¹⁹ John B. Hallagan and Joanna Drake, The Flavor and Extract Manufacturers Association of the United States, “[Labeling Vanilla Flavorings and Vanilla-Flavored Foods in the U.S.](#),” Perfumer & Flavorist, Apr. 25, 2018.

²⁰ Hallagan, endnote 7, FDA, 1983. Letter dated 9 February 1983 from FDA to FEMA constituting an FDA Advisory Opinion (21 C.F.R. § 135.110(f) “makes no provision for any natural flavors other than natural characterizing flavors” which means the “FDA must treat all natural flavors that simulate the characterizing flavor as artificial flavors when deciding what name should appear on the principal display panel.”).

²¹ Hallagan at p. 11.

C. *McDonald's "Quality Food"*

48. McDonald's represents the company as a values based restaurant that provides "quality food" at a value price.²²

49. The company states on its website: "We are helping to create a future of quality, secure and sustainable food because how our food is produced and **where it comes from matter to our customers**, communities and the environment. This includes **sourcing quality ingredients** in responsible ways and supporting farming communities."²³

50. Alistair Macrow, McDonald's Global Chief Marketing Officer describes the company's focus:²⁴

We want people to leave our restaurants feeling good about eating our food – not just because it's delicious, **but also we source quality ingredients** and give customers options. We will continue to invest in strong partnerships with suppliers and farmers around the world and deliver on customer expectations by evolving our menu and offering balanced, wholesome options the whole family can enjoy.

51. This focus is not new. Rather, it was Ray Kroc's original vision "to build a restaurant system known for consistently high-quality food and uniformity in its preparation methods" which would "enable the company to consistently offer its customers safe, high-quality food at an affordable price."²⁵

52. Studies show that these marketing efforts have been successful because loyal McDonald's customers tend to have "higher perceptions of health and nutrition and quality of McDonald's food than they [do] of value perceptions."²⁶

²² McDonald's Website, "Values in Action," available at <https://www.mcdonalds.com/us/en-us/about-us/values-in-action.html>.

²³ McDonald's website, "Food Quality & Sourcing," available at <https://corporate.mcdonalds.com/corpmcd/our-purpose-and-impact/food-quality-and-sourcing.html> (emphasis added).

²⁴ *Id.*

²⁵ Purdue University Center for Food and Agricultural Business, "Case Study: McDonald's Corporation" (2011) at 4, 9. Prepared by McDonald's Corporation and Kenneth McCorckle of Wells Fargo Bank. <https://agribusiness.purdue.edu/wp-content/uploads/2019/08/mcdonalds-case-study-2011.pdf>

²⁶ Adams, Claire, "McDonald's Users' Perceptions Of Health And Nutrition, Quality, And Value On Visit Frequency" (2018). Electronic Theses and Dissertations. 594. <https://egrove.olemiss.edu/etd/594>

D. *McDonald's "Vanilla"*

53. Defendant knows that customers seek high quality, authentic vanilla ice cream because it emphasizes this on its website:

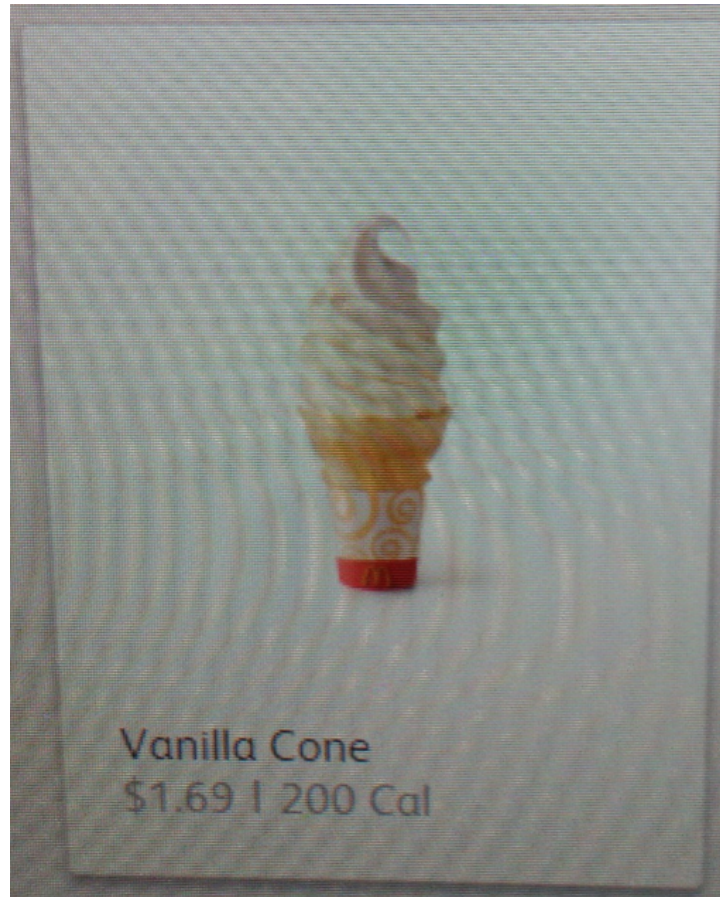
What is your soft serve ice cream made of?

You'll find ingredients like milk, sugar and cream in our reduced-fat vanilla ice cream. Our vanilla soft serve—featured in our popular vanilla cone, McCafé® Shakes and McFlurry® desserts—is made with no artificial flavors, colors or preservatives. Still curious? Learn more about our [reduced fat vanilla ice cream](#).

54. McDonald's emphasizes that its vanilla ice cream is devoid of artificial flavors, colors, and preservatives.

55. In other words, its vanilla flavor only comes from real vanilla rather than synthetic non-vanilla ingredients.

56. McDonald's representations, through its menu boards, kiosks, website and advertising of the Products – “Vanilla Soft Serve” and “Vanilla Cone,” and all other dessert products which incorporate the vanilla soft serve ice cream – are false, misleading and unlawful because the vanilla soft serve ice cream is flavored by artificial vanilla in the form of vanillin, and contains less real vanilla than consumers expect.



57. Several reasons support the allegations that McDonald's Vanilla Soft Serve Ice Cream is not flavored primarily by real vanilla ingredients.

58. First, the use of non-vanilla flavoring is revealed through the ingredient list designation of "Natural Flavor" instead of an exclusively vanilla ingredient like "vanilla extract" or "vanilla flavoring." *See* 21 C.F.R. § 169.175 (b)(1) ("The specified name of the food is 'Vanilla extract' or 'Extract of vanilla'"); *see also* 21 U.S.C. §343(g) (requiring ingredients to be listed with "the name of the food specified in the definition and standard").

Vanilla Reduced Fat Ice Cream

Ingredients: Milk, Sugar, Cream, Corn Syrup, Natural Flavor, Mono and Diglycerides, Cellulose Gum, Guar Gum, Carrageenan, Vitamin A Palmitate.

Ingredients: Milk, Sugar, Cream, Corn Syrup, Natural Flavor, Mono and Diglycerides, Cellulose Gum, Guar Gum, Carrageenan, Vitamin A Palmitate.

59. In vanilla ice cream, the designation of an ingredient as “natural flavor” means it is a combination of vanilla and non-vanilla flavor.

60. Second, this conclusion is confirmed by gas chromatography-mass spectrometry (“GC-MS”) analysis, a method that laboratories typically rely on to authenticate whether a product contains vanilla from vanilla beans or synthetic compounds designed to mimic the taste provided by vanilla.

Table 1

Sheehan & Associates, P.C., Project #7738

McDonald's Soft Serve Vanilla Ice Cream

Production Code: N/A

Methylene Chloride Extract of 10.0 g with 1 ppm Matrix-Spiked Int. Std. by P&T-TD-GC-MS

Data File = TSQA4264

MS Scan #	Area Integration	Peak Assignment	Conc. PPM w/w
83	310407	acetic acid	0.080
159	1930546	acetol	0.495
180	42711	propionic acid	0.011
212	1955672	acetoin	0.502
266	19306078	1,2-propylene glycol	4.953
300	1607581	butyric acid	0.412
314	264343	hexanal	0.068
361	539000	furfural	0.138
374	27475	2-methylbutyric acid	0.007
382	363269	dimethylsulfoxide (DMSO)	0.093
388	241862	furfuryl alcohol	0.062
409	38958	pentanoic acid	0.010
420	413208	lactic acid	0.106
431	136045	2-heptanone	0.035
448	72265	heptanal	0.019
479	30721289	dimethyl sulfone	7.881
552	13734486	hexanoic acid + small traces of benzaldehyde + methyl furfural	3.523
571	167763	octanal	0.043
607	126291	cyclotene	0.032
619	58729	benzyl alcohol	0.015
638	694334	heptanoic acid	0.178
645	31416	octyl alcohol	0.008
649	77250	2-acetyl pyrrole	0.020
668	73765	2-nonanone	0.019
677	541857	guaiacol	0.139
685	1139318	nonanal	0.292
708	401224	maltol + phenylethyl alcohol	0.103
758	29300370	octanoic acid	7.516
765	414626	benzoic acid	0.106
786	69629	2-methoxy-4-methylphenol	0.018
791	251866	decanal	0.065
802	3898206	naphthalene-d8 (internal standard)	1.000
834	962648	hydroxymethyl furfural (HMF)	0.247
842	2097635	nonanoic acid	0.538
875	90617	2-undecanone	0.023
884	236044	delta-nonolactone	0.061
908	102033	2,4-decadienal	0.026
949	28027470	decanoic acid	7.190
1019	193995968	vanillin	49.765
1043	177151	vanillyl ethyl ether + 4-hydroxy-3-methoxybenzyl alcohol	0.045
1049	65941	acetovanillone	0.017
1055	1307410	2-dodecanone	0.335
1079	595013	delta-decalactone	0.153
1108	5606010	lauric acid	1.438
1169	131924	propyl paraben	0.034
1183	51265	tridecanoic acid	0.013
1207	174975	syringaldehyde	0.045
1220	786713	gamma-dodecalactone + 2-pentadecanone	0.202
1249	913884	delta-dodecalactone	0.234
1259	110703	myristoleic acid	0.028
1266	1432064	myristic acid	0.367
Total (excluding internal standard)			87.71

61. GC-MS analysis can detect the presence of the numerous trace compounds which contribute to the flavor profile from vanilla.

62. The analysis reveals between 10 and 12 other chemicals that are common to vanilla but are also part of a standard compounded vanilla flavor, such as maltol, guaiacol, vanillyl ethyl ether, cyclopentyl acetate, acetoin, furfural and benzaldehyde.

63. The results show the Product contains “an abnormal excess of vanillin (MS Scan # 1019, 49.765 PPM) relative to the profile of minor components in a vanilla preparation,” which is a strong indicator it contains vanillin from non-vanilla sources.²⁷

64. In a sample of vanilla extract subjected to the same GC-MS analysis, the ratio of vanillin to p-hydroxybenzoic acid is 270 (vanillin, MS Scan # 759, 77.4301 divided by p-hydroxybenzoic acid, MS Scan # 832, 0.2867).

65. P-hydroxybenzoic acid is one of the compounds used to evaluate the authenticity of vanilla ingredients.²⁸

66. If all vanillin in the Vanilla Soft Serve came from vanilla beans, it would be expected to contain p-hydroxybenzoic acid at 0.184 PPM.

67. Vanillyl ethyl ether is a benzyl ether which is closely associated with vanilla authenticity.

68. The ratio of vanillin to vanillyl ethyl ether in the Product is 1105.89 (vanillin, MS Scan # 1019, 49.765 PPM divided by vanillyl ethyl ether, MS Scan # 1043, 0.045).

69. In the same sample of vanilla extract, the ratio of vanillin to vanillyl ethyl ether is 27.2 (vanillin, MS Scan # 759, 77.4301 divided by vanillyl ethyl ether, MS Scan # 809, 2.8421).

70. The non-detection of p-hydroxybenzoic acid and the disparate ratio of vanillin to vanillyl ethyl ether in the Product means the Product contains less real vanilla and contains added vanillin.

71. This added vanillin is from non-vanilla sources, such as rice bran or wood pulp.

²⁷ Arun K. Sinha et al., “[A comprehensive review on vanilla flavor: extraction, isolation and quantification of vanillin and other constituents](#),” International Journal of Food Sciences and Nutrition 59.4 (2008): 299-326.

²⁸ K. Gassenmeier and E. Binggeli, [Vanilla Bean Quality – A Flavour Industry View](#), Expression of Multidisciplinary Flavour Science, Givaudan Schweiz AG, Ueberlandstrasse 138, CH-8600 Switzerland.

72. This type of vanillin, when made through a natural process like fermentation, can be labeled a “natural flavor” only when used in foods where the characterizing flavor is not vanilla.

73. Defendant’s Product, “containing vanillin derived from a non-vanilla bean source needs to be labeled as artificially flavored [because] the food is characterized/labeled as vanilla flavored.”²⁹

74. The Vanilla Soft Serve “contains natural flavor compounds that simulate vanilla but are not derived from vanilla beans,” and are therefore considered artificial flavors.³⁰

75. The GC-MS analysis also reveals propylene glycol (MS Scan # 266, 4.953 PPM) in relatively significant levels.

76. Propylene glycol is commonly used as a solvent carrier for a flavor.

77. In contrast, the solvent carrier for vanilla extract is ethyl alcohol.

78. The presence of propylene glycol supports the allegations that the Vanilla Soft Serve contains non-vanilla flavors.

79. The representations for the Vanilla Soft Serve Ice Cream are misleading because this gives consumers the impression that all of the vanilla taste is from vanilla beans, when this is not true and misleads consumers.

80. Representing the Product as “Vanilla” instead of “Artificial Vanilla” or “Artificially Flavored Vanilla” is deceptive and misleading to consumers. *See* 21 C.F.R. §135.110(f)(2)(iii) (“If the food contains both a natural characterizing flavor and an artificial flavor simulating it, and if the artificial flavor predominates”).

Reliance and Economic Injury

81. When purchasing the Product, Plaintiff sought a product with a materially greater amount of vanilla than it actually contained.

²⁹ Hallagan and Drake.

³⁰ Hallagan and Drake, p. 48.

82. When purchasing the Product, Plaintiff sought a product that was natural, in that its vanilla flavor was provided primarily by vanilla beans from the vanilla plant.

83. Plaintiff read and relied on Defendant's false and misleading product name, menu board, kiosk description and misleading claims in its labeling and advertising of the product.

84. Plaintiff saw and relied on statements on the Product's advertising, which misleadingly reference only "vanilla" even though much, if not all, of the vanilla flavoring comes from non-vanilla sources.

85. The vanilla representations made by Defendant throughout its marketing efforts - including but not limited to its menu boards, kiosks, website and advertising - however, are misleading, and had the capacity, tendency, and likelihood to confuse or confound Ms. Harris and other consumers acting reasonably (including the putative Class) because, as described in detail herein, the products are not sourced primarily from real vanilla but instead their flavor comes from the inclusion of synthetic, artificial flavor "boosting" ingredients.

86. Ms. Harris is not a nutritionist or food scientist, but rather a lay consumer who did not have the specialized knowledge that Defendant had regarding the ingredients present in the Products. At the time of purchase, Ms. Harris was unaware of the amount of the high concentration of artificial vanilla present in the Product and the minimal - at best - amount of real vanilla.

87. Ms. Harris acted reasonably in relying on Defendant's marketing, which Defendant intentionally placed on the menu board and kiosks - as well as all other marketing efforts concerning the Products - with the intent to induce average consumers into purchasing the Products.

88. Ms. Harris would not have purchased the Products if she knew that the representations were false and misleading in that the Products were not primarily flavored by real vanilla.

89. The Product costs more than similar products without misleading representations, and would have cost less absent the misleading vanilla representations. If Defendant were enjoined from making the misleading claims, the market demand and price for its Product would

drop, as it has been artificially and fraudulently inflated due to Defendant's use of deceptive ingredient representations.

90. Ms. Harris paid more for the Product, and would only have been willing to pay less, or unwilling to purchase them at all, absent the misleading representations complained of herein.

91. For these reasons, the Product was worth less than what Ms. Harris paid for it, and may have been worth nothing at all.

92. Instead of receiving products that were primarily flavored with real vanilla, the products Ms. Harris received were not primarily flavored with real vanilla, but rather their flavor comes from non-vanilla, artificial ingredients.

93. Ms. Harris lost money as a result of Defendant's deceptive claims and practices in that she did not receive what she paid for when purchasing the Product.

94. Ms. Harris detrimentally altered her position and suffered damages in an amount equal to the amount she paid for the Product.

95. The Product costs significantly more per ounce at McDonald's restaurants compared to other similar products which lack prominent and unqualified descriptions and claims of "Vanilla" and more than the price that could be charged for it if it disclosed the source of the vanilla flavor.³¹

96. Plaintiff paid more for the Product than she would have had she not been misled by the false and misleading representations and advertising complained of herein.

³¹ See Parker, April Rae, "Effect of Labeling on Consumer Perception of Commercial and Laboratory-Produced Vanilla Ice Creams. " Master's Thesis, University of Tennessee, 2003. https://trace.tennessee.edu/utk_gradthes/2159. Concluding that "Any sample labeled 'natural' was liked more than the other samples overall and for vanilla flavor. The samples labeled 'natural' also had a more intense perceived strength of vanilla flavor than the other samples. For the commercial ice creams, the word 'natural' on the sample, despite the actual flavoring used, apparently biased consumer's perception of the product." In other words, any natural or real vanilla representation – even when the ice cream is artificially flavored – led consumers to have higher demand for the product in comparison to ice creams where the vanilla flavor was represented as artificial.

97. Plaintiff lost money as a result of Defendant's deception in that Plaintiff did not receive what she paid for.

98. By engaging in its misleading and deceptive marketing, sales and pricing scheme, Defendant reaped and continues to reap increased sales and profits.

CLASS ACTION ALLEGATIONS

99. Plaintiff brings this action as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure. The class that Plaintiff Harris seeks to represent (the "Class" or "the California Class") is composed of and defined as follows:

All persons residing in California who have purchased McDonald's Vanilla Soft Serve Ice Cream and other dessert items which feature the Vanilla Soft Serve, i.e., Vanilla Shake, for their own use (which includes feeding their families), and not for resale, since May 9, 2014. Excluded from the Class are: governmental entities; Defendant; any entity in which Defendant has a controlling interest; Defendant's officers, directors, affiliates, legal representatives, employees, co-conspirators, successors, subsidiaries, and assigns; and, any judge, justice, or judicial officer presiding over this matter and the members of their immediate families and judicial staff.

100. For the purposes of this Complaint, the term "Class Members" refers to all members of the Class, including the Plaintiff Eugina Harris.

101. This action is maintainable as a class action under Federal Rules of Civil Procedure Rule 23(a), and (b)(2) and (b)(3).

102. **Numerosity.** The Class consists of thousands of persons throughout the State of California. The Class is so numerous that joinder of all members is impracticable, and the disposition of their claims in a class action will benefit the parties and the Court.

103. **Commonality and Predominance.** The questions of law and fact common to the Class has the capacity to generate common answers that will drive resolution of this action. They predominate over any questions affecting only individual class members. Common questions of law and fact include, but are not limited to, the following:

- a. Whether McDonald's contributed to, committed, or is responsible for the conduct alleged herein;

- b. Whether McDonald's conduct constitutes the violations of law alleged herein;
- c. Whether McDonald's acted willfully, recklessly, negligently, or with gross negligence in the violations of laws alleged herein;
- d. Whether Class Members are entitled to injunctive relief; and
- e. Whether Class Members are entitled to restitution and damages.

104. By seeing the name, labeling, display and marketing of the Product, and by purchasing the Product, all Class Members were subject to the same wrongful conduct.

105. Absent McDonald's material deceptions, misstatements and omissions, Plaintiff Harris and other Class Members would not have purchased the Product.

106. **Typicality.** Plaintiff's claims are typical of the claims of the Class, respectively, because she purchased McDonald's soft serve ice cream products and was injured thereby. The claims of Plaintiff and other Class Members are based on the same legal theories and arise from the same false, misleading and unlawful conduct.

107. **Adequacy.** Plaintiff is an adequate representative of the Class because her interests do not conflict with those of other Class Members. Each Class Member is entitled to damages reflecting a similar and discrete purchase or purchases that each Class Member made. Plaintiff has retained competent and experienced class action counsel, who intends to prosecute this action vigorously. The Class Members' interests will be fairly and adequately protected by Plaintiff and his counsel.

108. **Superiority.** A class action is superior to other available methods for the fair and efficient adjudication of this controversy, because joinder of all Class Members is impracticable. The amount at stake for each consumer, while significant, is such that individual litigation would be inefficient and cost-prohibitive. Plaintiff anticipates no difficulty in the management of this action as a class action.

109. This Court should certify a class under Rule 23(b)(2) because Defendant has acted or refused to act on grounds that apply generally to the Class, by making illegal, unfair,

misleading and deceptive representations and omissions regarding McDonald's Vanilla Soft Serve Ice Cream.

110. This Court should certify a class under Rule 23(b)(3) because the common issues identified above predominate over any questions affecting individual members and a class is superior to other available methods to fairly and efficiently adjudicate the claims.

111. **Notice to the Class.** Plaintiff anticipates that this Court can direct notice to the Class, to be effectuated by publication in major media outlets and the Internet.

FIRST CLAIM
(ON BEHALF OF THE CALIFORNIA CLASS)
(Violation of California Business & Professions Code §§ 17200 *et seq.* – Unlawful Conduct Prong of the UCL)

112. Plaintiff incorporates by reference all allegations contained in the complaint as if fully set forth herein. California Business & Professions Code section 17200 ("UCL") prohibits any "unlawful, unfair or fraudulent business act or practice."

113. The acts, omissions, misrepresentations, practices, and non-disclosures of Defendant, as alleged herein, constitute "unlawful" business acts and practices in that they violate the Federal Food, Drug, and Cosmetic Act ("FFDCA") and its implementing regulations, including, at least, the following sections:

114. 21 U.S.C. § 343, which deems food misbranded when the label contains a statement that is "false or misleading in any particular," with "misleading" defined to "take[] into account (among other things) not only representations made or suggested by statement, word, design, device, or any combination thereof, but also the extent to which the labeling or advertising fails to reveal facts material";

115. 21 U.S.C. § 321(n), which states the nature of a false and misleading advertisement;

116. 21 C.F.R. § 101.18(b), which prohibits true statements about food ingredients and descriptions that are misleading in light of the presence of other ingredients;

117. 21 C.F.R. Part 169, Food Dressings and Flavorings;

118. 21 C.F.R. § 135.110, which sets forth a framework to truthfully identify the source of an ice cream product's flavor; and

119. 21 C.F.R. § 102.5 which prohibits misleading common or usual names.

120. Defendant's conduct is further "unlawful" because it violates the California False Advertising Law ("FAL") and the Consumer Legal Remedies Act ("CLRA"), as discussed in the claims below.

121. Defendant's conduct also violates the California Sherman Food, Drug, and Cosmetic Law, Cal. Health & Saf. Code section 109875, *et seq.* ("Sherman Law"), including, at least, the following sections:

122. Section 110100 (adopting all FDA regulations as state regulations);

123. Section 110290 ("In determining whether the labeling or advertisement of a food ... is misleading, all representations made or suggested by statement, word, design, device, sound, or any combination of these, shall be taken into account. The extent that the labeling or advertising fails to reveal facts concerning the food ... or consequences of customary use of the food ... shall also be considered.");

124. Section 110390 ("It is unlawful for any person to disseminate any false advertisement of any food.... An advertisement is false if it is false or misleading in any particular.");

125. Section 110395 ("It is unlawful for any person to manufacture, sell, deliver, hold, or offer for sale any food ... that is falsely advertised.");

126. Section 110398 ("It is unlawful for any person to advertise any food, drug, device, or cosmetic that is adulterated or misbranded.");

127. Section 110400 ("It is unlawful for any person to receive in commerce any food ... that is falsely advertised or to deliver or proffer for delivery any such food...."); and

128. Section 110660 ("Any food is misbranded if its labeling is false or misleading in any particular.").

129. Each of the challenged statements made and actions taken by Defendant violates the FFDCA, the CLRA, the FAL, and the Sherman Law, and therefore violates the "unlawful"

prong of the UCL.

130. Defendant leveraged its deception to induce Plaintiff Eugina Harris and members of the Class to purchase products that were of lesser value and quality than advertised.

131. Defendant's deceptive advertising caused Plaintiff Eugina Harris and members of the Class to suffer injury in fact and to lose money or property, as it denied them the benefit of the bargain when they decided to purchase Vanilla Soft Serve Ice Cream over other products that are less expensive, and contain virtually the same or immaterially different amounts of vanilla. Had Plaintiff Eugina Harris and the members of the Class been aware of Defendant's false and misleading advertising tactics, they would not have purchased McDonald's Vanilla Soft Serve Ice Cream at all, or would have paid less than what they did for it.

132. In accordance with California Business & Professions Code section 17203, Plaintiff Eugina Harris seeks an order enjoining Defendant from continuing to conduct business through unlawful, unfair, and/or fraudulent acts and practices and to commence a corrective advertising campaign.

133. Plaintiff Eugina Harris also seeks an order for the disgorgement and restitution of all monies from the sale of McDonald's Vanilla Soft Serve Ice Cream Products that were unjustly acquired through acts of unlawful, unfair and/or fraudulent competition.

SECOND CLAIM
(ON BEHALF OF THE CALIFORNIA CLASS)
(Violation of California Business & Professions Code §§ 17200, *et seq.* –
Unfair and Fraudulent Conduct Prong of the UCL)

134. Plaintiff Eugina Harris incorporates by reference all of the allegations of the preceding paragraphs as if fully set forth herein.

135. California Business & Professions Code section 17200 prohibits any "unlawful, unfair or fraudulent business act or practice."

136. The false and misleading representations of McDonald's Vanilla Soft Serve Ice Cream, as alleged herein, constitutes "unfair" business acts and practices because such conduct is immoral, unscrupulous, and offends public policy. Further, the gravity of Defendant's conduct

outweighs any conceivable benefit of such conduct.

137. The acts, omissions, misrepresentations, practices, and non-disclosures of Defendant as alleged herein constitute “fraudulent” business acts and practices, because Defendant’s conduct is false and misleading to Plaintiff and members of the Class.

138. Defendant’s representations and marketing of McDonald’s Vanilla Soft Serve Ice Cream is likely to deceive Class Members about the flavoring source and amount of vanilla in the Product.

139. Defendant either knew or reasonably should have known that the claims and statements concerning McDonald’s Vanilla Soft Serve Ice Cream were likely to deceive consumers.

140. In accordance with California Business & Professions Code section 17203, Plaintiff Eugina Harris seeks an order enjoining Defendant from continuing to conduct business through unlawful, unfair, and/or fraudulent acts and practices and to commence a corrective advertising campaign.

141. Plaintiff Eugina Harris also seeks an order for the disgorgement and restitution of all monies from the sale of McDonald’s Vanilla Soft Serve Ice Cream products that were unjustly acquired through acts of unlawful, unfair and/or fraudulent competition.

THIRD CLAIM
(ON BEHALF OF THE CALIFORNIA CLASS)
(Violation of California Business & Professions Code §§ 17500, *et seq.* –
False and Misleading Advertising)

142. Plaintiff Eugina Harris incorporates by reference all allegations contained in the complaint as if fully set forth herein.

143. California False Advertising Law (Cal. Business & Professions Code sections 17500 and 17508) prohibits “mak[ing] any false or misleading advertising claim.”

144. As alleged herein, Defendant, in its marketing of McDonald’s Vanilla Soft Serve Ice Cream, makes “false [and] misleading advertising claim[s],” as it deceives consumers as to the flavor composition and amount of real vanilla in the Product.

145. In reliance on these false and misleading advertising claims, Plaintiff Eugina Harris and members of the Class purchased and consumed McDonald's Vanilla Soft Serve Ice Cream without the knowledge that McDonald's Vanilla Soft Serve Ice Cream did not get its vanilla taste from vanilla beans.

146. Defendant knew or should have known that its representations and marketing was likely to deceive consumers.

147. As a result, Plaintiff Eugina Harris and the Class are entitled to injunctive and equitable relief, restitution, and an order for the disgorgement of the funds by which Defendant was unjustly enriched.

FOURTH CLAIM
(ON BEHALF OF THE CALIFORNIA CLASS)
(Violation of California Civil Code §§ 1750, *et seq.* –
Consumers Legal Remedies Act)

148. Plaintiff Eugina Harris incorporates by reference all allegations contained in the complaint as if fully set forth herein.

149. The CLRA adopts a statutory scheme prohibiting various deceptive practices in connection with the conduct of a business providing goods, property, or services primarily for personal, family, or household purposes.

150. Defendant's policies, acts, and practices were designed to, and did, result in the purchase and use of McDonald's Vanilla Soft Serve Ice Cream primarily for personal, family, or household purposes, and violated and continue to violate the following sections of the CLRA:

151. Section 1770(a)(2), which prohibits representing that goods have a particular composition or contents that they do not have;

152. Section 1770(a)(5), which prohibits representing that goods have characteristics, uses, benefits or ingredients that they do not have;

153. Section 1770(a)(7), which prohibits representing that goods are of a particular standard, quality, or grade if they are of another;

154. Section 1770(a)(9), which prohibits advertising goods with intent not to sell them as advertised; and

155. Section 1770(a)(16), which prohibits representing that the subject of a transaction has been supplied in accordance with a previous representation when it has not.

156. Plaintiff Eugina Harris requests that this Court enjoin the Defendant from continuing to employ the unlawful methods, acts and practices alleged herein pursuant to Cal. Civ. Code § 1780. If Defendant is not restrained from engaging in these types of practices in the future, Plaintiff and other members of the Class will continue to suffer harm.

157. On August 17, 2020, Tiana Naples sent a Consumer Legal Remedies Notice via certified mail, return receipt requested, from Plaintiff's Counsel pursuant to Cal. Civ. Code § 1782, to Defendant's registered agent within the state of California and Defendant's headquarters.

158. Defendant received the CLRA Notices on August 20, 2020 (registered agent) and August 21, 2020 (headquarters). See Exhibits D and E.

159. The CLRA Notices provided Defendant notice of the misconduct and requested that Defendant cure its misconduct pursuant to Cal. Civ. Code. § 1782 within 30 days.

160. Defendant, through counsel, responded to Plaintiff's Counsel on September 9, 2020, and denied that the statements and representations of the Product as "Vanilla" were misleading and refused to cure the misconduct alleged.

161. Plaintiff seeks injunctive relief, restitution and damages for Defendant's violation of the CLRA.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, on behalf of herself and other members of the proposed Class herein, prays for judgment and relief on all of the legal claims as follows:

- A. Certification of the Class, certifying Plaintiff as representative of the Class, and designating Plaintiff's counsel as counsel for the Class;
- B. A declaration that Defendant has committed the violations alleged herein;
- C. For restitution and disgorgement pursuant to, without limitation, the California Business & Professions Code §§ 17200, *et seq.* and Cal Civ. Code § 1780;

- 1 D. For declaratory and injunctive relief pursuant to, without limitation, the California
2 Business & Professions Code §§ 17200, *et seq.* and 17500, *et seq.*;
3 E. For damages, declaratory and injunctive relief pursuant to California Civil Code §
4 1780;
5 F. An award of compensatory damages, the amount of which is to be determined at
6 trial;
7 G. For punitive damages;
8 H. For interest at the legal rate on the foregoing sums;
9 I. For attorneys' fees;
10 J. For costs of suit incurred; and
11 K. For such further relief as this Court may deem just and proper.

12 **JURY TRIAL DEMAND**

13 Plaintiff demands a jury trial on all causes of action so triable.

14
15 Dated: April 23, 2021

16 **Borison Firm, LLC.**

17 /s/Scott Borison
18 Scott C. Borison (State Bar No. 289456)
19 1900 S. Norfolk St Ste 350
20 San Mateo CA 94403
Telephone: (301) 620-1016
Facsimile: (301) 620-1018
scott@borisonfirm.com

21 **Sheehan & Associates, P.C.**
22 Spencer Sheehan (*Pro hac vice forthcoming*)
23 60 Cuttermill Road Ste 409
24 Great Neck NY 11021
Tel: (516) 303-0552
Fax: (516) 234-7800
spencer@spencersheehan.com

25
26 *Counsel for Plaintiff and the Proposed Class*