

**SUPREME COURT OF THE STATE OF NEW YORK
BRONX COUNTY**

FREDERICK MCKINLEY and
LISA VIZCARRA, individually and on
behalf of all others similarly situated,

Plaintiffs,

Index No. 805260/2024E

- against -

First Amended
Class Action Complaint

CONOPCO INC. and
UNILEVER UNITED STATES, INC.,

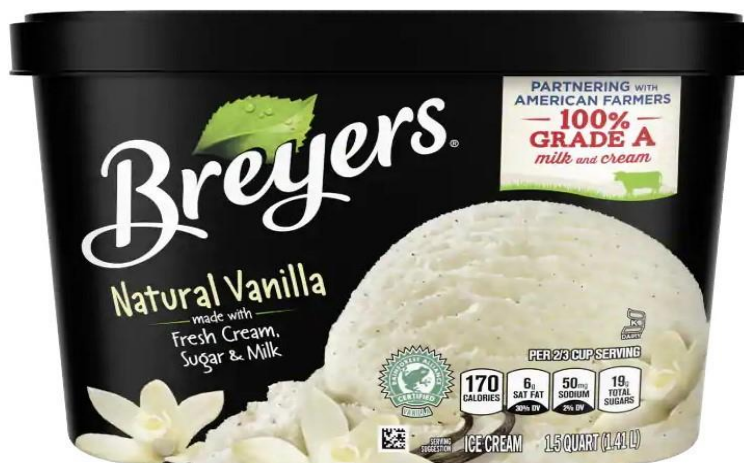
Defendants

Jury Trial Demanded

Frederick McKinley (“McKinley”) and Lisa Vizcarra (“Vizcarra”) (collectively, “Plaintiffs”) allege as follows:

INTRODUCTION

1. Defendant Conopco, Inc. (“Conopco”) and defendant Unilever United States, Inc. (“Unilever”) (collectively with Conopco, “Defendants”) manufacturer, sell, and market Breyers Natural Vanilla Ice Cream (the “Product”), pictured below.



2. By prominently displaying the words “Natural Vanilla” and images of vanilla flowers, cured vanilla beans, and a scoop of ice cream with visible dark specks that appear to be flecks of vanilla bean (collectively, the “Representations”), Defendants falsely and misleadingly market Breyers Natural Vanilla Ice Cream to consumers as containing vanilla flavor derived only from the vanilla plant and not from non-vanilla plant sources.

3. Unfortunately for consumers, this is untrue. Breyers Natural Vanilla Ice Cream contains non-vanilla plant vanilla flavors and vanilla enhancers that are not disclosed on the Product packaging or label.

4. Defendants charge a price premium of approximately \$1.00 per unit of the most popular size of Breyers Natural Vanilla Ice Cream based upon the Representations at issue here. For example, a 1.5 quart container of Breyers Natural Vanilla Ice Cream costs \$4.67 (or \$3.11 per quart) at Walmart. In comparison, a 1.44 quart of Turkey Hill ice cream that discloses on the front of the packaging that it contains natural and artificial flavoring costs \$3.52 (or \$2.45 per quart) at Walmart. At a premium of 66 cents per quart ($\$3.11 - \$2.45 = 66$ cents), Breyers commands a premium of 99 cents for its 1.5 quart container.

5. Plaintiffs would not have paid more for Breyers Natural Vanilla Ice Cream had they realized that some of its vanilla flavor came from non-vanilla plant sources.

6. Plaintiffs seek damages and an injunction to stop Defendants' false and misleading marketing practices with regard to the Product.

JURISDICTION

7. Defendant Conopco is incorporated in the state of New York and, therefore, is a citizen of New York.

8. The Court has jurisdiction over Defendants because Defendant Conopco is a citizen of New York and both Defendants transact business within New York and sell the Product to consumers within New York in retail stores and online.

VENUE

9. Plaintiff McKinley resides in Bronx County and bought the Product in Bronx County.

10. Venue in this Court is based on Plaintiff McKinley's residence in Bronx County and the fact that the Products are widely distributed and sold within Bronx County.

PARTIES

11. Defendant Conopco is a New York corporation and oversees the manufacturing, sale, and marketing of the Product at issue here.

12. Defendant Unilever is the parent corporation of Conopco.

13. Plaintiff McKinley resides in Bronx County and bought the Product in Bronx County.

14. Plaintiff Vizcarra resides in San Francisco County and bought the Product in California.

15. Plaintiffs are among the large number of Americans who like vanilla ice cream.

16. Plaintiffs, like most consumers, prefer to consume foods that derive their flavor from the promoted natural ingredients, as opposed to chemical compounds extracted in a laboratory.

17. Plaintiffs, like most consumers, look to the front label of foods to see what they are buying and to learn basic information about them.

18. Plaintiffs saw and relied on the Representations to believe and expect that the Product's vanilla flavor came only from the vanilla plant and not from any other flavoring enhancers.

19. Plaintiffs purchased the 1.5 quart containers of the Product during the Class Period as defined below.

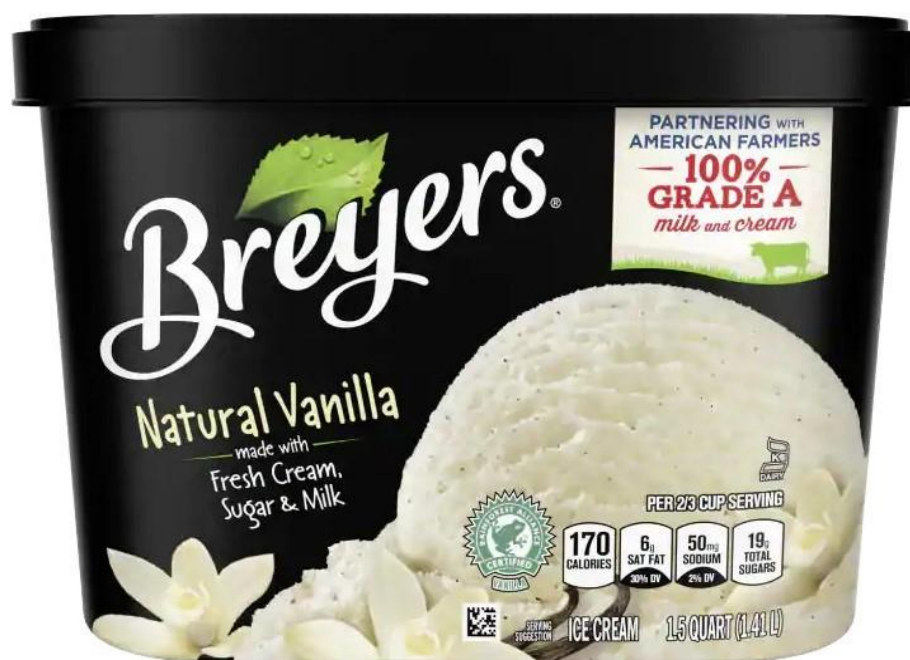
20. Plaintiffs overpaid for the Product (by approximately \$1.00 per unit purchased), paying more than they would have had they known the Product did not contain vanilla flavor derived only from the vanilla plant.

21. The Product was worth less than what Plaintiffs paid, and they would not have paid as much absent Defendants' false and misleading statements, omissions, packaging and labeling.

22. Plaintiffs chose between Defendants' Product and vanilla ice cream products represented similarly, but which did not misrepresent their attributes, features, and/or components.

FACTUAL ALLEGATIONS

23. The Representations are false, misleading and deceptive because Breyers Natural Vanilla Ice Cream does not get its flavoring exclusively from real vanilla as the Representations implies.



24. These Representations are misleading because Breyers Natural Vanilla Ice Cream contains vanilla flavors not derived from the vanilla bean or otherwise from the vanilla plant.

25. Laboratory analysis, specifically by the Center for Advanced Food Technology at Rutgers University, demonstrated that Breyers Natural Vanilla Ice Cream contains vanilla flavor from non-vanilla plant sources.

26. Distinguishing real vanilla from non-real vanilla is a challenging task because every time a new high tech authentication method is adopted, “bad actors”

find ways to “beat the test,” such as artificial vanillin designed to contain isotopes present in real vanilla.

27. This is why identifying the presence and amount of the following four vanilla marker compounds is valuable:

<u>Compounds</u>	<u>Percent Present in Vanilla Beans</u>
Vanillin	1.3-1.7 %
p-hydroxybenzaldehyde	0.1%
vanillic acid	0.05%
p-hydroxybenzoic acid	0.03%

28. The testing of Breyers Natural Vanilla Ice Cream did not detect p-hydroxybenzaldehyde, vanillic acid or p-hydroxybenzoic acid, which means the Breyers Natural Vanilla Ice Cream has, at most, a small amount of real vanilla:

Breyer's Natural Vanilla Ice Cream
Production Code: 29230 A 07:58
Methylene Chloride Extract of 10.0 g with 1 ppm Matrix-Spiked Int. Std. by P&T-TD-GC-MS

Data File = TSQA3571

MS Scan #	Area Integration	Peak Assignment	Conc. PPM w/w
205	99298	acetic acid	0.022
250	3625596	diacetyl	0.797
342	268657	acetoin	0.059
447	440003	butyric acid	0.097
474	2288379	ethyl lactate	0.503
510	679180	dimethylsulfoxide (DMSO)	0.149
632	14688936	dimethyl sulfone	3.230
684	5573689	hexanoic acid	1.226
750	115042	benzyl alcohol	0.025
769	568416	heptanoic acid	0.125
806	540814	guaiacol	0.119
813	465017	nonanal	0.102
836	139435	maltol	0.031
885	12067851	octanoic acid	2.654
890	77124	benzoic acid	0.017
912	315936	2-methoxy-4-methylphenol	0.069
928	4547572	naphthalene-d8 (internal standard)	1.000
971	3843797	nonanoic acid	0.845
1007	187607	delta-nonalactone	0.041
1030	148583	2,4-decadienal	0.033
1065	7005324	decanoic acid	1.540
1121	25782638	vanillin	5.670
1140	125485	undecanoic acid	0.028
1158	376018	vanillyl ethyl ether	0.083
1195	335836	delta-decalactone	0.074
1225	1486537	lauric acid	0.327
1338	81955	gamma-dodecalactone	0.018
1365	268239	delta-dodecalactone	0.059
1381	405333	myristic acid	0.089
Total (excluding internal standard)			18.03

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29. Moreover, the fact that Breyers Natural Vanilla Ice Cream has elevated levels of vanillin evidences that the vanillin is from non-vanilla bean sources.

30. The absence of detectable levels of p-hydroxybenzaldehyde, p-hydroxybenzoic acid and vanillic acid, coupled with elevated vanillin levels,

indicates that the vanillin in the Product is not from real vanilla but rather from a chemically derived source.

Reliance and Economic Injury

31. When purchasing Breyers Natural Vanilla Ice Cream, Plaintiffs sought a product flavored exclusively by real vanilla.

32. Plaintiffs saw and relied on Breyers' false and misleading Representations to believe that all the vanilla flavor of the Product came from the vanilla plant.

33. Defendants charge a price premium of approximately \$1.00 per 1.5 quart container of Breyers Natural Vanilla Ice Cream. For example, a 1.5 quart container of Breyers Natural Vanilla Ice Cream costs \$4.67 (or \$3.11 per quart) at Walmart. In comparison, a 1.44 quart of Turkey Hill ice cream that discloses on the front of the packaging that it contains natural and artificial flavoring costs \$3.52 (or \$2.45 per quart) at Walmart. At a premium of 66 cents per quart ($\$3.11 - \$2.45 = 66$ cents), Breyers commands a premium of 99 cents for its 1.5 quart container.

34. Plaintiffs purchased 1.5 quart containers of Breyers Natural Vanilla Ice Cream and paid more for it (by approximately \$1.00 per unit purchased) than they would have paid for ice cream based on the false and misleading Representations.

CLASS ACTION ALLEGATIONS

35. Plaintiffs bring this action as a class action pursuant to CPLR §§ 901-902.

36. The class that Plaintiffs seek to represent (the “Class”) is composed of and defined as follows:

All consumers who purchased Breyers Natural Vanilla Ice Cream in the United States for their own use, and not for resale, since April 21, 2016 to present (“Class Period”). Excluded from the Class are: governmental entities; Defendants; any entity in which Defendants have a controlling interest; Defendants’ officers, directors, affiliates, legal representatives, employees, 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.

37. For the purposes of this Complaint, the term “Class Members” refers to all members of the Class, including the named Plaintiffs.

38. This action is maintainable as a class action under CPLR §§ 901-902.

39. **CPLR § 901(a)(1) - Numerosity.** The Class consists of many thousands of persons throughout the United States. 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.

40. **CPLR § 901(a)(2) - Commonality and Predominance.** The questions of law and fact common to the Class have 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 Defendants contributed to, committed, or is responsible for the conduct alleged herein;

- b. Whether Defendants' conduct constitutes the violations of law alleged herein;
- c. Whether Defendants 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.

41. By seeing the name, labeling, display and marketing of Breyers Natural Vanilla Ice Cream, and by purchasing Breyers Natural Vanilla Ice Cream, all Class Members were subject to the same wrongful conduct.

42. Absent Defendants' material deceptions, misstatements and omissions, Plaintiffs and other Class Members would not have paid as much for the Breyers Natural Vanilla Ice Cream.

43. **CPLR § 901(a)(3) - Typicality.** Plaintiffs' claims are typical of the claims of the Class, respectively, because they purchased Breyers Natural Vanilla Ice Cream products and were injured thereby. The claims of Plaintiffs and the other Class Members are based on the same legal theories and arise from the same false, misleading and unlawful conduct.

44. **CPLR § 901(a)(4) - Adequacy.** Plaintiffs are adequate representatives of the Class because their 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. Additionally, Plaintiffs have retained competent and experienced class action counsel, who intend to prosecute this action vigorously. The Class Members' interests will be fairly and adequately protected by Plaintiffs and their counsel.

45. **CPLR § 901(a)(5) - 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 is such that individual litigation would be inefficient and cost-prohibitive. Plaintiffs anticipate no difficulty in the management of this action as a class action.

46. **CPLR § 902.** Given the small amount of recovery per class members when weighed against the costs of litigation, the class members have no interests in separate actions but rather prefer to proceed as a class action, as prosecuting thousands of separate actions would be impractical and inefficient. Furthermore, a nationwide class in New York (where Defendant Conopco is incorporated) is preferred to piecemeal litigation in potentially 50 or more separate courts throughout the United States. Finally, there is no difficulty likely to be encountered in the management of this class action.

FIRST CLAIM

Negligent Misrepresentation

47. Plaintiffs incorporate by references all preceding paragraphs.
48. Defendants misrepresented the ingredients of the Product.
49. Defendants had a duty to disclose and/or provide non-deceptive labeling of the Product and knew or should have known same were false or misleading.
50. This duty is based, in part, on the Representations on the front label of the Product.
51. Defendants negligently misrepresented and/or negligently omitted material facts.
52. Plaintiffs reasonably and justifiably relied on these negligent misrepresentations and omissions, which served to induce and did induce, the purchase of the Products.

53. Plaintiffs and class members would not have paid as much if the true facts had been known, thereby suffering damages.

SECOND CLAIM

Unjust Enrichment

54. Plaintiffs incorporates by references all preceding paragraphs.

55. Defendants obtained benefits and monies because the Product was not as represented and expected, to the detriment of Plaintiffs and other class members, who seek restitution and disgorgement of inequitably obtained profits.

PRAYER FOR RELIEF

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

- A. An order certifying that the action may be maintained as a class action;
- B. An order enjoining Defendants from pursuing the policies, acts and practices complained of herein;
- C. An order requiring Defendants to pay damages to Plaintiffs and all members of the Class;
- D. Pre-judgment interest from the date of filing suit;
- E. Costs, expenses, and reasonable attorneys' fees; and
- F. Such other and further relief as the Court may deem necessary or appropriate.

JURY TRIAL DEMAND

Plaintiffs demand a jury trial on all causes of action so triable.

Respectfully submitted,

Dated: June 26, 2024

REESE LLP

/s/ Michael R. Reese

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and the Proposed Class*

Notice of Lead Counsel Designation: Michael Reese