

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

ADI AMUIAL, SAMANTHA AMUIAL,
SEBASTIAN ROITER, and
ELISA MAGANA AUDIFFRED,
*individually and on behalf of all others
similarly situated,*

Plaintiffs,

Case No.:

v.

NESTLÉ USA, INC.; NESTLÉ S.A.,
FRONERI INTERNATIONAL LIMITED;
DREYER'S GRAND ICE CREAM, INC.;
DREYER'S GRAND ICE CREAM HOLDINGS,
INC.;
Defendants.

CLASS ACTION COMPLAINT AND DEMAND FOR JURY TRIAL

Plaintiffs Adi Amuial, Samantha Amuial, Sebastian Roiter, and Elisa Magana Audiffred (“Plaintiffs”), individually and on behalf of all others similarly situated, bring this Class Action Complaint against Defendants Nestlé USA, Inc., Nestlé S.A., Froneri International Limited, Dreyer’s Grand Ice Cream, Inc., and Dreyer’s Grand Ice Cream Holdings, Inc. (collectively, “Defendants”), and allege upon personal knowledge as to themselves and their own acts, and upon information and belief as to all other matters, based on the investigation of counsel, as follows:

NATURE OF THE ACTION

1. For nearly a century, the Drumstick has been an American ice cream. The Drumstick dates back to the 1920s and for generations families knew it as a simple premium treat: real ice cream, dipped in chocolate, rolled in nuts, in a crisp sugar cone. Parents who grew up on

Drumstick bought it for their own children, trusting that the cone in the box was the same one they remembered.

2. That trust is the asset at the center of this case. The brand's value was never just the recipe, it was ninety (90) years of goodwill behind the name, the earned assumption that a Drumstick is real ice cream.

3. Over time, the brand changed hands. Nestlé acquired the Drumstick business in 1991 and built it into one of the best-selling items in the country. In 2019 and 2020, Nestlé transferred its United States ice cream business, Drumstick included, to Froneri, a joint venture it formed with the private-equity firm PAI Partners. Froneri sells that business in the United States as Dreyer's Grand Ice Cream. It makes and markets the Drumstick found in American freezers today.

4. At some point the recipe changed. To lower costs, the milkfat that defines ice cream was reduced and replaced in part with vegetable oils: coconut, palm, and soybean. The change was enough that the product no longer meets the federal standard of identity as "ice cream," 21 C.F.R. § 135.110. Defendants may no longer lawfully call it ice cream, and the package now carries a different name in small off-colored print: "frozen dairy dessert."

5. Defendants never told their customers about the change in the recipe. They did not announce that the recipe had changed, that the product was no longer ice cream, or why the name on the box was different. The small off-colored print was the only notice consumers ever received, and it was easy to miss, because everything around it was built to say the opposite.

6. Despite the recipe change, Defendants set out on a campaign to deceive their customers into believing the recipe never changed and the Drumstick was still ice cream. This was done deliberately and on every outlet channel they control. Defendants own and operate ICECREAM.COM where they proudly market and advertise the Drumstick as the "Home of Ice

Cream.” On this website there is even a history of the Drumstick section where they give a timeline of how the product was created, made and sold. Yet they conveniently leave out that, by no later than 2009, the recipe changed and it was no longer ice cream.

7. Further, every search and social media platform, national advertising campaign, press releases, retailer catalogs, and the ice-cream aisle branded “ice cream” freezers bearing “The Original” heritage slogan, all deceive customers into believing the Drumstick is ice cream, all while charging a premium price. Each is detailed, act by act, in Section D below.

8. The product is sold, searched, shelved, cataloged, displayed, and priced as premium ice cream, but it is not ice cream. Plaintiffs bought Drumstick for years believing they were buying the ice cream, the brand it had always been. Instead, they paid a premium for a frozen dairy dessert.

9. Plaintiffs bring this action on behalf of themselves and all others who did the same, to recover the difference between what they paid and what they received, and to require Defendants either to tell the truth about the product or to make it ice cream again. A product made with vegetable oils should not be sold to consumers as the ice cream they remember.

PARTIES

10. Plaintiffs Adi Amuial and Samantha Amuial are citizens of Florida who reside in Miami-Dade County, Florida. Over approximately the last ten years, including during the Class Period, they repeatedly purchased Drumstick cones at retail in Florida for personal and household consumption, in reliance on the net impression that the product was ice cream. Plaintiffs Sebastian Roiter and Elisa Magana Audiffred, his wife, are citizens of Florida who reside in Broward County, Florida. Mr. Roiter has lived in Florida for approximately twenty years and Ms. Magana Audiffred for approximately eleven years. Throughout those years, including during the Class Period, they regularly purchased Drumstick cones at retail in Florida, both in stores and through grocery-

delivery services such as Instacart, for personal and household consumption, in reliance on the net impression that the product was ice cream.

11. Defendant Dreyer's Grand Ice Cream, Inc. is the entity through which Froneri operates its United States ice cream business and that manufactures, markets, prices, and distributes Drumstick. Defendants describe this company in their own press materials as "a leading U.S. ice cream company, owned by Froneri," with a principal place of business of 590 Ygnacio Valley Rd., Suite 300, Walnut Creek, CA 94596. It is a Delaware corporation registered to do business in Florida, and it is a citizen of Delaware and California.

12. Defendant Dreyer's Grand Ice Cream Holdings, Inc. is the United States ice cream holding company created in 2003, when Nestlé combined its U.S. ice cream operations with Dreyer's; on the closing of that transaction the holding company held 100% of the equity of both Dreyer's Grand Ice Cream, Inc. and Nestlé's former U.S. ice cream company. It is also the entity identified, in the public "Page Transparency" disclosures of the official Drumstick Facebook page, as the manager of that page. It is a Delaware corporation and a citizen of Delaware and California.

13. Defendant Froneri International Limited which has a principal place of business located at Richmond House, Leeming Bar, Northallerton, North Yorkshire, DL7 9UL, United Kingdom, is the joint venture of Nestlé S.A. and PAI Partners that owns Defendants' United States ice cream business and the Drumstick marketing content is published "under license by Froneri International Limited." It is a company organized under the laws of England and Wales and a citizen or subject of a foreign state.

14. Defendant Nestlé USA, Inc. which has a principal place of business located at 1812 N. Moore Street, Arlington, Virginia, is a Delaware corporation and a citizen of Delaware and Virginia. It acquired the Drumstick business in 1991 and, through its Nestlé Dreyer's Ice Cream

Company, owned and operated the brand throughout the reformulation era until the transfer to Froneri.

15. Defendant Nestlé S.A. is a Swiss société anonyme, the ultimate parent of Nestlé USA, and an approximately fifty-percent owner of Froneri. Its registered seat is Avenue Nestlé 55, 1800 Vevey, Switzerland, and it is a citizen or subject of a foreign state.

16. Nestlé acquired the Drumstick business in 1991. In 2003, Nestlé combined its United States ice cream operations with Dreyer's under the holding company named above. The Federal Trade Commission reviewed and challenged that transaction on the ground that it concentrated the market for premium ice cream. Nestlé later completed its acquisition of Dreyer's.

17. In 2016, Nestlé and PAI Partners formed the Froneri joint venture, and in 2019 and 2020 Nestlé transferred its entire United States ice cream business, including Dreyer's, Häagen-Dazs, and Drumstick, to Froneri.

18. At all relevant times, Defendants acted in concert and as a coordinated enterprise. Nestlé supplied the brand goodwill and the ICECREAM.COM search-capture funnel that draws consumers seeking ice cream; the Dreyer's/Froneri Defendants manufacture, market and sell the reformulated frozen dairy dessert those consumers receive. Each Defendant acted as the agent, joint venturer or co-participant of the others, such that each is liable for the acts and omissions alleged. The precise allocation among them is peculiarly within Defendants' knowledge and is a proper subject of discovery.

JURISDICTION AND VENUE

19. This Court has subject-matter jurisdiction under the Class Action Fairness Act, 28 U.S.C. § 1332(d)(2). The aggregate amount in controversy exceeds \$5,000,000, exclusive of interest and costs; the proposed classes exceed 100 members; and at least one class member is a

citizen of a State different from at least one Defendant, satisfying minimal diversity. No Defendant is a citizen of Florida, so the exceptions in 28 U.S.C. § 1332(d)(3) and (d)(4) do not apply.

20. This Court has personal jurisdiction over Defendants because they transact substantial business in Florida, market and sell the product throughout this District, and committed the acts and omissions giving rise to Plaintiffs' claims within this State.

21. Venue is proper under 28 U.S.C. § 1391(b) because Plaintiffs reside in this District, a substantial part of the events and omissions occurred here, and Defendants caused harm to class members residing here.

22. All conditions precedent to this action have occurred, been performed, or have been waived.

FACTUAL ALLEGATIONS

A. Drumstick Was Built on a Promise of Premium Ice Cream.

23. The Drumstick has been sold as ice cream since approximately 1928 and has long been marketed as "The Original" and the number-one-selling cone. For decades the brand earned a reputation for premium ingredients, and consumers came to associate the Drumstick name with real ice cream. Defendants understand and rely on that goodwill. It is what makes consumers reach for Drumstick in the ice cream freezer aisle, and pay more for it.

B. Federal Law Defines What May Be Called "Ice Cream."

24. The FDA prescribes a standard of identity for "ice cream" at 21 C.F.R. § 135.110. To be labeled "ice cream," a product generally must contain not less than 10% milkfat and not less than 20% total milk solids.

25. A product that fails this standard, for example because milkfat has been displaced by vegetable oil, may not lawfully be labeled or sold as “ice cream.” To hide this, Defendants use the term “frozen dairy dessert.”

C. Defendants Reformulated the Drumstick Recipe Below the Standard, Then Hid the Change From Consumers.

26. Years ago, and by no later than 2009, while Nestlé owned the brand, Defendants reformulated the Drumstick recipe to reduce costs, so that it no longer meets the federal standard. As late as 2005 and 2007, Defendants’ own website called Drumstick “the original ice cream sundae cone” with “creamy ice-cream,” and boxes in retail circulation in early 2009 still read “ice cream cones.” By April 2009 the ingredient panel on drumstick.com listed whey first and cream fifth, with calories and fat cut, and the words “ice cream” had been removed from every product page. By June 2009 Drumstick cone products carried the words “frozen dairy dessert.” Defendants announced none of this. They replaced the milkfat that defines ice cream with cheaper vegetable oils (coconut, palm, palm olein, and soybean oil), held together by a heavy load of stabilizers and emulsifiers such as guar gum, carob bean gum, monoglycerides, and soy lecithin. On the current ingredient panel the first ingredient is “dairy product solids” or skim milk, not cream. The product became, in substance and in law, something other than ice cream.

27. Federal law forced a name change that Defendants would not make on their own. Because the reformulated product fell below the standard of identity, Defendants could no longer lawfully call it “ice cream,” and the package had to carry a different name: “frozen dairy dessert.” That small, off colored two-word descriptor is the only notice consumers ever received that anything had changed.

28. Defendants gave that notice in the manner least likely to be seen or understood. The “frozen dairy dessert” descriptor appears in the smallest practicable type, in a low-contrast color

that blends into the package, set apart from the brand name, the “The Original” claim, and the ice-cream imagery that dominate the box. It is not where a reasonable consumer looks, and it is not legible at a glance in the freezer ice cream aisle. Defendants did not explain it, define it, or flag it as a change.

29. Beyond that buried descriptor, Defendants changed nothing that would tell a reasonable consumer the product is no longer ice cream. The Drumstick name, logo, packaging design, and imagery stayed the same. The heritage claims stayed the same: “The Original,” “America’s favorite since 1928,” and the “classic vanilla ice cream flavor” copy. The product stayed in the ice-cream section, in freezers marked “ice cream.” It remained categorized and sold as ice cream by major retailers, continues to be proudly displayed as the key product on ICECREAM.COM and it continued to command a premium, ice-cream price. For nearly a century the brand has been marketed as ice cream, and after the reformulation that marketing did not change.

30. Defendants also gave no notice outside the package. When it suited them, Defendants publicized recipe changes: in 2016, for example, they issued a press release announcing that they were removing artificial colors, flavors, high-fructose corn syrup, and GMO ingredients from Drumstick and other brands. But Defendants never announced the change that actually mattered: that they had reformulated the product below the standard for ice cream, and that the product was no longer ice cream. They placed no “recipe changed” or “not ice cream” statement in their advertising, on their websites, or on their social accounts, and they did not notify consumers. They took no step to require, enable, or even encourage their retailers to distinguish the product from ice cream, whether by moving it out of the ice-cream set, to relabel the shelf, or to flag it as a frozen dairy dessert. Defendants did nothing to inform the public. Their own “Our Story”

timeline recounts a century of minor milestones, anniversaries, new cone varieties and a Super Bowl ad, but omits the reformulation entirely.

31. Defendants did not merely fail to correct the impression. They amplified it. Knowing the product is not ice cream, Defendants commandeered the generic term “ice cream” online to funnel ice-cream demand to their product line: they own and operate ICECREAM.COM, “the Home of Ice Cream,” list Drumstick there among “your favorite ICE CREAM brands,” seed the words “ice cream” throughout their search-engine metadata, and tag their social posts to ice-cream hashtags such as “#NationalIceCreamDay.” A consumer who searches the internet for “ice cream” is routed, by Defendants’ design, to a product Defendants know is not ice cream. This is intentional, misleading advertising, detailed act-by-act in Section D below.

32. The single change that actually mattered to consumers, that they were no longer buying ice cream, is the one change Defendants concealed. That omission was material: a reasonable consumer would consider it important to know that a product sold and priced as



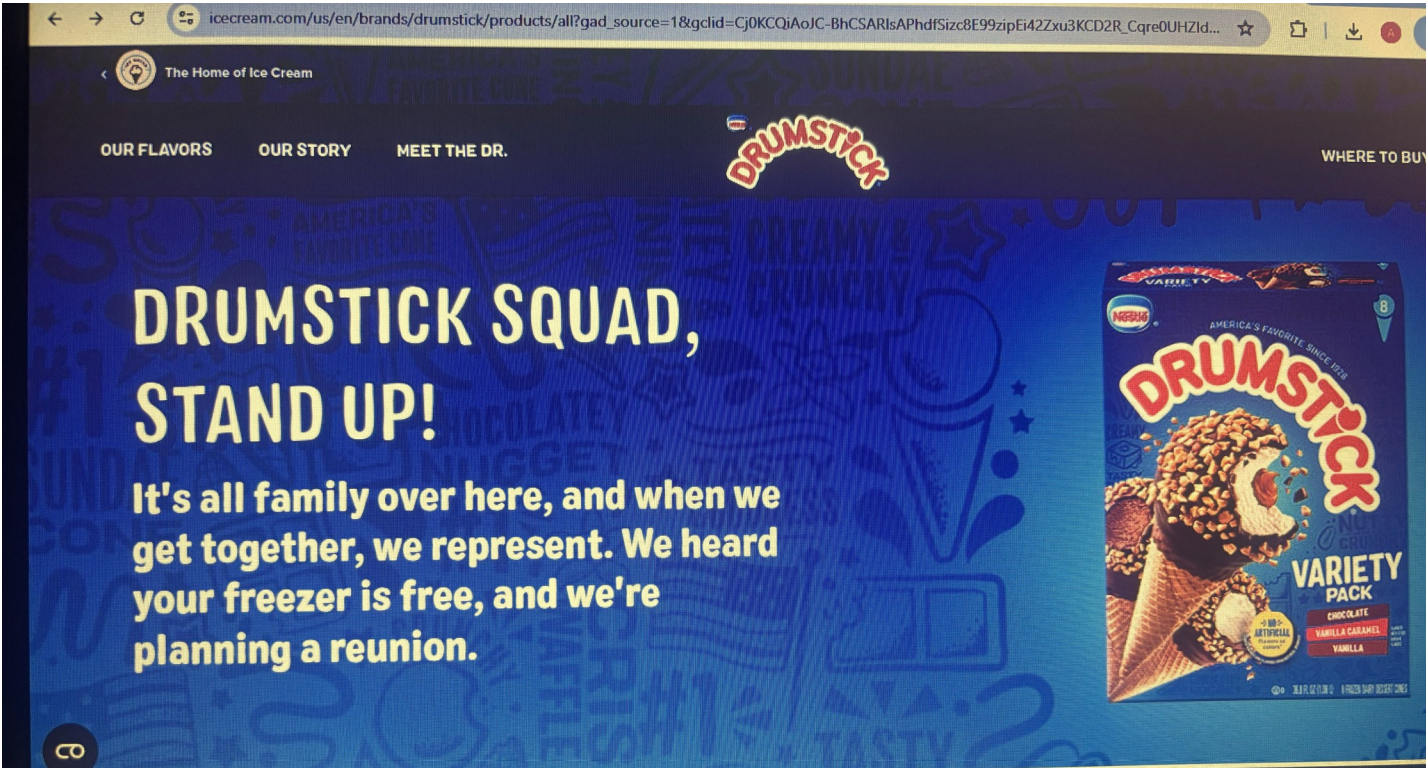
premium ice cream is not ice cream at all. The buried, unexplained descriptor did not correct the net impression created by the brand, the package, the placement, the marketing, and the price; and a reasonable consumer acting reasonably under the circumstances would not have understood, from anything Defendants did, that Drumstick is no longer ice cream. Defendants' conduct was unfair, unconscionable, and deceptive, and by design. The relabeling satisfied the letter of the labeling rule while defeating its purpose, preserving the very impression the rule exists to prevent.

D. Defendants' Deliberate, Multi-Channel Effort to Sell a Frozen Dairy Dessert as Ice Cream

33. Defendants do not just deceive with a single statement. They do it with a system, built channel by channel, each one engineered to place Drumstick in front of consumers looking for ice cream and to surround it with the language, placement, and associations of ice cream. No single

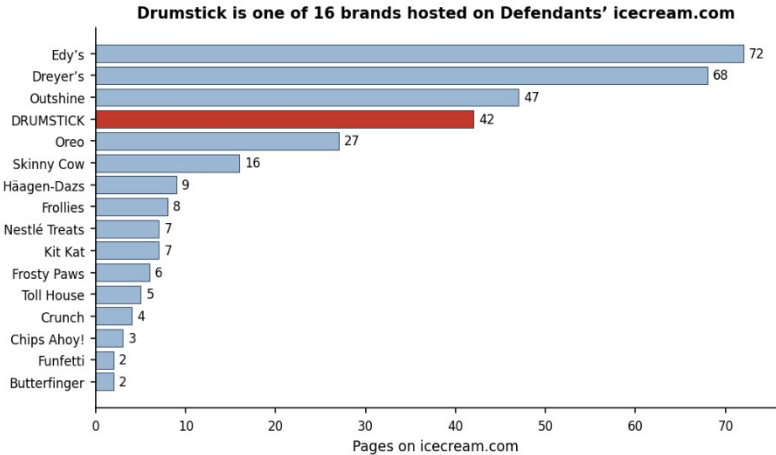
piece needs to print the words “ice cream” for the system to work. Several do. The rest are built to capture the consumer who is already searching for it. Each of the following is a separate, deliberate act; together they form a single scheme, and it is their cumulative effect that deceives. **The standard is the reasonable consumer, not any one purchaser’s recollection.** Each act below is deceptive because it is likely to mislead a reasonable consumer acting reasonably under the circumstances. That is the objective standard that governs Plaintiffs’ claims under FDUTPA. Liability does not turn on which particular word, image, webpage, listing, or shelf a given purchaser remembers seeing, and Plaintiffs need not prove individualized reliance. The question is whether Defendants’ conduct, taken as a whole, conveys a net impression likely to deceive the reasonable consumer, meaning the ordinary buyer reaching into a freezer case. A reasonable consumer is not required to suspect that a product named, placed, priced, and marketed as ice cream is secretly something else, or to pull each carton from the freezer and read the back panel to dispel an impression Defendants deliberately created.

- i. **The domain.** Defendants intentionally own and operate the website ICECREAM.COM and brand it “the Home of Ice Cream.” A consumer who



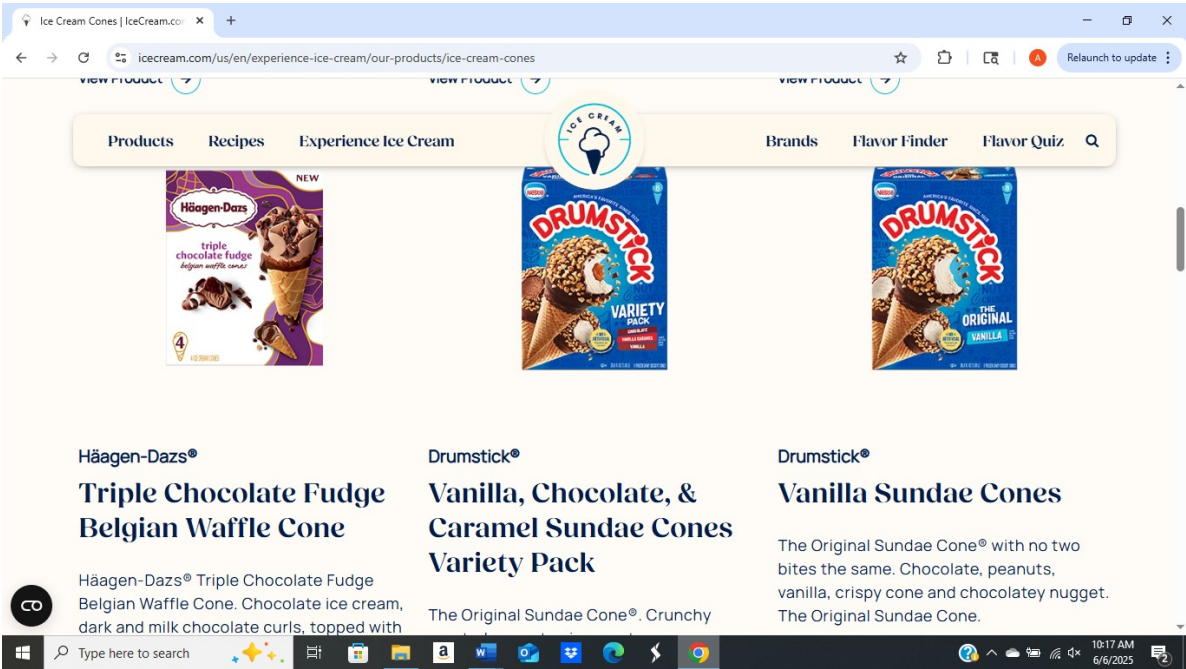
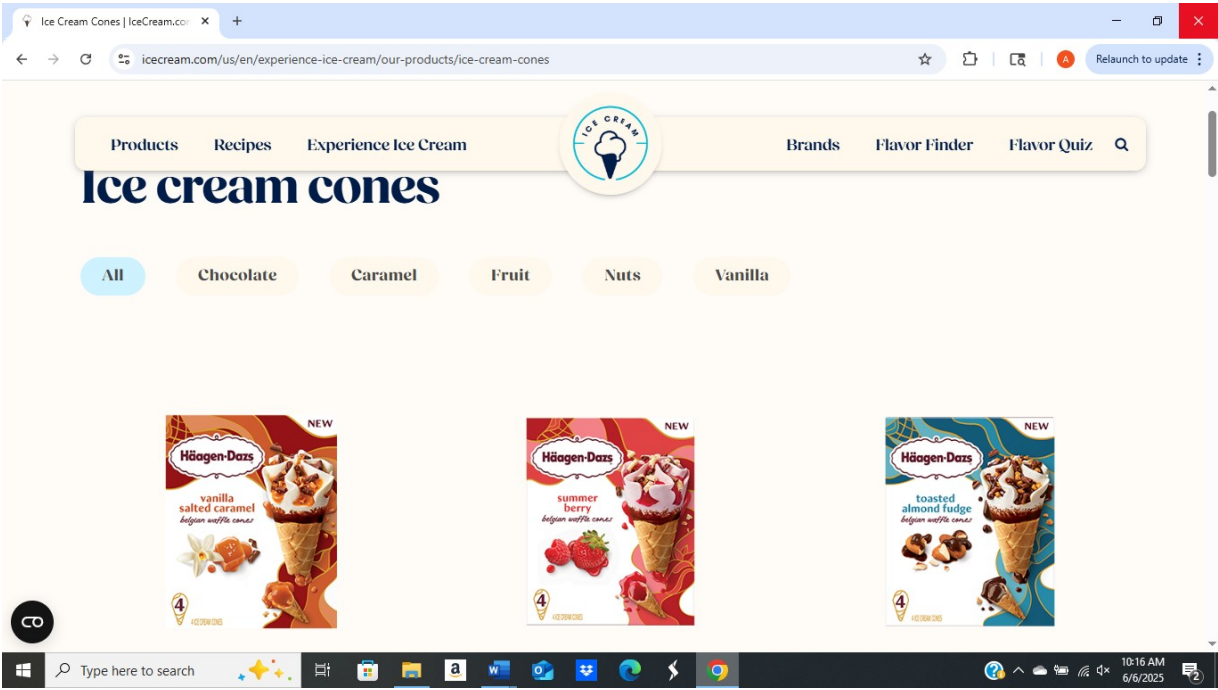
searches the internet for “ice cream” is delivered to Defendants’ own property, and to Drumstick, as shown below.

- ii. **The brand directory.** On ICECREAM.COM Defendants intentionally list Drumstick among “your favorite ICE CREAM brands,” beside brands that are real ice cream, placing the product in the ice-cream category by their own hand.

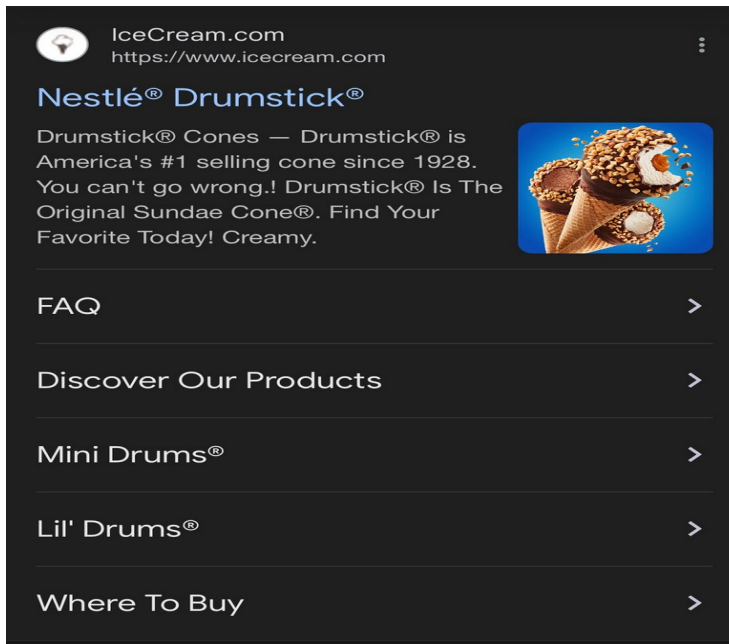


ICECREAM.COM mixes real ice cream, such as Häagen-Dazs, with frozen dairy dessert products such as Drumstick under the same “ice cream” headings and in the same “Ice Cream Cones,” “Ice Cream Bars,” and “Ice Cream Sandwiches” categories, with nothing to tell a consumer which products are ice cream and which are not.

Source: crawl of icecream.com (on file). Across the site, 167 of 499 pages use “ice cream” in the page description that search engines display.



- iii. **The brand's own website.** Defendants intentionally operate the brand's namesake domain, drumstick.com, so that when that domain is entered you are redirected into ICECREAM.COM: the official Drumstick product pages are served from ICECREAM.COM, and Defendants' promotional pages run on subdomains such as snackdown.drumstick.com. The brand's own web presence is wired into "the Home of Ice Cream."



- iv. **Search-engine capture.** Defendants intentionally embed the words "ice cream" in the titles and descriptions of 167 of the website's 499 pages, the text a search engine displays beneath a link, so that a search for "ice cream" surfaces Defendants' pages. The consumer is captured under a false premise before ever seeing the package.
- v. **Social media and the "ice cream" holiday.** Defendants intentionally operate @drumstick on Instagram and TikTok, where they hold roughly 1.1 million followers and call themselves the largest ice-cream manufacturer on the platform, and their corporate Dreyer's Grand Ice Cream account publishes product posts tagged "#NationalIceCreamDay" and describes the company as being "in the business of putting smiles on people's faces, with ice cream." Defendants also market to National Ice Cream Day (the third Sunday of July), using the ice-cream holiday itself to present Drumstick as ice cream. In a 2023 release, for example,

Defendants co-branded a NASCAR Cup car for a race timed to “National Ice Cream Day,” and their brand manager asked “What better way to celebrate National Ice Cream Day than with a Drumstick® sundae cone?” while calling Drumstick “The Original Sundae Cone.” That a given post does not print the words “ice cream” does not cure the act; the deception is complete the moment a consumer searching for ice cream is intentionally routed to a frozen dairy dessert. In fact the term “frozen dairy dessert” is nowhere to be found on the Drumstick Facebook and Instagram pages.

- vi. **National advertising.** Defendants intentionally promote the product as ice cream on the country’s largest stages. In 2024 they ran their first Super Bowl commercial, by their own account meant to get consumers to “consider ice cream as a snack,” in which the cones are handed out and eaten as ice cream. In 2026 they launched a national television campaign with WWE Superstar Cody Rhodes, “Lick it. Flip it. Drumstick it.,” timed to WrestleMania, spanning a national TV spot, social content, and a touring branded sampling vehicle, the “DrumTruck.” The DrumTruck is not a generic promotional rig: by Defendants’ own description it is built to evoke “vintage ice cream truck nostalgia,” and it is styled and colored to resemble a traditional ice-cream truck of the familiar Mr. Softee type, down to an eight-foot ice-cream cone mounted on the roof. Defendants built an ice cream truck and tour it across the country to sell a product they know is not ice cream.

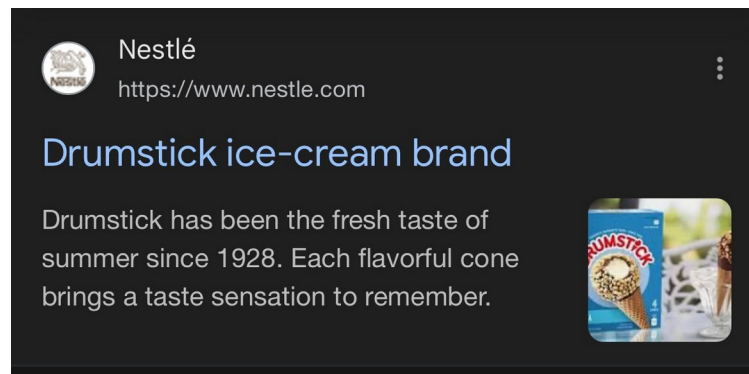
- vii. **On-package digital capture.** Defendants intentionally place QR codes on the



Drumstick package that route consumers to Defendants’ promotional microsites, drumsticksnackdown.com and snackdown.drumstick.com, for the “Summer

Snackdown” sweepstakes, sponsored by Dreyer’s Grand Ice Cream, Inc. To enter, a consumer buys Drumstick, uploads the purchase receipt, and submits name, email, mailing address, and phone number, so that the package itself functions as a marketing funnel that also harvests consumer data.

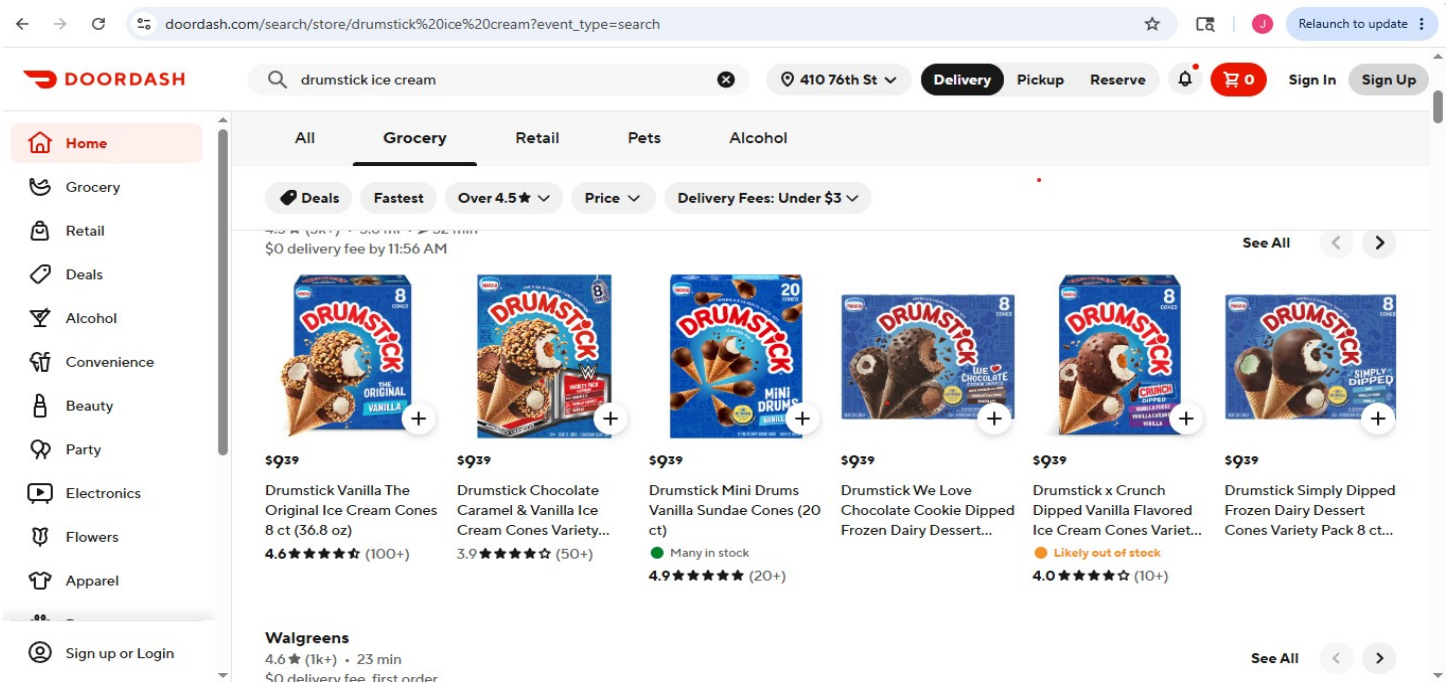
- viii. **Defendants’ own corporate voice.** In their press releases, Defendants describe Dreyer’s Grand Ice Cream as “a leading U.S. ice cream company” that “manufactures, markets and distributes a full spectrum of delicious ice cream and frozen snacks,” placing Drumstick within that ice-cream portfolio. Defendant Nestlé goes further: on its own corporate website, Nestlé lists Drumstick as one of its “ice cream brands.” The page sits in Nestlé’s “Ice cream” category ([nestle.com/brands/ice-cream/drumstick](https://www.nestle.com/brands/ice-cream/drumstick)), is titled “Drumstick ice-cream brand,” and groups Drumstick alongside genuine ice creams such as Häagen-Dazs and Mövenpick. Defendants categorize the product as ice cream in their own corporate identity.



- ix. **Retailer and platform catalog placement and “ice cream” naming.** Major retailers sell and categorize Drumstick as ice cream online, across the United States. Walmart lists it under “Ice Cream & Novelties”; in Florida, Publix lists it under “Ice Cream Cones”; in California, Safeway and Vons shelve it under “Novelty Ice Cream & Bars”; in New York, Wegmans and ShopRite list it under “Ice Cream Cones” and “Ice cream & Novelties.” On many such listings the product name still carries the words “frozen dairy dessert,” so that a single page classifies the product as ice cream while naming it a frozen dairy dessert. Other sellers go further and name the product “ice cream” outright, in the listing title itself. DoorDash, for

example, sells “Drumstick Vanilla The Original Ice Cream Cones” (filed under “Ice Cream & Frozen Desserts > ... > Ice Cream Cones”); ACME Markets titles it “Nestlé Drumstick Ice Cream ... Variety Pack”; and Sam’s Club (via Instacart) lists “Drumstick Ice Cream Cones Variety Pack”. The same “ice cream” naming appears across grocery-delivery and online-shopping services nationwide, including Uber Eats, Instacart, and similar platforms, in what is, on information and belief, hundreds or thousands of listings. Defendants supply the product names, images, and marketing copy these sellers display. The DoorDash listing carries Defendants’ own copy inviting consumers to “Celebrate with The Original Sundae Cone and get the classic vanilla ice cream flavor you love ... with Nestlé Drumstick.” Defendants permit, benefit from, and decline to police the “ice cream” presentation, even though they alone know the product is not ice cream. Defendants should not allow their retailers and resellers to sell and market the product as “ice cream,” and their intentional failure to provide that oversight is part of the deception: each additional “ice cream” listing further trains search engines, and consumers, to recognize Drumstick as ice cream.

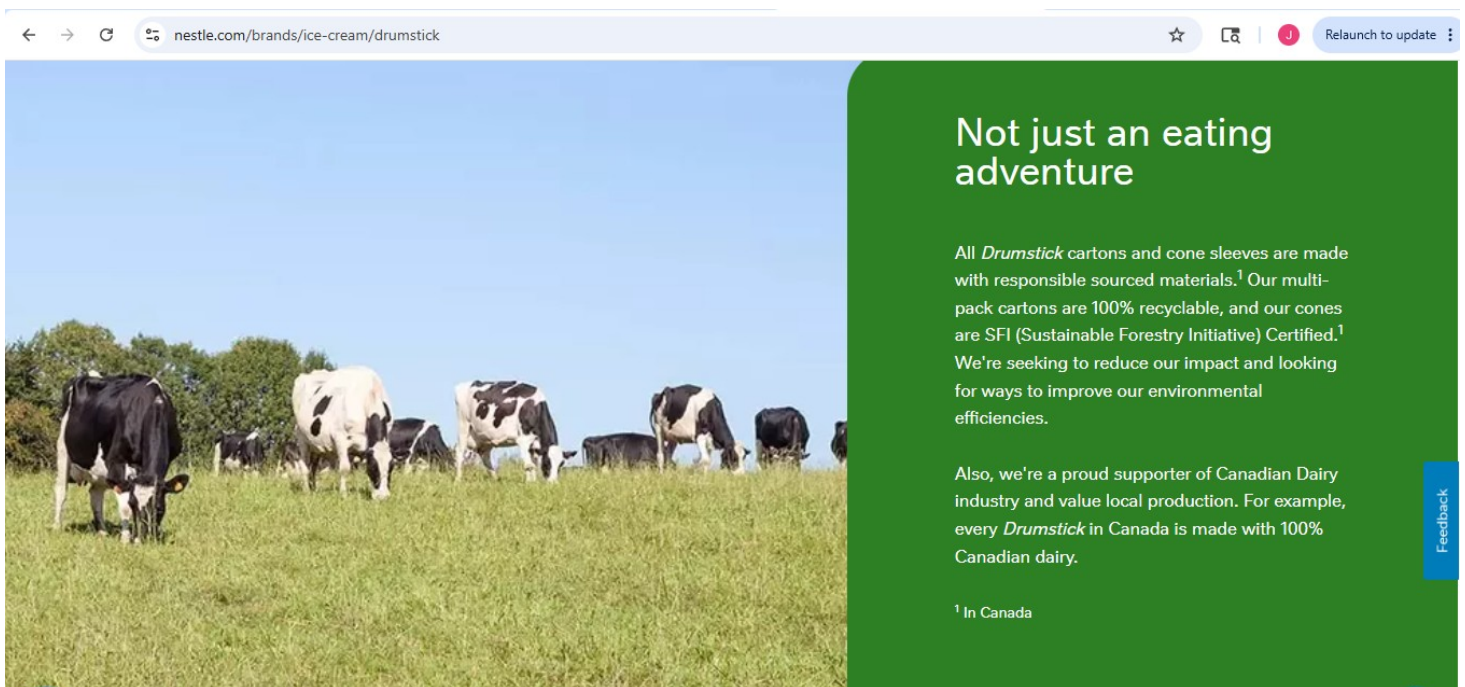
- x. **The aisle.** Defendants intentionally cause Drumstick to be shelved in the ice-cream section of retailers, directly beside genuine ice cream.



- xi. **The freezer.** In many stores, Defendants intentionally supply the freezer the product sits in, marked “ice cream,” as marketing support to retailers, as shown below.
- xii. **“The Original” and the false claim of continuity.** Defendants brand the product “The Original” and “The OG cone,” and market it as “America’s favorite since 1928.” To call a product “The Original” is to tell consumers it is the original recipe, the same Drumstick the brand has sold for nearly a century. It is not. The original 1928 Drumstick was real ice cream; the product Defendants sell today is a reformulated frozen dairy dessert. A product that has been changed so fundamentally that it no longer meets the standard it was built on is not “The Original,” or from 1928, and labeling it that way is deceptive. Defendants’ own “Our Story” on its website ICECREAM.COM confirms the design. It opens by rooting the brand in ice cream, a “scoop” of ice cream rolled into a waffle at the 1904 World’s Fair. It calls it “The OG cone,” and then narrates a century of milestones: a 50th-anniversary party, the King Cone, Simply Dipped, Lil’ Drums, the Super Nugget, Mini Drums, Crushed It!, Dr. Umstick, and the 2024 Super Bowl commercial. In that entire timeline, Defendants never mention the one change that actually matters: that they reformulated the product below the ice cream standard and had to relabel it a “frozen dairy dessert.” Having established at the outset that the product is ice cream, and never retracting it, Defendants leave the reader with precisely the impression they intend: that nothing has changed, and that Drumstick is, and always has been, ice cream. The package drives the point home with the promise of the “classic vanilla ice cream flavor you love.”
- xiii. **The dairy imagery.** On their brand websites, Defendants pair Drumstick with photographs of dairy cows in a field and tell consumers they are a “proud supporter” of the dairy industry and of local dairy production. That imagery conveys the impression that the product is a real-dairy, cream-based ice cream. That impression is false for the reformulated U.S. product, whose defining milkfat has been displaced by vegetable oils. Compounding the effect, this webpage is among the first results a search engine returns for the brand; a reasonable consumer who lands on it sees the Nestlé name, the cows, and Drumstick, and has no reason to realize the

dairy-sourcing statement is, in small print, limited to Canada. Nothing conspicuously warns the U.S. consumer that the Canadian and U.S. products differ. Standing alone this would be a small thing. Alongside the rest of Defendants' ice-cream cues, it reinforces the same false impression.

- xiv. **The price.** Defendants intentionally price the product as if it were premium ice cream, completing the impression that the consumer is buying a premium ice-cream product.



34. One phrase is absent from all of this. Across every channel Defendants control, the ICECREAM.COM domain, the brand's own drumstick.com website, the search results, the social media accounts, the national television advertising campaigns, the on-package QR codes and sweepstakes microsites, the press releases, the retailer catalogs, the aisle, and the freezer, the words "frozen dairy dessert" do not appear. The phrase appears in one place: in small, off-colored type on the box. Each act above was a deliberate choice. Together they are a coordinated system, built to sell a frozen dairy dessert to consumers who believe, and whom Defendants intend to believe, that

they are buying ice cream. No single act need be unlawful standing alone. There is nothing wrong with advertising on National Ice Cream Day. But Defendants' deliberate, repeated choice to tie a non-ice-cream product to "ice cream" at every turn, and to leave that impression uncorrected, is what deceives. The totality is what confuses the buyer, and Defendants built it that way.

E. Plaintiffs Relied and Were Injured.

35. Plaintiffs regularly purchased Drumstick during routine grocery shopping, believing, based on the heritage, the marketing, the icecream.com representations, the retailer listings, the aisle placement, and the branded freezers, that they were buying premium ice cream.

36. Plaintiffs only recently learned that the product is no longer ice cream and is instead a reformulated "frozen dairy dessert."

37. Plaintiffs took Defendants' representations into account and paid a price premium they would not have paid had they known the truth. Had they known the product was not ice cream, they would not have purchased it, would not have paid as much for it, or would have purchased alternative products that are real ice cream. The price premium could not have been charged without Defendants' "ice cream" representations. If Defendants were required to stop presenting the product as ice cream, its price would no longer be inflated by that premium and would reflect the market value of a frozen dairy dessert.

38. Plaintiffs face a real and immediate threat of future harm from a product that continues to be marketed, placed, and priced as ice cream when it is not, a deception that only an injunction will end. Plaintiffs would purchase Drumstick again in the future if it were reformulated to be, and accurately labeled as, ice cream. As matters stand, however, Plaintiffs cannot rely on Defendants' labeling and marketing to know whether what they are buying is ice cream, and they

are therefore deterred from purchasing Drumstick, a product they would otherwise buy, unless and until Defendants either make it ice cream or stop presenting it as ice cream.

39. Plaintiffs' injury is the price premium attributable to the false "ice cream" impression, meaning the difference between the price paid and the market value of the frozen dairy dessert delivered, measurable on a class-wide basis through standard econometric methods, including conjoint analysis and hedonic regression. Defendants price and sell Drumstick as a premium, ice-cream product, so that consumers pay ice-cream-level prices for a product that is not ice cream and that costs less to produce. By way of example, an eight-count box of Drumstick Original Vanilla sells at a national retailer for approximately \$7.12, a unit price of roughly 19 cents per fluid ounce, above the unit price of the same retailer's own-brand chocolate-dipped vanilla cones, which that retailer sells as ice cream cones for approximately \$6.22 per eight-count box, roughly 18 cents per fluid ounce. A frozen dairy dessert made with coconut and palm oil in place of cream has a lower market value than ice cream of the same size and form, and the difference between the ice-cream-level price Defendants charge and that lower market value is the premium Plaintiffs and the Classes paid.

CLASS ACTION ALLEGATIONS

40. Plaintiffs bring this action under Rule 23 on behalf of themselves and the following proposed classes (the "Classes"): all purchasers of Drumstick who bought it at retail for personal, family, or household use (not for resale) during the fullest period permitted by the applicable statutes of limitations through the present (the "Class Period").

Nationwide Class: All persons in the United States who purchased Drumstick during the Class Period.

Florida Subclass: All persons who purchased Drumstick in Florida during the Class Period.

41. Excluded are Defendants, their officers and directors, the Court and its staff, and counsel of record. Plaintiffs reserve the right to amend, including to add subclasses of purchasers in other States and representatives for those subclasses.

Numerosity: Rule 23(a)(1).

42. The Classes are so numerous that joinder is impracticable; Defendants sell Drumstick throughout Florida and the rest of the United States, and the Classes number, on information and belief, in the thousands or more.

Commonality: Rule 23(a)(2).

43. Common questions of law and fact predominate, including:

- a. whether Defendants represented by net impression, that the Drumstick is ice cream;
- b. whether those representations are likely to deceive a reasonable consumer;
- c. whether the small-type off colored “frozen dairy dessert” statement cures the deception created by Defendants’ other representations, placement, and pricing;
- d. whether the product is misbranded under applicable law;
- e. whether class members paid a price premium attributable to the “ice cream” impression;
- f. whether Defendants were unjustly enriched; and
- g. the appropriate measure of class wide damages, restitution, and injunctive relief.

Typicality: Rule 23(a)(3).

44. Plaintiffs’ claims are typical because Plaintiffs and all members purchased the same product subjected to the same uniform course of deceptive marketing and sustained the same type of injury, a price premium, in the same manner.

Adequacy: Rule 23(a)(4).

45. Plaintiffs will fairly and adequately protect the Classes’ interests; they have no antagonistic interests and have retained experienced class counsel with the resources to prosecute this action vigorously.

Predominance and Superiority: Rule 23(b)(3).

46. Common questions predominate because the deceptive net impression and the price-premium injury are common to the Classes and provable with common evidence, including Defendants' uniform marketing and a class wide econometric damages model. A class action is superior to thousands of individually uneconomical suits.

Injunctive Relief: Rule 23(b)(1) and (b)(2).

47. Defendants have acted on grounds generally applicable to the Classes, making final injunctive and corresponding declaratory relief appropriate as to the Classes as a whole.

COUNT I

Unjust Enrichment (Nationwide Class)

48. Plaintiffs reallege and incorporate paragraphs 1 through 47 as if fully set forth herein.

49. Plaintiffs and the Nationwide Class conferred a benefit on Defendants by paying inflated, ice-cream-level prices for a product that is not ice cream.

50. Defendants knew of, voluntarily accepted, and retained that benefit, obtained through the deceptive marketing alleged above, including the icecream.com representations and the concealment of the reformulation.

51. It would be inequitable for Defendants to retain the benefit.

52. WHEREFORE Plaintiffs and the Nationwide Class are entitled to restitution and disgorgement of the amounts by which Defendants were unjustly enriched.

COUNT II

Florida Deceptive and Unfair Trade Practices Act, Fla. Stat. § 501.201 *et seq.* (Florida Subclass)

53. Plaintiffs reallege and incorporate paragraphs 1 through 47 as if fully set forth herein.

54. Florida Deceptive and Unfair Trade Practices Act, Fla. Stat. § 501.201 *et seq.* (“FDUTPA”), declares unlawful “unfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce.” Fla. Stat. § 501.204(1). Plaintiffs and the Florida Subclass are “consumers,” and Defendants’ manufacture, marketing, and sale of Drumstick is “trade or commerce,” within Fla. Stat. § 501.203.

55. Defendants committed deceptive acts because their conduct, the concealed reformulation, the buried statement of identity, and the coordinated multi-channel marketing detailed in Sections C and D *supra*, was likely to deceive a consumer acting reasonably under the circumstances into believing that Drumstick is ice cream. These deceptive acts include affirmative misrepresentations, among them “The Original,” “since 1928,” the ICECREAM.COM domain, Nestlé’s own “ice cream brands” listing, and the dairy-cow imagery, and not merely the omission of the reformulation. The net impression created by Defendants’ coordinated conduct is that the product is ice cream, when it is not.

56. Defendants’ conduct is independently unfair and unconscionable because it offends established public policy and is immoral, unethical, oppressive, unscrupulous, and substantially injurious to consumers; the injury it causes is not outweighed by any countervailing benefit and could not reasonably have been avoided by consumers who were given no meaningful notice of the change. Defendants acted intentionally and by design; although FDUTPA does not require proof of intent, Defendants’ deliberate, coordinated conduct aggravates the violation.

57. Defendants’ failure to disclose, conspicuously or at all, that the reformulated product is no longer ice cream was the concealment of a material fact. A reasonable consumer would consider it important, in deciding whether to buy and how much to pay, to know that a product sold and priced as premium ice cream is, in fact, a frozen dairy dessert.

58. The small, low-contrast “frozen dairy dessert” descriptor neither defeats liability nor triggers FDUTPA’s safe harbor, Fla. Stat. § 501.212(1). The safe harbor reaches only an act or practice that is required or specifically permitted by federal or state law. Federal law requires Defendants to print the statement of identity on the box. No federal or state law requires or permits Defendants to own and operate ICECREAM.COM, to list Drumstick there as an ice cream brand, to seed the words “ice cream” through their search results and hashtags, to place the product in branded “ice cream” freezers, or to call it “The Original.” Plaintiffs do not challenge the statement of identity. They challenge the separate, affirmative “ice cream” representations that surround it, none of which the FDA reviewed or approved, and those representations independently create the deceptive net impression.

59. FDUTPA applies an objective standard and does not require proof of individualized reliance; causation is established by showing that the practice was likely to deceive a reasonable consumer, making deception and causation provable on a class wide basis.

60. Plaintiffs and the Florida Subclass suffered actual damages: the price premium attributable to the false “ice cream” impression, measured as the difference between the price paid and the market value of the frozen dairy dessert actually delivered. Plaintiffs do not seek Defendants’ cost savings or profits as FDUTPA actual damages.

61. WHEREFORE, Plaintiffs and the Florida Subclass are entitled to actual damages, declaratory and injunctive relief, and attorneys’ fees and costs under Fla. Stat. §§ 501.211 and 501.2105.

COUNT III

Declaratory and Injunctive Relief, Fla. Stat. § 501.211(1) (All Classes)

62. Plaintiffs reallege and incorporate paragraphs 1 through 47 as if fully set forth herein.

63. FDUTPA provides that “anyone aggrieved by a violation of this part may bring an action to obtain a declaratory judgment that an act or practice violates this part and to enjoin a person who has violated, is violating, or is otherwise likely to violate this part.” Fla. Stat. § 501.211(1). This right is independent of the action for actual damages under § 501.211(2).

64. Plaintiffs and the members of the Classes are aggrieved by the acts and practices alleged in Sections C and D. Those acts are ongoing. Defendants continue to sell the product as ice cream through ICECREAM.COM, their social media accounts, national advertising, press materials, and the retailer and platform listings they supply, and they continue to brand it “The Original” and “America’s favorite since 1928.”

65. Plaintiffs would purchase Drumstick again if it were ice cream, or if Defendants stopped presenting it as ice cream. Until then, Plaintiffs cannot rely on Defendants’ labeling and marketing to know what they are buying, and they face the same deception each time they shop. Absent an injunction, Defendants are likely to continue the practices alleged, and Plaintiffs and the Classes have no adequate remedy at law for that continuing harm. The price premium alleged above could not be charged if Defendants stopped presenting the product as ice cream, and an injunction would end it.

66. Defendants have acted on grounds that apply generally to the Classes, so that final injunctive and declaratory relief is appropriate for the Classes as a whole under Rule 23(b)(2).

67. WHEREFORE Plaintiffs and the Classes are entitled to a declaration that Defendants’ acts and practices violate FDUTPA, and to an injunction ordering the corrective measures set out in paragraph (b) of the Prayer for Relief, together with attorneys’ fees and costs under Fla. Stat. § 501.2105.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs, on behalf of themselves and the Classes, respectfully request that the Court:

- (a) Certify the proposed Classes, appoint Plaintiffs as class representatives, and appoint the undersigned as class counsel;
- (b) Enjoin the deceptive acts alleged and order corrective measures, including: (i) a public announcement, through the same channels Defendants use to market the product, that the Drumstick recipe was changed from the original and that the product is no longer ice cream; (ii) a prominent disclosure on the package and in all advertising that the product is a frozen dairy dessert and not ice cream; (iii) an end to the listing of Drumstick as an “ice cream” brand or product on ICECREAM.COM, nestle.com, and Defendants’ other websites; (iv) an end to advertising or presenting the product as ice cream on social media, in national advertising, in press materials, and through retailer and platform listings Defendants supply or control; and (v) an end to the “The Original,” “The OG,” and “since 1928” continuity claims unless and until the product again meets the federal standard of identity for ice cream, or, in the alternative, reformulation of the product to meet that standard;
- (c) Award actual damages, including the class wide price premium, with pre- and post-judgment interest;
- (d) Award restitution and disgorgement on the Nationwide Class’s unjust-enrichment claim and as otherwise equitable;
- (e) Award declaratory relief;
- (f) Award attorneys’ fees and costs under FDUTPA, Fla. Stat. § 501.2105, and all applicable law; and
- (g) Grant such other and further relief as the Court deems just and proper.

DEMAND FOR JURY TRIAL

Plaintiffs hereby demand a trial by jury.

By: /s/ Josef Timlichman
Josef Timlichman, Esq.
Florida Bar No.: 121265

JOSEF TIMLICHMAN LAW, PLLC
Attorneys for Plaintiffs and
Prospective Classes
1801 Polk Street
Hollywood, FL 33020
Phone: (305) 748-3789
Facsimile: (305) 847-2441
josef@lawnowfl.com