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22 **UNITED STATES DISTRICT COURT FOR THE**  
23 **DISTRICT OF NEVADA**

24 TINA THORNTON., on behalf of herself and all  
25 others similarly situated,

26 Plaintiff,

27 vs.

28 MCCORMICK & COMPANY, INC.,

Defendant.

Case No.

**CLASS ACTION COMPLAINT**

**DEMAND FOR JURY TRIAL**

1 **INTRODUCTION**

2 1. Recently celebrating its 125th year of business, McCormick & Company is the world's  
3 largest spice company, and black pepper is the top-selling spice in the United States. The red and white  
4 tin that houses McCormick ground pepper is ubiquitous in American grocery stores and many of  
5 McCormick's customers have purchased its products for years.

6 2. Facing rising black pepper prices in recent years, McCormick decided to take advantage  
7 of the brand loyalty that it has built up with its customers by deceiving them. Earlier this year,  
8 McCormick began to shortchange pepper buyers by cutting the amount of pepper in its tins by 25  
9 percent, without reducing either the price or the size of the container. As a result of McCormick's  
10 deceptively packaged container, many consumers have been misled into believing they are buying more  
11 pepper than McCormick's products actually contain.

12 3. McCormick's conduct violates Nevada and Maryland consumer protection laws and  
13 constitutes unjust enrichment. Plaintiff brings this suit on behalf of herself and proposed classes of  
14 McCormick black pepper purchasers for damages and restitution, and to enjoin McCormick from  
15 continuing its deceptive and misleading conduct.

16 **PARTIES**

17 4. Plaintiff Tina Thornton is a citizen and resident of Sparks, Nevada, in Washoe County.

18 5. Defendant McCormick & Company, Incorporated ("McCormick") is a Maryland  
19 corporation with its principal place of business in Sparks, Maryland.

20 **JURISDICTION AND VENUE**

21 6. This Court has jurisdiction over this action under 28 U.S.C. § 1332(d) because this is a  
22 class action involving common questions of law and fact in which the aggregate amount in controversy  
23 exceeds \$5,000,000, there are more than one hundred members of the proposed classes, and Plaintiff  
24 and members of the proposed classes are citizens of states different from that of McCormick.

25 7. This Court has jurisdiction over McCormick because it is registered to conduct business  
26 in Nevada, has sufficient minimum contacts in Nevada, or otherwise intentionally avails itself of the  
27 markets in Nevada through the promotion, sale, marketing, and distribution of its products sufficient to  
28 render the exercise of jurisdiction by the Court proper and necessary.

1 8. Venue is appropriate within this district under 28 U.S.C. § 1391(b) and (c) because  
2 McCormick transacts business within this district, carries out interstate trade and commerce in this  
3 district, and is subject to the Court’s personal jurisdiction with respect to this action.

4 **SUBSTANTIVE ALLEGATIONS**

5 **The Increased Cost of Raw Black Pepper Threatens to Significantly Reduce McCormick’s Profits**

6 9. McCormick is a worldwide leader in the sale and distribution of spices to retailers and  
7 consumers. Although the publicly-traded company packages and distributes a wide variety of spices,  
8 pepper (particularly black pepper) is the product that “drives McCormick more than anything else.”

9 10. McCormick does not grow its own black pepper. It must purchase raw black pepper  
10 from other sources. According to the company, the cost of the raw spices that it must purchase is an  
11 “overwhelming factor as it relates to our overall cost structure” and approximately 80% of its overall  
12 cost of goods sold is attributable to the cost of raw spice material and packaging. As a result,  
13 McCormick has stated that raw spice costs are “really a driver on our margin.”

14 11. Since 2010 the cost of raw black pepper has increased by approximately 500% as a  
15 result of various factors, including increased consumption in Southeast and East Asia, as well as  
16 production problems in traditional export regions like Vietnam. Although the cost of raw black pepper  
17 had been increasing for years, beginning in the summer of 2014 the worldwide price of black pepper  
18 began to experience a particularly steep increase.

19 12. The increasing cost of black pepper prevented McCormick from reaching its long-term  
20 financial goals, with earnings per share failing to meet the company’s five-year projections. While the  
21 company reported significant sales growth, it was unable to realize its earnings targets in large part  
22 because of “higher than normal material cost inflation.” And in 2015 McCormick expected material  
23 costs to once again place significant pressure on its profits. McCormick expected that half of the \$100  
24 million in increased raw material costs that it expected to pay in 2015 would be attributable to the rising  
25 cost of pepper.

26 13. McCormick had limited options to offset the continued and increasing rise in the cost of  
27 its raw materials, particularly black pepper. In a January 2015 earnings call, Alan Wilson—  
28 McCormick’s Chairman, President, and CEO—stated that with respect to pepper, the company was

1 “getting to a price point where it’s pretty stretched” and, unable to increase prices due to the  
2 competitive landscape, the company would need to find ways to cut costs. Mr. Wilson and other  
3 McCormick executives explained, however, that the company would have difficulty offsetting the  
4 increased cost of raw spices.

5  
6 **McCormick Begins to Underfill its Black Pepper Products While Maintaining the Products’ Size  
7 and Prices**

8 14. McCormick has, for decades, sold black pepper in widely-recognized non-transparent  
9 metal tins containing pure ground black pepper and bottles with built-in grinders containing whole  
10 black peppercorns (“Black Pepper Products”):



22 15. McCormick recognized that it could not maintain its profit margins without taking  
23 action, but raising prices was not an option if it wished to keep its products competitively priced.  
24 Rather than accepting lower profits and missing its earnings targets, the company’s solution was to cut  
25 its costs by deceptively underfilling its black pepper products.

26 16. In or about January 2015, McCormick began filling its Black Pepper Products with less  
27 black pepper while maintaining the products’ appearance, size, and price. The empty space in the  
28 packaging is referred to as “slack-fill.” Federal regulations define slack-fill as “the difference between

1 the actual capacity of a container and the volume of product contained therein.” 21 C.F.R. § 100.100.

2 Each of the Black Pepper Products now contains 19-25 percent of nonfunctional slack-fill:

McCormick Black Pepper Product	Original Fill Amount	New Fill Amount With Slack-Fill	Slack-Fill Percentage
Small Tin (3 1/16” tall, 1 5/16” deep, 2 5/16” wide)	2oz	1.5oz	25%
Medium Tin (3 10/16” tall, 1 9/16” deep, 2 13/16” wide)	4oz	3oz	25%
Large Tin (4 10/16” tall, 2 4/16” deep”, 3 5/16” wide)	8oz	6oz	25%
Small Grinder	1.24oz	1oz	19%
Large Grinder	3.1oz	2.5oz	19%

17 17. The picture below illustrates McCormick’s small grinder with the original 1.24oz full  
18 capacity amount fill (on the right) and the new 1oz slack-filled product (on the left).



1 18. Prior to 2015, each of the Black Pepper Products listed above was substantially filled to  
2 capacity consistent with normal industry practices.

3 19. Although the Black Pepper Products now contain less black pepper than they did prior to  
4 2015, the containers have remained the same size and, aside from listing the revised weight in fine  
5 print, the packaging has been unchanged:



15 3oz Medium Tin with Slack-Fill

16 4oz Original Fill Tin



28 1.5oz Medium Tin with Slack-Fill

2oz Original Fill Tin

1 **McCormick's Slack-Filling of its Black Pepper Products is Intended to be and Is Deceptive and**  
2 **Misleading**

3 20. Due to the design of the Black Pepper Products' packaging, consumers are unable to  
4 determine that the containers are only filled to 75-81 percent of their capacity.

5 21. As the pictures above illustrate, each of the slack-filled tins is constructed of non-  
6 transparent metal that prevents consumers from determining the tins' fill level.

7 22. Both the large and small slack-filled grinders have non-transparent plastic tops and non-  
8 transparent plastic labels that prevent consumers from determining the grinders' fill level.



18 2.5oz Large Grinder With Slack Fill

19 23. The packaging is even more deceptive given that McCormick has used nearly identical  
20 packaging for its Black Pepper Products before and after it began to slack-fill the products.  
21 McCormick did not change the appearance or size of its Black Pepper Product tins or grinders when it  
22 began filling them with less black pepper.

23 24. According to federal regulations, a product is considered misleading and misbranded if  
24 it contains non-functional slack-fill. 21 C.F.R. § 100.100. Non-functional slack-fill is empty space in a  
25 package that is filled to less than its capacity for reasons other than the following:

- 26 (1) Protection of the contents of the package;  
27 (2) The requirements of the machines used for enclosing the contents in such package;  
28 (3) Unavoidable product settling during shipping and handling;

1 (4) The need for the package to perform a specific function, where such function is inherent  
2 to the nature of the food and is clearly communicated to customers;

3 (5) The fact that the product contains of food packaged in a reusable container where the  
4 container is part of the presentation of the food and has value which is both significant in  
5 proportion to the value of the product and independent of its function to hold the food;  
6 or

7 (6) Inability to increase level of fill or to further reduce the size of the package (e.g., where  
8 some minimum package size is necessary to accommodate required food labeling  
9 (excluding any vignettes or other nonmandatory designs or label information),  
10 discourage pilfering, facilitate handling, or accommodate tamper-resistant devices).

11 *Id.*

12 25. The slack-fill that McCormick now includes in its Black Pepper Products serves no  
13 functional purpose. The fact that for decades the Black Pepper Products were filled to capacity  
14 demonstrates that the slack-fill is not (1) necessary to protect the black pepper within the tins and  
15 grinders, (2) a result of the requirements of the machines used to fill the tins and grinders, (3)  
16 unavoidable product settling during the shipping and handling process, (4) necessary for the tins and  
17 grinders to function correctly, (5) necessary to the presentation of the Black Pepper Products, or (6) the  
18 result of an inability to increase the fill level of black pepper in the tins and grinders.

19 26. Instead, the slack-fill is designed to and does deceive and mislead consumers into  
20 thinking that they are purchasing the amount of black pepper that the Black Pepper Products are  
21 capable of holding.

22 27. McCormick does not disclose that its Black Pepper Products contain approximately 19-  
23 25 percent nonfunctional slack-fill. And while McCormick has publicly stated that it would not  
24 increase the price of its black pepper products, it has implemented a de facto price increase by selling  
25 Black Pepper Products with significant slack-fill for the same price as it previously sold the same  
26 products for when they were substantially filled to capacity.

27 ///

28 ///



1 **PLAINTIFF’S EXPERIENCE**

2 28. Plaintiff Tina Thornton purchased a red and white tin of McCormick “Pure Ground  
3 Black Pepper” from a Wal-Mart in Sparks, Nevada in 2015.

4 29. At the time of sale, Plaintiff Thornton reasonably believed that the pepper tin she  
5 purchased was full and did not realize that it only contained 75% of the pepper that the tin was  
6 designed to hold. She chose to purchase McCormick pepper instead of competing products based in  
7 part on this representation.

8 30. Had Plaintiff Thornton known that the pepper tin she purchased only contained 75% of  
9 the product the tin was designed to hold, she would have not purchased it or would have paid less for it.

10 **CLASS ACTION ALLEGATIONS**

11 31. Pursuant to Rule 23 of the Federal Rules of Civil Procedure, Plaintiff brings this action  
12 on behalf of herself and proposed classes initially defined as:

13 **Nationwide Class**

14 *All persons in the United States that purchased a Black Pepper Product between January 1,*  
15 *2015, and the present for their personal or household use.*

16 **Nevada Class**

17 *All persons in Nevada that purchased a Black Pepper Product between January 1, 2015, and*  
18 *the present for their personal or household use.*

19 32. Excluded from the classes are McCormick; any affiliate, parent, or subsidiary of  
20 McCormick; any entity in which McCormick has a controlling interest; any officer, director, or  
21 employee of McCormick; any successor or assign McCormick; anyone employed by counsel for  
22 Plaintiff in this action; any judge to whom this case is assigned and his or her spouse; and anyone who  
23 purchased a Black Pepper Product for the purpose of resale.

24 33. This action has been brought and may properly be maintained as a class action under  
25 Federal Rule of Civil Procedure 23(a) and 23(b)(3).

26 34. **Numerosity.** The members of the classes are so numerous that joinder is impracticable.  
27 Plaintiff believes that there are potentially hundreds of thousands, if not millions, of members of  
28 Nationwide Class and at least tens of thousands of members of the Nevada Class.

1           35.    Typicality. Plaintiff's claims are typical of the claims of the members of the classes.  
2 Plaintiff and all members of the Classes purchased a Black Pepper Product that deceptively and  
3 misleadingly contain slack-fill.

4           36.    Adequacy. Plaintiff will fairly and adequately protect and represent the interests of the  
5 classes. Plaintiff's interests are coincident with, and not antagonistic to, those of members of the  
6 classes and she intends to prosecute this action vigorously on behalf of the classes. Plaintiff has  
7 retained counsel with experience in the prosecution of class action consumer protection litigation.

8           37.    Commonality. Common questions of law and fact exist as to all members of the  
9 Classes, including:

- 10           a.    Whether and when McCormick began to include nonfunctional slack-fill in its  
11                Black Pepper Products;
- 12           b.    Whether McCormick omitted or failed to disclose to Plaintiff and members of  
13                the classes that the Black Pepper Products contain nonfunctional slack-fill;
- 14           c.    Whether McCormick's conduct was likely to deceive or mislead reasonable  
15                consumers;
- 16           d.    Whether McCormick's conduct violated federal regulations;
- 17           e.    Whether McCormick's conduct violated the Maryland Consumer Protection Act;
- 18           f.    Whether McCormick's conduct violated the Nevada Deceptive Trade Practices  
19                Act;
- 20           g.    Whether McCormick was unjustly enriched;
- 21           h.    Whether Plaintiff was injured by McCormick's conduct;
- 22           i.    Whether Plaintiff and members of the classes are entitled to recover damages  
23                and/or restitution; and
- 24           j.    Whether Plaintiff and the members of the classes are entitled to equitable or  
25                injunctive relief.

26           38.    Predominance. The above common questions of law and fact predominate over  
27 questions that may affect only individual members of the classes because McCormick has acted on  
28 grounds generally applicable to the classes.

1 39. Superiority. The class action is superior to other available means for the fair and  
2 efficient adjudication of this dispute. The injury suffered by each class member, while meaningful on  
3 an individual basis, is not of such magnitude as to make the prosecution of individual actions against  
4 McCormick economically feasible. Even if class members themselves could afford such individualized  
5 litigation, the court system could not. In addition to the burden and expense of managing many actions  
6 arising from McCormick's underfilling of its Black Pepper Products, individualized litigation presents  
7 a potential for inconsistent or contradictory judgments. Individualized litigation increases the delay and  
8 expense to all parties and the court system presented by the legal and factual issues of the case. By  
9 contrast, the class action device presents far fewer management difficulties and provides the benefits of  
10 single adjudication, economy of scale, and comprehensive supervision by a single court.

11 40. In the alternative to certification under Rule 23(b)(3), the classes may be certified under  
12 Rule 23(b)(2) because McCormick has acted or refused to act on grounds generally applicable to the  
13 classes, thereby making appropriate final and injunctive relief with respect to the members of the  
14 classes as a whole.

## 15 CAUSES OF ACTION

### 16 **First Cause of Action**

#### 17 **Violation of the Maryland Consumer Protection Act**

#### 18 **Md. Com. Law Code §§ 13-101, *et seq.***

19 41. Plaintiff incorporates by reference each preceding paragraph as though fully set forth  
20 herein.

21 42. Plaintiff brings this cause of action on behalf of the Nationwide Class.

22 43. McCormick's conduct, as alleged in this complaint, constitutes unfair and deceptive  
23 trade practices in violation of the Maryland Consumer Protection Act, Md. Code Com. Law §§ 13-101,  
24 *et seq.*

25 44. McCormick's conduct constitutes a deceptive trade practice in that McCormick has  
26 failed to state the fact that its Black Pepper Products contain a substantial amount of nonfunctional  
27 slack-fill. Md. Code Com. Law§ 13-301(3). McCormick's failure to state that its Black Pepper  
28 Products contain a significant amount of nonfunctional slack-fill is material because consumers receive

1 less black pepper than they would reasonably expect based on the size of the Black Pepper Products'  
2 containers. McCormick's failure to disclose material facts has the tendency to deceive reasonable  
3 consumers such as Plaintiff and members of the Classes.

4 45. McCormick's conduct constitutes a deceptive trade practice in that McCormick has  
5 knowingly omitted the fact that its Black Pepper Products contain a significant amount of nonfunctional  
6 slack-fill. Md. Code Com. Law § 13-301(9). McCormick's omission regarding its Black Pepper  
7 Products is material because consumers receive less black pepper than they would reasonably expect  
8 based on the size of the Black Pepper Products' containers. McCormick intended that consumers  
9 would rely on its omission of material facts when they purchase Black Pepper Products with substantial  
10 slack-fill.

11 46. Because of the Black Pepper Products' use of non-transparent packaging, the presence  
12 of nonfunctional slack-fill in the products was not known or reasonably knowable by Plaintiff and class  
13 members.

14 47. As a direct and proximate result of McCormick's conduct, Plaintiff and members of the  
15 Nationwide Class have been harmed. Plaintiff and class members bought Black Pepper Products they  
16 otherwise would not have, paid more for Black Pepper Products than they otherwise would have, and  
17 did not receive the benefit of their bargain as a result of McCormick's deceptive and misleading  
18 conduct.

19 48. Plaintiff and the Nationwide Class are entitled damages, equitable relief, including  
20 disgorgement of all profits accruing to McCormick because of its deceptive and misleading conduct,  
21 and reasonable attorney fees and costs of suit. Md. Code Com. Law § 13-408.

22 **Second Cause of Action**

23 **Violation of the Nevada Deceptive Trade Practices Act**

24 **Nev. Rev. Stat. §§ 598.0903, et seq.**

25 49. Plaintiff incorporates by reference each preceding paragraph as though fully set forth  
26 herein.

27 50. Plaintiff brings this cause of action on behalf of the Nevada Class.  
28

1 51. McCormick's conduct, as alleged in this complaint, constitutes "consumer fraud"  
2 because it is a deceptive trade practice prohibited by the Nevada Deceptive Trade Practices Act, Nev.  
3 Rev. Stat. §§ 598.0903, *et seq.*

4 52. McCormick's conduct constitutes a deceptive trade practice in that McCormick has  
5 knowingly failed to disclose that its Black Pepper Products contain a significant amount of  
6 nonfunctional slack-fill. Nev. Rev. Stat. § 598.0923(2). McCormick's omission regarding its Black  
7 Pepper Products is material because consumers receive less black pepper than they would reasonably  
8 expect based on the size of the Black Pepper Products' containers. McCormick's material omissions  
9 are likely to deceive reasonable consumers such as Plaintiff and members of the Classes. Because of  
10 the Black Pepper Products' use of non-transparent packaging, the presence of nonfunctional slack-fill  
11 in the products was not known or reasonably knowable by Plaintiff and class members.

12 53. McCormick's conduct constitutes a deceptive trade practice because it knowingly  
13 violated 21 C.F.R. § 100.100. Nev. Rev. Stat. § 598.0923(3). 21 C.F.R. § 100.100 provides that:

14 In accordance with section 403(d) of the act, a food shall be deemed to be misbranded if its  
15 container is so made, formed, or filled as to be misleading.

16 (a) A container that does not allow the consumer to fully view its contents shall be  
17 considered to be filled as to be misleading if it contains nonfunctional slack-  
18 fill. Slack-fill is the difference between the actual capacity of a container and the  
19 volume of product contained therein. Nonfunctional slack-fill is the empty space  
20 in a package that is filled to less than its capacity for reasons other than:

- 21 (1) Protection of the contents of the package;  
22 (2) The requirements of the machines used for enclosing the contents in such  
23 package;  
24 (3) Unavoidable product settling during shipping and handling;  
25 (4) The need for the package to perform a specific function (e.g., where  
26 packaging plays a role in the preparation or consumption of a food),  
27 where such function is inherent to the nature of the food and is clearly  
28 communicated to consumers;

1 (5) The fact that the product consists of a food packaged in a reusable  
2 container where the container is part of the presentation of the food and  
3 has value which is both significant in proportion to the value of the  
4 product and independent of its function to hold the food, e.g., a gift  
5 product consisting of a food or foods combined with a container that is  
6 intended for further use after the food is consumed; or durable  
7 commemorative or promotional packages; or

8 (6) Inability to increase level of fill or to further reduce the size of the  
9 package (e.g., where some minimum package size is necessary to  
10 accommodate required food labeling (excluding any vignettes or other  
11 nonmandatory designs or label information), discourage pilfering,  
12 facilitate handling, or accommodate tamper-resistant devices).

13 54. McCormick's Black Pepper Products contain slack-fill and the products' packaging does  
14 not permit consumers to fully view its contents. The slack-fill in Black Pepper Products is  
15 nonfunctional because McCormick has included it for reasons other than those listed in 21 C.F.R. §  
16 100.100(a)(1)-(6).

17 55. As a direct and proximate result of McCormick's conduct, Plaintiff and members of the  
18 Nevada Class have been harmed. Plaintiff and class members bought Black Pepper Products they  
19 otherwise would not have, paid more for Black Pepper Products than they otherwise would have, and  
20 did not receive the benefit of their bargain as a result of McCormick's deceptive and misleading  
21 conduct. Plaintiff and members of the Nevada Class are "victim[s] of consumer fraud" within the  
22 meaning of Nev. Rev. Stat. § 41.600.

23 56. Plaintiff and the Nevada Class are entitled damages, equitable relief, including  
24 disgorgement of all profits accruing to McCormick because of its deceptive and misleading conduct,  
25 and reasonable attorney fees and costs of suit. Nev. Rev. Stat. § 41.600.

1 **Third Cause of Action**

2 **Unjust Enrichment**

3 57. Plaintiff incorporates by reference each preceding paragraph as though fully set forth  
4 herein.

5 58. Plaintiff brings this cause of action on behalf of the Nationwide Class.

6 59. McCormick has enjoyed substantial economic benefits from its sale of Black Pepper  
7 Products that contain substantial amounts of nonfunctional slack-fill. The benefits McCormick has  
8 received are directly traceable to Plaintiff's and class members' purchases of Black Pepper Products.

9 60. McCormick has unjustly retained the benefits it received to the detriment of Plaintiff and  
10 members of the Nationwide Class. McCormick sold Black Pepper Products to Plaintiff and the class  
11 members that included nonfunctional slack-fill while still charging the same price it did as when the  
12 products were substantially filled to capacity. McCormick did so for the purpose of enriching itself.  
13 McCormick did not disclose to Plaintiff and the members of the Nationwide Class that its Black Pepper  
14 Products contained nonfunctional slack-fill.

15 61. McCormick continues to possess money paid by Plaintiff and the class members to  
16 which it is not entitled.

17 62. McCormick should be compelled to disgorge, for the benefit of Plaintiff and the  
18 Nationwide Class, the profits and other financial benefits it has received as result of including  
19 nonfunctional slack-fill in its Black Pepper Products.

20 63. Plaintiff and class members do not have an adequate contractual remedy at law.

21 **PRAYER FOR RELIEF**

22 WHEREFORE, Plaintiff prays for judgment as follows:

- 23 a. For an order certifying the proposed Classes and appointing Plaintiff's counsel to  
24 represent the Classes;
- 25 b. For an order awarding Plaintiff and class members actual, statutory, punitive, or any  
26 other form of damages provided by statute;
- 27 c. For an order awarding Plaintiff and class members restitution, disgorgement, or other  
28 equitable relief provided by statute or as the Court deems proper;

- 1 d. For an order enjoining McCormick from continuing its deceptive and misleading
- 2 conduct;
- 3 e. For an order awarding Plaintiff and class members pre-judgment and post-judgment
- 4 interest;
- 5 f. For an order awarding Plaintiff and class members reasonable attorney fees and costs of
- 6 suit, including expert witness fees; and
- 7 g. For an order awarding such further relief as the Court may deem just and proper.

8 **DEMAND FOR JURY TRIAL**

9 64. Pursuant to Fed. R. Civ. P. 38(b), Plaintiff demands a trial by jury for all issues so triable  
10 under the law.

11 Dated: November 20, 2015

Respectfully submitted,

12 **DURNEY & BRENNAN, LTD.**

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