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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

MELANIE HOUSE, ERICH ZANDER,
ELIZABETH LIVINGSTON, and BONNIE
BURKERT, Individually and on Behalf of all
Others Similarly Situated

Plaintiffs,

v.

KIND LLC

Defendant.

Case No.

CLASS ACTION COMPLAINT

DEMAND FOR JURY TRIAL

1 Plaintiffs Melanie House, Erich Zander, Bonnie Burkert, and Elizabeth Livingston
2 (collectively "Plaintiffs"), on behalf of themselves and all others similarly situated, and the general
3 public, by and through the undersigned counsel, hereby brings this action against Defendant KIND
4 LLC ("KIND" or "Defendant"), and allege the following based upon knowledge, information, and
5 belief, including the investigation of counsel.

6 INTRODUCTION

7 1. KIND is a quickly-growing company that sells snack bars and other snacks that they
8 market as "healthy." Defendant's "healthy" marketing is central to the marketing of the Products
9 and the same and/or substantially similar health related statements are prominently displayed in the
10 same location on the front and back packaging of the Products and were uniformly communicated
11 to Plaintiffs and every other member of the Classes.

12 2. Recently, the FDA informed KIND that the labels on four types of its snack bars,
13 KIND Fruit & Nut Almond & Apricot, KIND Fruit & Nut Almond & Coconut, KIND Plus Peanut
14 Butter Dark Chocolate + Protein, and KIND Dark Chocolate Cherry Cashew + Antioxidants
15 (referred to individually as the "Product" and collectively the "Products"), are not in compliance
16 with the Federal Food, Drug, and Cosmetic Act ("FDCA") and its implementing regulations.

17 3. The "healthy" claim is false, misleading and likely to deceive reasonable consumers
18 in the same respect. Contrary to Defendant's representations, the Products are not "healthy" and
19 contain other false and misleading statements regarding the healthiness of the Products and their
20 ingredients. The Products are simply not what Defendant advertises them to be. As a result, the
21 Products are misbranded and sold pursuant to unlawful, unfair, deceptive, misleading and deceptive
22 business practices. At a minimum, Defendant's "healthy" and other health-related statements are
23 likely to deceive reasonable consumers.

24 4. As a result of Defendant's false and misleading labeling and advertising of the
25 Products, Plaintiffs and members of the Classes (defined below) have suffered injury in fact,

1 including economic damages, and have lost money or property. Specifically, Plaintiffs and
2 members of the Classes have purchased KIND bars under the mistaken belief that the products
3 were "healthier" and/or had additional benefits compared to other snack products. But for
4 Defendant's false and misleading advertising and marketing of the KIND bars, Plaintiffs and
5 members of the Classes would not have purchased or paid as much for the KIND bars.

6 5. Plaintiffs bring this action on behalf of themselves and the Classes to rectify the
7 injuries caused by Defendant's unlawful practices, and to enjoin KIND's ongoing deceptive
8 labeling and advertising of the Products. Plaintiffs seek, among other things, equitable relief,
9 declaratory relief, restitution, and damages for the putative Classes. Plaintiffs also seek reasonable
10 attorneys' fees pursuant to Cal. Code Civ. Proc. § 1021.5, as this lawsuit seeks the enforcement of
11 an important right affecting the public interest and satisfies the statutory requirements for an award
12 of attorneys' fees, and pursuant to sections 501.211(2) and 501.2105, *Florida Statutes*.

13 PARTIES

14 6. Plaintiff Melanie House is a citizen and resident of California. Throughout the Class
15 Period (defined below), Ms. House purchased one or more of the Products from various retail stores
16 within the last four years. Were it not for KIND's false, misleading, deceptive, or otherwise
17 unlawful labeling and advertising, Ms. House would not have purchased or paid as much for the
18 KIND bars.

19 7. Plaintiff Erich Zander is a citizen and resident of California. Throughout the Class
20 Period (defined below), Mr. Zander purchased one or more of the Products from various retail
21 stores with the last four years. Were it not for KIND's false, misleading, deceptive, or otherwise
22 unlawful labeling and advertising, Mr. Zander would not have purchased or paid as much for the
23 KIND bars.

24 8. Plaintiff Bonnie Burkert is a citizen and resident of California. Throughout the Class
25 Period (defined below), Ms. Burkert purchased one or more of the Products from various retail
26

1 stores within the last four years. Were it not for KIND's false, misleading, deceptive, or otherwise
2 unlawful labeling and advertising, Ms. Burkert would not have purchased or paid as much for the
3 KIND bars.

4 9. Plaintiff Elizabeth Livingston is a citizen and resident of Florida. Ms. Livingston
5 purchased one or more of the Products from various retail stores within the last four years. Were it
6 not for KIND's false, misleading, deceptive, or otherwise unlawful labeling and advertising, Ms.
7 Livingston would not have purchased or paid as much for the KIND bars.

8 10. Defendant KIND LLC is based in New York and has its principal place of business
9 at 55 W. 21st St., New York, NY 10010. KIND manufactures and distributes various snack
10 products, including KIND Fruit & Nut Almond & Apricot, KIND Fruit & Nut Almond & Coconut,
11 KIND Plus Peanut Butter Dark Chocolate + Protein, and KIND Dark Chocolate Cherry Cashew +
12 Antioxidants bars.

13 11. The advertising for the Products relied upon by Plaintiffs was prepared and/or
14 approved by Defendant and its agents, and was disseminated by Defendant and its agents through
15 advertising containing the misrepresentations alleged herein. The advertising for the Products was
16 designed to encourage consumers to purchase the Products and reasonably misled the reasonable
17 consumer, i.e. Plaintiffs and the Classes into purchasing the Products. Defendant is the owner,
18 manufacturer and distributor of the Products, and is the company that created and/or authorized the
19 unlawful, fraudulent, unfair, misleading and/or deceptive marketing, advertising, statements and
20 Representations for the Products.

21 12. Plaintiffs allege that, at all times relevant herein, Defendant and its subsidiaries,
22 affiliates, and other related entities, as well as their respective employees, were the agents, servants
23 and employees of Defendant and at all times relevant herein, each was acting within the purpose
24 and scope of that agency and employment. Plaintiffs further allege on information and belief that at
25 all times relevant herein, the distributors and retailers who delivered and sold the Products, as well
26

1 as their respective employees, also were Defendant's agents, servants and employees, and at all
2 times herein, each was acting within the purpose and scope of that agency and employment.

3 13. In addition, Plaintiffs allege that, in committing the wrongful acts alleged herein,
4 Defendant in concert with its subsidiaries, affiliates, and/or other related entities and their
5 respective employees, planned, participated in and furthered a common scheme to induce members
6 of the public to purchase the Products by means of untrue, misleading, deceptive, and/or fraudulent
7 representations, and that Defendant participated in the making of such representations in that it
8 disseminated those misrepresentations and/or caused them to be disseminated. Whenever reference
9 in this Complaint is made to any act by Defendant or its subsidiaries, affiliates, distributors,
10 retailers and other related entities, such allegation shall be deemed to mean that the principals,
11 officers, directors, employees, agents, and/or representatives of Defendant committed, knew of,
12 performed, authorized, ratified and/or directed that act or transaction on behalf of Defendant while
13 actively engaged in the scope of their duties.

14 JURISDICTION AND VENUE

15 14. This Court has jurisdiction over this action pursuant to 28 U.S.C. §1332(d)(2)(A),
16 the Class Action Fairness Act, because the matter in controversy exceeds the sum or value of
17 \$5,000,000 exclusive of interest and costs, at least one member of the putative Classes of Plaintiffs
18 is a citizen of a different state than Defendant, more than two-thirds of the putative Classes reside
19 in states other than the state in which Defendant is a citizen and in which this case is filed, and
20 therefore any exceptions to jurisdiction under 28 U.S.C. § 1332(d) do not apply.

21 15. The Court has personal jurisdiction over Defendant pursuant to Cal. Code Civ. P. §
22 410.10 as a result of Defendant's substantial, continuous and systematic contacts with California,
23 and because Defendant has purposely availed itself of the benefits and privileges of conducting
24 business activities within California.

25 16. Venue is appropriate in this Court pursuant to 28 U.S.C. § 1391(b) and (c) because

Defendant is subject to personal jurisdiction in this district and a substantial part of the events or omissions giving rise to the claims occurred in this district.

FACTS

I. KIND and its Products

17. KIND makes and distributes 22 varieties of snack bars, including the Products, and 6 varieties of "snackable clusters" marketed as "healthy" snacks.

18. KIND was founded in 2004 by Daniel Lubetzky because "he wanted to bring more kindness to the world in the form of a healthy snack."¹

19. KIND's snacks can be purchased in 80,000 locations nation-wide and KIND is the fastest-growing energy and nutrition bar in the country.² At one point, KIND bars were only available in 1,000 specialty grocery stores, such as Whole Foods, whereas now they are available at Wal-Mart, Target, Costco, and 7-Eleven, among other locations.³

20. KIND bars purchased directly through KIND's website (www.KINDsnacks.com/store) retail for \$100 for a case of 72, or \$1.38 each. KIND bars purchased at Target retail for anywhere from \$19.99 for a box of 12, or \$1.67 each (KIND Fruit & Nut Almond & Coconut, KIND Peanut Butter Dark Chocolate + Protein, and KIND Dark Chocolate Cherry Cashew + Antioxidants) to \$14.79 for a box of 12, or \$1.23 each (KIND Fruit & Nut Almond & Apricot).

21. KIND has been incredibly successful, increasing sales from \$10 million in 2010 to nearly \$120 million in 2012. As of February 2014, six of the top ten fastest selling produces in the

¹ "Why KIND bars are suddenly everywhere," Caroline Fairchild, Fortune, Feb. 10, 2014, <http://fortune.com/2014/02/10/why-KIND-bars-are-suddenly-everywhere/> (last visited May 6, 2015).

² *Id.*

³ *Id.*

1 nutritional bar category are KIND bars.⁴

2 22. Energy and nutrition bars are a trend in American eating preferences- particularly
3 those like KIND which allege to be healthy and filling. Approximately 27 million more Americans
4 ate nutrition bars in 2013 than in 2003.⁵

5 23. KIND invests significant resources towards increasing awareness of its products,
6 and currently spends nearly \$10 million per year to get people to try its products. They have a full-
7 time field marketing team in 25 U.S. markets that offer samples in stores, at corporate offices, and
8 at events.⁶

9 24. KIND markets its products as "healthy and tasty," which is its brand philosophy.
10 KIND's website states that it strives to share a message of "holistic kindness" with its "healthy
11 snacks and foods."⁷

12 25. According to internal KIND surveys, 70% of KIND's customers choose the bars
13 because of their advertised health attributes.⁸ KIND founder, Mr. Lubetsky, has said,
14 "Transparency is one of our core principles... We treat the food with integrity."⁹

15 26. Defendant prominently displays the same and/or substantially similar "healthy" and
16 other similarly positive health attribute statements in the same location on the front and back
17 packaging of the Products and were uniformly communicated to Plaintiffs and every other member
18 of the Classes, which reinforced the substantially similar health perception of the Products. These

19
20 ⁴ *Id.*

21 ⁵ *Id.*

22 ⁶ *Id.*

23 ⁷ <http://www.KINDsnacks.com/about/#slide-one> (last visited May 6, 2015).

24 ⁸ <http://www.fastcompany.com/3023368/KIND-snacks-setting-a-high-bar> (last visited May 6,
25 2015).

26 ⁹ *Id.*

representations are central to the marketing of the Products.

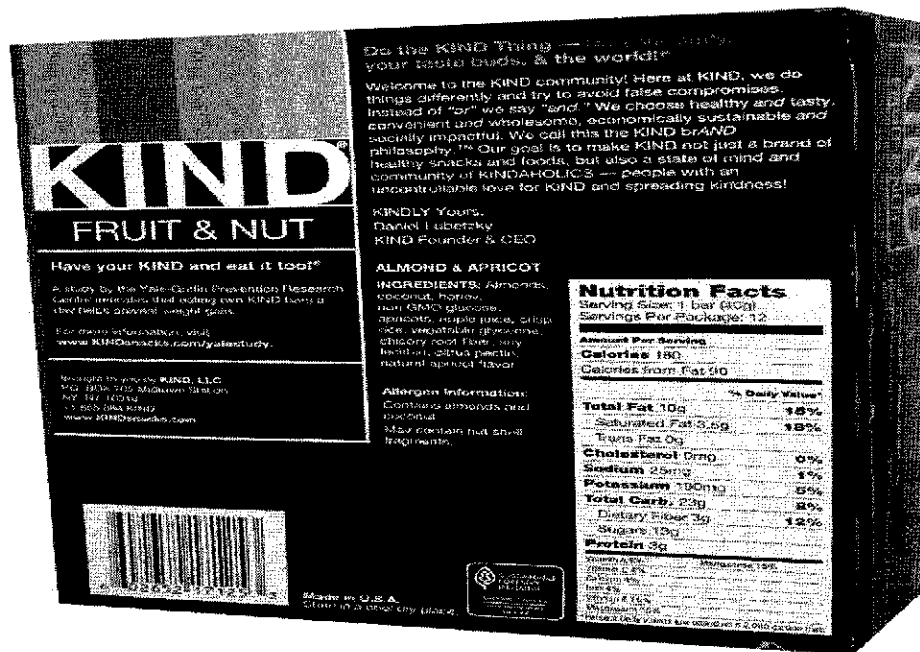
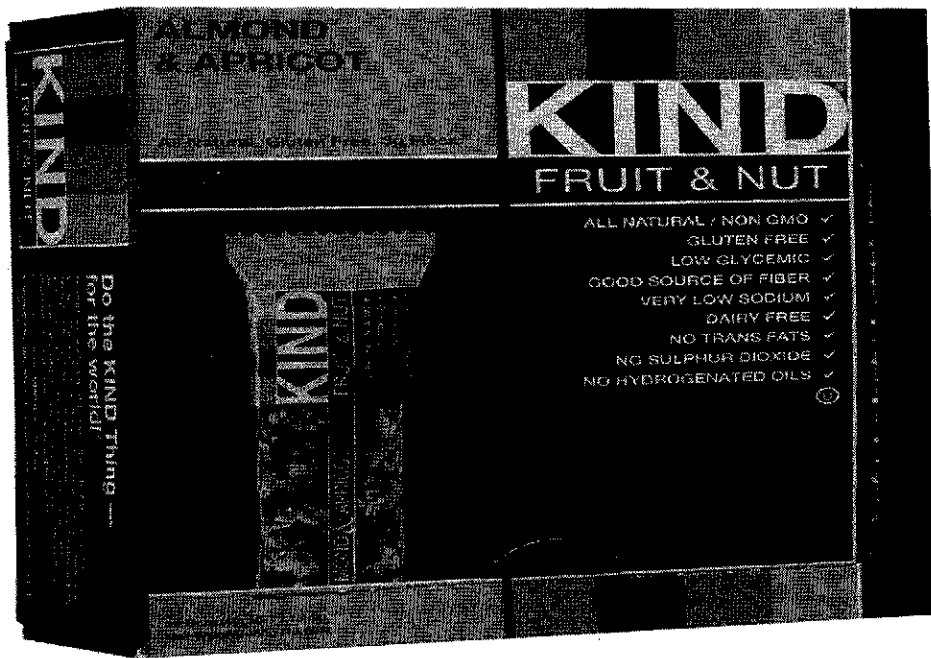


Figure A- KIND Fruit & Nut Almond & Apricot Bars

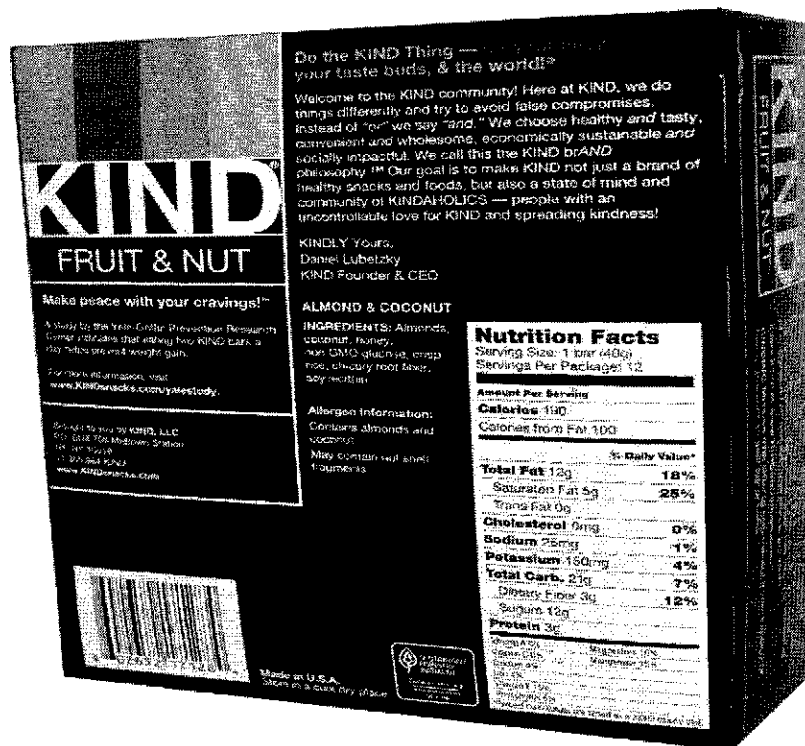
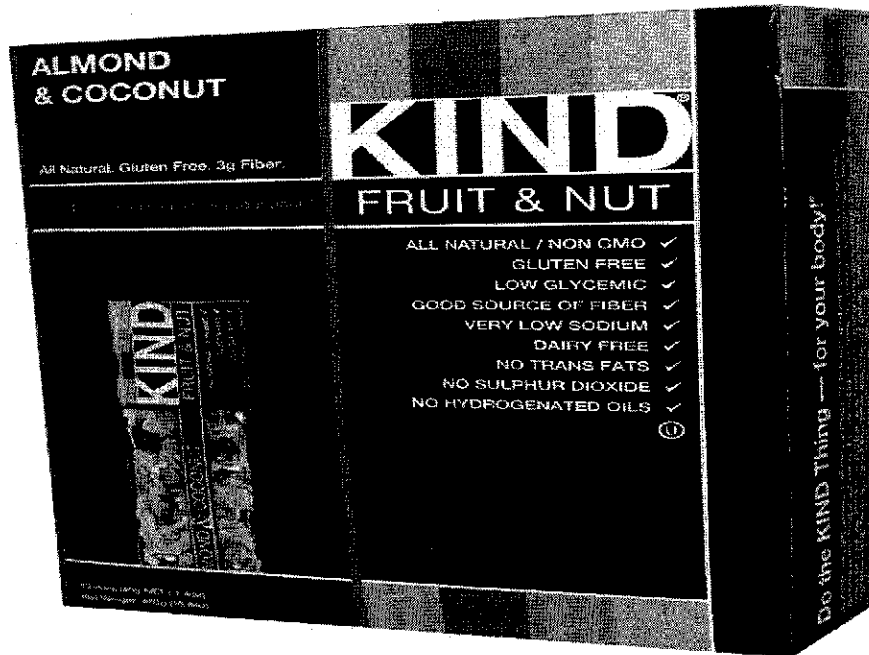


Figure B- KIND Fruit & Nut Almond & Coconut Bars

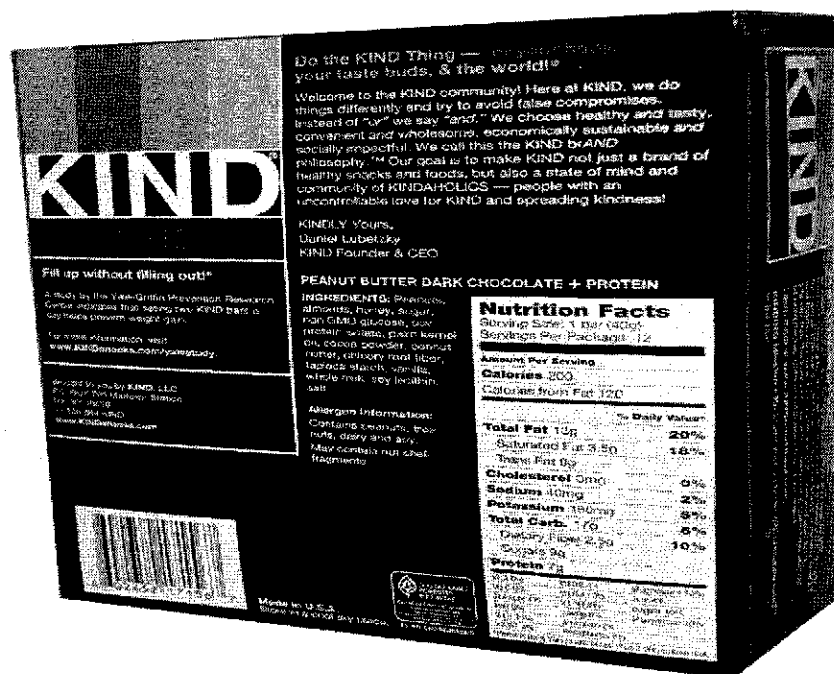
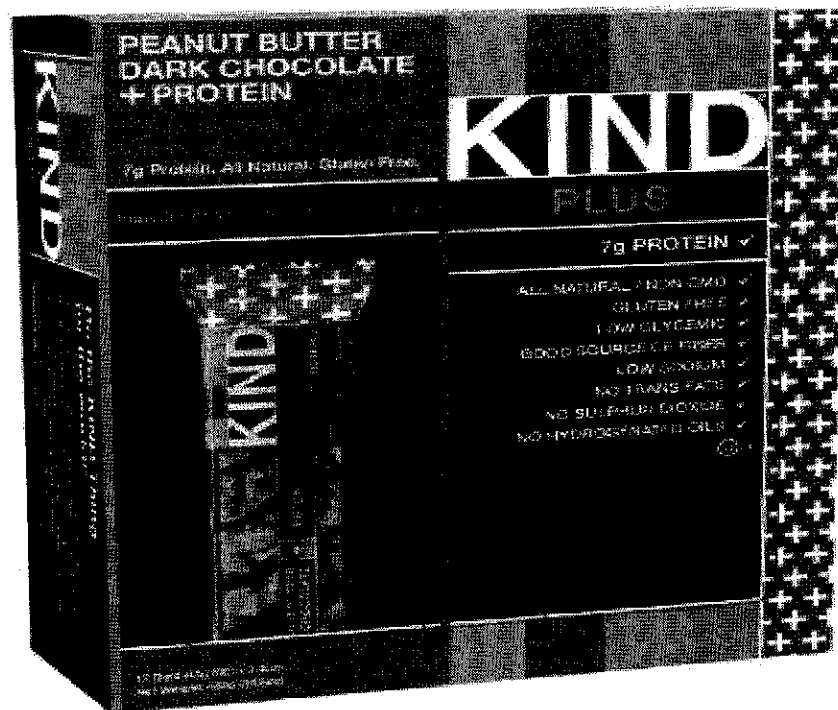


Figure C- KIND Plus Peanut Butter Dark Chocolate + Protein Bars

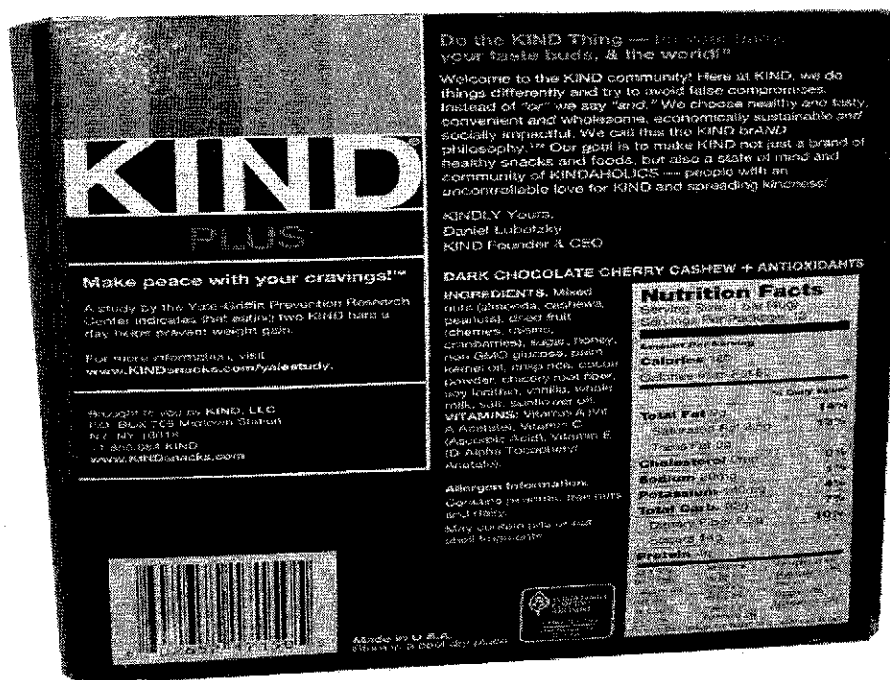
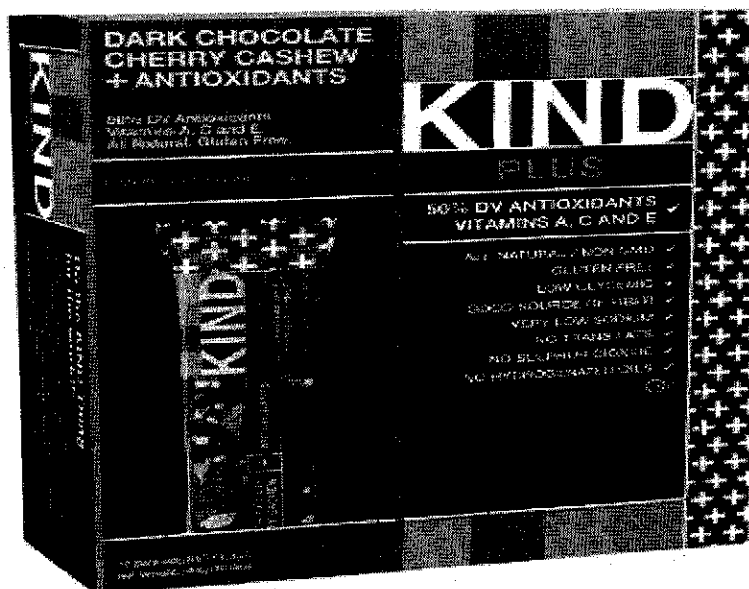


Figure D- KIND Dark Chocolate Cherry Cashew + Antioxidants Bars

II. KIND's Violations of Food Labeling Requirements

27. On March 17, 2015, the Food and Drug Administration ("FDA") issued a letter to KIND regarding the labels on its KIND Fruit & Nut Almond & Apricot, KIND Fruit & Nut Almond & Coconut, KIND Plus Peanut Butter Dark Chocolate + Protein, and KIND Dark Chocolate Cherry Cashew + Antioxidants bars.¹⁰ The FDA found that these products violated section 403 of the FDCA (21 U.S.C. §343 and Title 21, Code of Federal Regulations, Part 101 (21 CFR 101)).

28. Specifically, the FDA found that the labels of these KIND products bear nutrient content claims that the product does not meet.

A. Claim that Products are "Healthy"

29. The label of KIND Fruit & Nut Almond & Apricot states that this product is "Healthy and tasty, convenient and wholesome," in connection with other statements such as "good source of fiber," "no trans fats," and "very low sodium."

30. The label of KIND Fruit & Nut Almond & Coconut states that this product is "Healthy and tasty, convenient and wholesome," in connection with other statements such as "good source of fiber," "no trans fats," and "very low sodium."

31. The label of KIND Peanut Butter Dark Chocolate + Protein states that this product is "Healthy and tasty, convenient and wholesome," in connection with other statements such as "good source of fiber," "no trans fats," "low sodium," "+ protein," and "7g protein."

32. The label of KIND Dark Chocolate Cherry Cashew + Antioxidants states that this product is "Healthy and tasty, convenient and wholesome," in connection with other statements such as "good source of fiber," "no trans fats," "very low sodium" "+ antioxidants," and "50% DV antioxidants vitamins A, C and E."

33. KIND's website at www.KINDsnacks.com/about asserts, "There's healthy. There's

¹⁰ FDA Warning Letter to Kind, LLC, March 17, 2015, available at <http://www.fda.gov/ICECI/EnforcementActions/WarningLetters/ucm440942.htm> (last visited May 6, 2015).

1 tasty. Then there's healthy and tasty" and "all of our snacks are pretty much the nirvana of healthful
2 tastiness."

3 34. KIND's website for the KIND Peanut Butter Dark Chocolate + Protein at
4 www.KINDsnacks.com/products/KIND-store/buy-KIND-bars/KIND-plus/peanut-butter-
5 darkchocolate-protein.html states "KIND Peanut Butter Dark Chocolate + Protein is a healthy and
6 satisfying blend of peanuts and antioxidant-rich dark chocolate. Each bar contains 7 grams of
7 protein, which promotes satiety and strengthens bones, muscles and skin."

8 35. However, the FDA letter informed KIND that none of these products meet the
9 requirements for use of the claim "healthy," as set forth in 21 CFR 101.65(d)(2), which requires,
10 among other things, that "healthy" can be used only if the food is "low saturated fat" as defined by
11 21 CFR 101.62(c), meaning it has a saturated fat content of 1 g or less and no more than 15% of the
12 calories are from saturated fat.

13 36. KIND Fruit & Nut Almond & Apricot bars contain 3.5 g of saturated fat per 40 g of
14 the food.

15 37. KIND Fruit & Nut Almond & Coconut bars contain 5 g of saturated fat per 40 g of
16 the food.

17 38. KIND Peanut Butter Dark Chocolate + Protein bars contain 3.5 g of saturated fat per
18 40 g of the food.

19 39. KIND Fruit & Nut Dark Chocolate Cherry Cashew + Antioxidants bars contain 2.5
20 g of saturated fat per 40 g of the food.

21 40. These amounts exceed the 1.5 g limit for the use of the term "healthy" and thus the
22 labeling and advertising is unlawful, false, misleading, and/or deceptive and they are misbranded
23 pursuant to 403(r)(1)(A) of the FDCA.

24 **B. Use of the Terms "+" and "Plus"**

25 41. Both the KIND Peanut Butter Dark Chocolate + Protein and KIND Dark Chocolate
26

Cherry Cashew + Antioxidants use the term “+” on the labels, but these products do not comply with the requirements to use this term.

42. The term “+,” as it is used on the label for the KIND Peanut Butter Dark Chocolate + Protein is read in conjunction with the term “7 g protein.” The term “+” as it is used on the label for the KIND Dark Chocolate Cherry Cashew + Antioxidants is read in conjunction with “50% DV Antioxidant, vitamins A, C and E.” Thus, these are nutrient content claims because they characterize the product’s level of vitamins and nutrients, which are required to be in nutrition labeling pursuant to 21 CFR 101.13(b).

43. 21 CFR 101.54(e) provides that the term “plus” may be used to describe the level of nutrients (i.e. vitamins or minerals) in food provided that the food contains at least 10% more of the recommended daily intake for the nutrient than an appropriate reference food, the claim is based on nutrients that are added to the food, and the claim bears the required information for relative claims as described in 21 CFR 101.13(j)(2) and 101.54(e)(1)(iii) (e.g. “contains 10% more of the Daily Value for fiber than white bread” or “Fiber content of white bread is 1 g per serving; (this product) has 3.5 g per serving”).

44. Neither the KIND Peanut Butter Dark Chocolate + Protein nor the KIND Dark Chocolate Cherry Cashew + Antioxidants state the identity of the reference food and the percentage of the nutrient it contains in comparison to the reference food, and thus the labeling and advertising is unlawful, false, misleading, and/or deceptive and they are misbranded.

C. Use of the Term “Antioxidant-rich”

45. The product page for KIND Peanut Butter Dark Chocolate + Protein bars on the website www.KINDsnacks.com/products/KIND-store/buy-KIND-bars/KIND-plus/peanut-butter-darkchocolate-protein.html includes the nutrient content claim “antioxidant-rich dark chocolate.”

46. The product and its labeling do not meet the requirements for the use of this term pursuant to 21 CFR 101.54(g). In order to use the term “antioxidant-rich,” a Reference Daily Intake

needs to have been established for the nutrient that is the subject of the claim, and the nutrients must have recognized antioxidant activity. Additionally, in order to qualify for an "antioxidant-rich" claim, the product must contain 20% or more of the Reference Daily Intake for the nutrients that have recognized antioxidant activity, such as vitamins A, C or E.

47. The KIND Peanut Butter Dark Chocolate + Protein bars contain 15% of the daily value of vitamin E, 0% of the daily value of vitamins A and C. Thus, this product cannot be labeled "antioxidant-rich" and the labeling and advertising is unlawful, false, misleading, and/or deceptive and they are misbranded.

D. Use of the Term "Good Source of Fiber"

48. The labels of KIND Fruit & Nut Almond & Apricot, KIND Fruit & Nut Almond & Coconut, KIND Peanut Butter Dark Chocolate + Protein, and KIND Fruit & Nut Dark Chocolate Cherry Cashew + Antioxidants all state that they are a "Good Source of Fiber."

49. However, the labels of these products do not include the required statement disclosing that these products are not low in total fat and disclosing the level of total fat per serving in immediate proximity to the claim that they are a "Good Source of Fiber," as required by 21 CFR 101.54(d).

50. Low in total fat means the food is in a serving size greater than 30 g and has 3 g or less of fat per serving size. 21 CFR 101.62(b)(2).

51. According to the Nutrition Facts on these KIND bars, the KIND Fruit & Nut Almond & Apricot contains 10 g of total fat per 40 g of the food, the KIND Fruit & Nut Almond & Coconut contains 12 g of total fat per 40 g of the food, the KIND Peanut Butter Dark Chocolate + Protein contains 13 g of total fat per 40 g of the food, and the KIND Fruit & Nut Dark Chocolate Cherry Cashew + Antioxidants contains 9 g of total fat per 40 g of the food.

52. The amount of fat in each of these products exceeds the "low fat" definition amounts, and thus this should be disclosed on the labels immediately next to the claims that these

1 products are a "Good Source of Fiber."

2 53. Because these products do not contain this required disclosure, the labeling and
3 advertising is unlawful, false, misleading, and/or deceptive and they are misbranded.

4 **E. Failure to Disclose Nutrition Information**

5 54. The KIND Fruit & Nut Almond & Apricot, KIND Fruit & Nut Almond & Coconut,
6 KIND Peanut Butter Dark Chocolate + Protein, and KIND Fruit & Nut Dark Chocolate Cherry
7 Cashew + Antioxidants all state that they contain "No Trans Fats."

8 55. However, the labels of these products do not include the levels of monounsaturated
9 fatty acids and polyunsaturated fatty acids as required by 21 CFR 101.9(c)(2)(iii) and (iv).

10 56. The KIND Peanut Butter Dark Chocolate + Protein product label says "+ protein"
11 and "plus 7 g protein." However, the nutritional label does not include the percent daily value for
12 protein as required when a label has a nutrient content claim for protein, as required by 21 CFR
13 101.9(c)(7)(i).

14 57. Thus, the labeling and advertising is unlawful, false, misleading, and/or deceptive
15 and they are misbranded misbranded.

16 **F. Failure to Provide the Name and Place of Business**

17 58. The labels of the KIND Fruit & Nut Almond & Apricot, KIND Fruit & Nut Almond
18 & Coconut, KIND Peanut Butter Dark Chocolate + Protein, and KIND Fruit & Nut Dark Chocolate
19 Cherry Cashew + Antioxidants do not contain the name and place of business of the manufacturer,
20 packer, or distributor, as required by 21 CFR 101.5.

21 59. Thus, the labeling and advertising is unlawful, false, misleading, and/or deceptive
22 and they are misbranded.

23 **G. Additional Violations Found**

24 60. The FDA found additional violations in KIND's labeling of KIND Fruit & Nut
25 Almond & Apricot, KIND Fruit & Nut Almond & Coconut, KIND Peanut Butter Dark Chocolate +

Protein, and KIND Fruit & Nut Dark Chocolate Cherry Cashew + Antioxidants.

61. First, the KIND Fruit & Nut Almond & Coconut contains 5 g of saturated fat per 40 g serving, but does not contain the disclosure statement "See nutrition information for saturated fat content pursuant to 21 CFR 101.13(h). Thus, the labeling and advertising is unlawful, false, misleading, and/or deceptive and they are misbranded.

62. The KIND Fruit & Nut Almond & Apricot, KIND Fruit & Nut Almond & Coconut, KIND Peanut Butter Dark Chocolate + Protein, and KIND Fruit & Nut Dark Chocolate Cherry Cashew + Antioxidants products all have statements beginning "Allergen Information: Contains..." but the allergen statement is not declared correctly because it does not include all major allergens in the food as required by section 403(w)(1)(B)(i) of the FDCA. For example, the ingredient lists for KIND Fruit & Nut Almond & Apricot, KIND Fruit & Nut Almond & Coconut, KIND Peanut Butter Dark Chocolate + Protein state soy lecithin is an ingredient, however soy is not declared in the "Contains..." statement. Thus, the labeling and advertising is unlawful, false, misleading, and/or deceptive and they are misbranded.

63. The KIND Fruit & Nut Dark Chocolate Cherry Cashew + Antioxidants ingredient list does not meet the requirements of 21 CFR 101.4(b) because the name of the ingredients are not listed as a specific name, but rather as a collective or generic name, like "mixed nuts." Thus, the labeling and advertising is unlawful, false, misleading, and/or deceptive and they are misbranded.

64. The KIND Peanut Butter Dark Chocolate + Protein ingredient list does not meet the requirements of 21 CFR 101.4(b)(2) because the label declares peanut butter as an ingredient but does not list the sub-ingredients. Thus, the labeling and advertising is unlawful, false, misleading, and/or deceptive and they are misbranded.

65. The KIND Fruit & Nut Almond & Apricot, KIND Fruit & Nut Almond & Coconut, KIND Peanut Butter Dark Chocolate + Protein, and KIND Fruit & Nut Dark Chocolate Cherry Cashew + Antioxidants products all list "non GMO glucose" as an ingredient, which is not an

appropriate common name for glucose syrup according to 21 CFR 101.4, 168.120, or 168.121. Thus, the labeling and advertising is unlawful, false, misleading, and/or deceptive and they are misbranded.

66. The KIND Fruit & Nut Almond & Apricot, KIND Fruit & Nut Almond & Coconut, KIND Peanut Butter Dark Chocolate + Protein, and KIND Fruit & Nut Dark Chocolate Cherry Cashew + Antioxidants product labels do not list KIND's street address as required by 21 CFR 101.5(d). Thus, the labeling and advertising is unlawful, false, misleading, and/or deceptive and they are misbranded.

67. The KIND Fruit & Nut Almond & Apricot, KIND Fruit & Nut Almond & Coconut, KIND Peanut Butter Dark Chocolate + Protein, and KIND Fruit & Nut Dark Chocolate Cherry Cashew + Antioxidants product labels do not contain an appropriate statement of identity as required by 21 CFR 101.3, which requires the label to state the identity of the product. Thus, the labeling and advertising is unlawful, false, misleading, and/or deceptive and they are misbranded.

III. KIND's Response to the FDA Letter

68. On April 14, 2015, KIND posted "A note to our KIND community" on its website stating that they received the FDA letter and that they will be correcting the items pointed out by the FDA. KIND specifically noted that it would no longer be able to use the word "healthy" on their products with more than 3 g of total fat or 1 g of saturated fat per serving, which applies to many of their products that contain nuts.¹¹

69. A spokesperson for KIND stated, "Our team is fully committed to working alongside the FDA, and we're moving quickly to comply with its request."¹²

¹¹ <http://www.KINDsnacks.com/blog/post/a-note-to-our-KIND-community-2/> (last visited May 6, 2015).

¹² "KIND LLC working with FDA over string of labeling errors; consumer litigation could follow, predict attorneys," Elaine Watson, April 16, 2015, <http://www.foodnavigator-usa.com/Regulation/KIND-LLC-working-with-FDA-over-string-of-labeling-errors> (last visited May 6, 2015).

1 70. Upon information and belief, as of the date of this Complaint the Products are still
2 being sold at retail outlets in packaging that includes the “healthy” and other unlawful language.

3 **IV. The Food, Drug and Cosmetic Act and Related State Laws**

4 71. Food manufacturers must comply with federal and state laws and regulations
5 governing labeling food products. Among these are the FDCA and its labeling regulations,
6 including those set forth in 21 C.F.R. part 101.

7 72. Pursuant to the FDCA, section 21 U.S.C. § 343(a),(d), & (f), “[a] food shall be
8 deemed to be misbranded . . . if its labeling is false or misleading in any particular, or . . . if its
9 container is so made, formed, or filled as to be misleading. . . . If any word, statement, or other
10 information required by or under authority of this chapter to appear on the label or labeling is not
11 prominently placed thereon with such conspicuousness (as compared with other words, statements,
12 designs, or devices in the labeling) and in such terms as to render it likely to be read and understood
13 by the ordinary individual under customary conditions of purchase and use.”

14 73. California’s Sherman Food, Drug, and Cosmetic Law, California Health and Safety
15 Code, Division 104, Part 5 (“Sherman Law”) incorporates many of the FDA’s regulations into
16 California state law governing the labeling and branding of food products.

17 74. Section 110100(a) of the Sherman Law states: all food labeling regulations and any
18 amendments to those regulations adopted pursuant to the federal act [FDCA], in effect on January
19 1, 1993, or adopted on or after that date shall be the food regulations of this state.” Cal. Health &
20 Safety Code § 110100(a).

21 75. Article 6 of the Sherman Law, Cal. Health & Safety Code § § 110660, *et seq.*,
22 concerns the misbranding of food. Section 110660 states that, “[a]ny food is misbranded if its
23 labeling is false or misleading in any particular.” Section 110665 states that “[a]ny food is
24 misbranded if its labeling does not conform with the requirements for nutrition labeling as set forth
25 in Section 403(q) (21 U.S.C. Sec. 343(q) of the federal act and the regulations adopted pursuant

1 thereto.” Section 110670 states that “[a]ny food is misbranded if its labeling does not conform with
2 the requirements for nutrient content or health claims as set forth in Section 403(r) (21 U.S.C. Sec.
3 343(r)) of the federal act and the regulations adopted pursuant thereto.”

4 76. Thus, the FDCA provisions and implementing regulations discussed herein are
5 incorporated into the Sherman Law by reference.

6 77. Section 110385 of the Sherman Law makes it “unlawful for any person to distribute
7 in commerce any food, drug, device, or cosmetic, if its packaging or labeling does not conform to
8 the provisions of this article or to regulations adopted pursuant to this article.”

9 78. Section 110760 of the Sherman Law makes it “unlawful for any person to
10 manufacture, sell, deliver, hold, or offer for sale any food that is misbranded.” Section 110765
11 makes it “unlawful for any person to misbrand any food.”

12 79. As a result of KIND’s conduct alleged herein, KIND has violated the
13 aforementioned provisions of the Sherman Law.

14 80. Pursuant to the FSA, Fla. Stat. § 500.04 (1): “[a] food shall be deemed to be
15 misbranded . . . if its labeling is false or misleading in any particular, or . . . if its container is so
16 made, formed, or filled as to be misleading. . . . If any word, statement, or other information
17 required by or under authority of this chapter to appear on the label or labeling is not prominently
18 placed thereon with such conspicuousness (as compared with other words, statements, designs, or
19 devices in the labeling) and in such terms as to render it likely to be read and understood by the
20 ordinary individual under customary conditions of purchase and use.”

21 81. In addition to its blanket adoption of federal labeling requirements, Florida has also
22 enacted various laws and regulations that adopt and incorporate specific enumerated federal food
23 laws and regulations. For example, Defendant’s Product label is misleading and deceptive pursuant
24 to Florida’s Food Safety Act, Fla. Stat. §§ 500.01, *et seq.*—identical in all material aspects hereto—
25 to the Food and Drug Administration’s (“FDA”) Federal Food Drug and Cosmetic Act (“FFDCA”),
26

21 U.S.C. §§ 343, 343-1. Plaintiffs' claims do not seek to contest or enforce anything in Florida's Food Safety Act that is beyond the FFDCA or FDA regulation requirements.

82. For example, the Florida Food Safety Act, Fla. Stat. § 500.01, states: "Purpose of chapter.—This chapter is intended to: (1) Safeguard the public health and promote the public welfare by protecting the consuming public from injury by product use and the purchasing public from injury by merchandising deceit, flowing from intrastate commerce in food; (2) Provide legislation which shall be uniform, as provided in this chapter, and administered so far as practicable in conformity with the provisions of, and regulations issued under the authority of, the Federal Food, Drug, and Cosmetic Act; the Agriculture Marketing Act of 1946; and likewise uniform with the Federal Trade Commission Act, to the extent that it expressly prohibits the false advertisement of food; and (3) Promote thereby uniformity of such state and federal laws and their administration and enforcement throughout the United States and in the several states." Fla. Stat. § 500.02(1)–(3).

83. In Florida, "A food is deemed to be misbranded: If its labeling is false or misleading in any particular." Fla. Stat. § 500.11(1)(a).

84. Furthermore, Plaintiffs' state consumer protection law claims are not preempted by federal regulations. *Jones v. ConAgra Foods, Inc.*, 912 F.Supp.2d 889, 897-98 (N.D. Cal. 2012).

V. Economic Damage to Plaintiffs and the Classes

85. As a result of purchasing the Products which were unlawfully branded, Plaintiffs and members of the Classes have suffered economic damages.

86. Defendant's marketing and advertising as discussed *supra* was and is false, misleading, and/or likely to deceive reasonable consumers. Therefore, the Products are misbranded and valueless, worth less than what Plaintiffs and members of the Classes paid for them, and/or are not what Plaintiffs and members of the Classes reasonably intended to receive.

87. Because the Products are unlawfully misbranded, and there is no market value for an

1 unlawful product, Plaintiffs and the Classes seek damages and injunctive relief described below.

2 88. Moreover, and in the alternative, Plaintiffs and members of the Classes paid a price
3 premium for the so called "healthy" Products, over other similar products that do not claim to be
4 "healthy" and/or are not unlawfully branded. As a result, Plaintiffs and the Classes are entitled to
5 damages in the amount of the difference between the premium purchase price charged for the
6 Products and the true market value of the Products without the false "healthy" and other unlawful
7 representations.

8 **RULE 9(b) ALLEGATIONS**

9 89. KIND made material misrepresentations and omissions of fact in the labeling and
10 advertising of the Products.

11 90. A representation that a product is "healthy" and has other positive health attributes is
12 material to a reasonable consumer. Defendant's own studies reflect that 70% of consumers choose
13 the bars because of their advertised health attributes.

14 91. These material misrepresentations and omissions of fact include the use of the terms
15 "healthy," "+" or "plus," "good source of fiber," and "no trans fats" on the labeling and packaging
16 of the Products, even those these products did not meet the requirements to make such claims.

17 92. Reasonable consumers frequently rely on food label representations and information
18 in making purchase decisions.

19 93. KIND's material misrepresentations and omissions of fact are material because a
20 reasonable consumer would not have purchased or paid as much for these KIND products if he
21 knew they contained false representations.

22 94. KIND made such representations regarding these products during the Class Period.

23 95. KIND's material misrepresentations and omissions of fact were made on the
24 labeling and packaging of the Products, on KIND's website (www.KINDsnacks.com) and through
25 other advertisements by KIND.

1 96. Plaintiffs and the other Class members reasonably relied to their detriment on
2 Defendant's misleading representations and omissions. Defendant's misleading affirmative
3 statements about the "healthiness of its Products obscured the material facts that Defendant failed
4 to disclose about the healthiness of its Products.

5 97. Plaintiffs and the Class members were among the intended recipients of Defendant's
6 deceptive representations and omissions.

7 98. Defendant made the deceptive representations and omissions on the Products with
8 the intent to induce Plaintiffs' and the Class members' purchase of the Products.

9 99. Plaintiffs and the Class members did not obtain the full value of the advertised
10 Products due to Defendant's misrepresentations and omissions. Plaintiffs and the Class members
11 purchased, purchased more of, or paid more for, the Products than they would have done, had they
12 known the truth about the Products' nutritional value.

13 **CLASS ACTION ALLEGATIONS**

14 100. Plaintiffs bring their claims as Class claims pursuant to Fed. R. Civ. P. 23. The
15 requirements of Fed. R. Civ. P. 23(a), (b)(2) and (b)(3) are met with respect to the Classes defined
16 below.

17 101. A Rule 23(b)(2) Class is appropriate when the defendant "has acted or refused to act
18 on grounds that apply generally to the Class, so that final injunctive relief or corresponding
19 declaratory relief is appropriate respecting the Class as a whole." Fed. R. Civ. P. 23(b)(2).

20 102. Declaratory relief is intended to minimize "the danger of avoidable loss and
21 unnecessary accrual of damages." 10B Charles Alan Wright, Arthur R. Miller & Mary Kay Kane,
22 *Federal Practice and Procedure* § 2751 (3d ed. 1998).

23 103. KIND's misrepresentations and omissions of fact with regard to the labeling and
24 advertising of their KIND Fruit & Nut Almond & Apricot, KIND Fruit & Nut Almond & Coconut,
25 KIND Peanut Butter Dark Chocolate + Protein, or KIND Fruit & Nut Dark Chocolate Cherry

Cashew + Antioxidants bars to the Plaintiffs and the putative Class makes declaratory relief with respect to a Rule 23(b)(2) class appropriate.

104. The Rule 23(b)(2) "Equitable Relief Class" is defined as follows:

All persons in the United States who purchased either KIND Fruit & Nut Almond & Apricot, KIND Fruit & Nut Almond & Coconut, KIND Peanut Butter Dark Chocolate + Protein, or KIND Fruit & Nut Dark Chocolate Cherry Cashew + Antioxidants bars for personal use, and not for resale any time between May 11, 2011, and the present ("Class Period").

105. Plaintiffs propose a Rule 23(b)(3) "California Damages Class" defined as follows:

All persons in California who purchased either KIND Fruit & Nut Almond & Apricot, KIND Fruit & Nut Almond & Coconut, KIND Peanut Butter Dark Chocolate + Protein, or KIND Fruit & Nut Dark Chocolate Cherry Cashew + Antioxidants bars for personal use, and not for resale any time between May 11, 2011, and the present ("Class Period").

106. Plaintiffs propose a Rule 23(b)(3) "Florida Damages Class" defined as follows:

All persons in Florida who purchased either KIND Fruit & Nut Almond & Apricot, KIND Fruit & Nut Almond & Coconut, KIND Peanut Butter Dark Chocolate + Protein, or KIND Fruit & Nut Dark Chocolate Cherry Cashew + Antioxidants bars for personal use, and not for resale any time between May 11, 2011, and the present ("Class Period").

107. Plaintiffs respectfully reserve the right to amend the Class definition if further investigation and discovery indicates that the Class definition should be narrowed, expanded, or otherwise modified, including without limitation, the inclusion of sub-classes consisting of consumers who purchased one or more of the varieties of the Products. Excluded from the Classes are Defendant KIND, any entities in which KIND has a controlling interest, any of its parents,

1 subsidiaries, affiliates, officers, directors, employees and members of such person's immediate
2 families, and the presiding judge(s) in this case and his/her immediate family.

3 108. The members of the proposed Classes are so numerous that individual joinder of all
4 members is impracticable, and the disposition of the claims of all putative Class members in a
5 single action will provide substantial benefits to the parties and the Court.

6 109. Questions of law and fact common to Plaintiffs and the putative Classes, and which
7 predominate over individual issues, include but are not limited to:

- 8 a. Whether KIND engaged in the conduct alleged herein;
- 9 b. Whether, and to what extent, the Products sold during the last four years were
10 improperly labeled and misbranded;
- 11 c. Whether Defendant's statements are violate applicable regulations;
- 12 d. Whether the improper labeling and misbranding of the Products is material to a
13 reasonable consumer;
- 14 e. Whether KIND engaged in false or misleading advertising;
- 15 f. Whether KIND's practices were deceptive, unfair, improper and/or misleading;
- 16 g. Whether KIND made intentional omissions and/or misrepresentations;
- 17 h. Whether KIND made negligent omissions and/or misrepresentations;
- 18 i. Whether KIND's conduct as alleged herein constitutes and results in unjust
19 enrichment;
- 20 j. Whether KIND's statements created express warranties concerning the Products
21 and, if so, whether KIND's conduct as alleged herein constitutes breach of express
22 warranty;
- 23 k. The proper equitable and injunctive relief; and
- 24 l. The proper amount of restitution.

25 110. Plaintiffs' claims are typical of putative Class members' claims in that they are

1 based on the same underlying facts, events, and circumstances relating to KIND's conduct.

2 111. Plaintiffs will fairly and adequately represent and protect the interests of the putative
3 Classes, have no interests incompatible with the interests of the putative Classes, and have retained
4 counsel competent and experienced in consumer protection and class litigation.

5 112. The putative Classes are sufficiently large for purposes of class litigation because
6 they contain at least thousands of members who purchased the Products in the last four years in the
7 United States and/or California.

8 113. Class treatment is superior to other options for resolution of the controversy because
9 the relief sought for each putative Class member is relatively small such that, absent representative
10 litigation, it would be impractical for putative Class members to seek redress for KIND's actions.

11 114. Questions of law and fact common to the putative Classes predominate over any
12 questions affecting individual Class members.

13 115. The prerequisites for maintaining a class action for declaratory and equitable relief
14 pursuant to Fed. R. Civ. P. 23(b)(2) exist because KIND has acted or refused to act on grounds
15 generally applicable to the Equitable Relief Class, thereby making appropriate declaratory and
16 equitable relief with respect to the Class as a whole. The central issues regarding KIND's improper
17 labeling and advertising of the Products is the same for all Class members. There is an economy to
18 class treatment of those central questions because their resolution has the potential to eliminate the
19 need for continued and repeated litigations across the country.

20 116. The prerequisites for maintaining a class action for damages pursuant to Fed. R. Civ.
21 P. 23(b)(3) exist because Plaintiffs and the Damages Class have all suffered damages as a result of
22 KIND's misrepresentations and omissions of fact. KIND's claims on its product labels and in
23 advertising, including that its products were "healthy," contained "+" or "Plus" amounts of protein
24 or antioxidants, were a "good source of fiber," and "had no trans fats," were material to Plaintiffs
25 and the Class. A class action is superior to other available methods for the fair and efficient

1 adjudication of the controversy. Class treatment of common questions of law and fact is superior to
 2 multiple individual actions or piecemeal litigation. Moreover, absent a class action, most Class
 3 members would likely find the costs of litigating prohibitively high and would therefore have no
 4 effective remedy at law.

5 117. The prosecution of separate actions by individual Class members would create a risk
 6 of inconsistent or varying adjudications, which would establish incompatible standards of conduct
 7 for KIND. In contrast, the conduct of this action as a class action presents far fewer management
 8 difficulties, conserves judicial resources and the parties' resources, and protects the rights of each
 9 Class member.

10 118. Thus, class treatment is appropriate under Fed. R. Civ. P. 23(a), and on behalf of a
 11 Rule 23(b)(2) Equitable Relief Class and a Rule 23(b)(3) Damages Class.

12 **CAUSES OF ACTION**

13 **FIRST CAUSE OF ACTION**

14 **DECLARATORY JUDGMENT ACT, 28 U.S.C. §2201, *et seq.***

15 **On behalf of the Rule 23(b)(2) Equitable Relief Class**

16 119. Plaintiffs reallege and incorporate the foregoing allegations in the Complaint as if
 17 fully set forth herein.

18 120. Declaratory relief is intended to minimize "the danger of avoidable loss and
 19 unnecessary accrual of damages." 10B Charles Alan Wright, Arthur Miller & Mary Kay Kane,
 20 *Federal Practice and Procedure* § 2751 (3d ed. 1998).

21 121. There is an actual controversy between KIND and Plaintiffs concerning (1)
 22 Whether, and to what extent, KIND Fruit & Nut Almond & Apricot, KIND Fruit & Nut Almond &
 23 Coconut, KIND Peanut Butter Dark Chocolate + Protein, and KIND Fruit & Nut Dark Chocolate
 24 Cherry Cashew + Antioxidants bars sold during the last four years were improperly labeled and
 25 misbranded; (2) Whether KIND engaged in false or misleading advertising; and (3) Whether

KIND's practices were deceptive, unfair, improper and/or misleading.

122. Pursuant to 28 U.S.C. § 2210, this Court may "declare the rights and legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought."

123. KIND has failed to comply with the laws and regulations of the FDA in its labeling and advertising of the Products. This failure has deceived consumers as to the nutritional and health attributes of these products.

124. Accordingly, because of KIND's failure to comply with FDA laws and regulations, Plaintiffs seek a declaration that KIND Fruit & Nut Almond & Apricot, KIND Fruit & Nut Almond & Coconut, KIND Peanut Butter Dark Chocolate + Protein, and KIND Fruit & Nut Dark Chocolate Cherry Cashew + Antioxidants bars are misbranded and contain material misrepresentations and omissions of fact.

125. Additionally, pursuant to 28 U.S.C. §2202 allowing for "[f]urther necessary or proper relief based on a declaratory judgment", Plaintiffs seek restitution from KIND as a result of KIND's failure to comply with FDA laws and regulations, misbranding and material misrepresentations and omissions of fact.

126. The declaratory and further relief requested herein will generate common answers that will settle the controversy related to the alleged misrepresentations and omissions of fact in the labeling for the Products. There is an economy to resolving these issues as they have the potential to eliminate the need for continued and repeated litigation.

SECOND CAUSE OF ACTION

VIOLATION OF THE CALIFORNIA UNFAIR COMPETITION LAW, CAL. BUS. & PROF. CODE §§ 17200 ET. SEQ.

On behalf of the Rule 23(b)(2) Equitable Relief Class and the Rule 23(b)(3) California Damages Class

127. Plaintiffs reallege and incorporate the foregoing allegations in the Complaint as if

1 fully set forth herein.

2 128. The California Unfair Competition Law (“UCL”) prohibits any “unlawful, unfair or
3 fraudulent business act or practice.” Cal. Bus. & Prof. Code § 17200.

4 129. KIND’s deceptive labeling of its KIND Fruit & Nut Almond & Apricot, KIND Fruit
5 & Nut Almond & Coconut, KIND Peanut Butter Dark Chocolate + Protein, and KIND Fruit & Nut
6 Dark Chocolate Cherry Cashew + Antioxidants bars is a “fraudulent” practice within the meaning
7 of the UCL in that the deceptive labeling is likely to deceive reasonable consumers and the public.

8 130. In accordance with Cal. Bus. & Prof. Code § 17203, Plaintiffs seek an Order
9 enjoining KIND from continuing to conduct business through fraudulent acts and practices, and to
10 commence a corrective advertising campaign.

11 131. On behalf of themselves and the putative Class, Plaintiffs also seek an Order for the
12 restitution of all monies from the sale of the KIND Fruit & Nut Almond & Apricot, KIND Fruit &
13 Nut Almond & Coconut, KIND Peanut Butter Dark Chocolate + Protein, and KIND Fruit & Nut
14 Dark Chocolate Cherry Cashew + Antioxidants bars, which were unjustly acquired through acts of
15 fraudulent competition.

16 **THIRD CAUSE OF ACTION**

17 **VIOLATION OF THE CALIFORNIA UNFAIR COMPETITION LAW,**

18 **CAL. BUS. & PROF. CODE §§ 17200 *ET SEQ.***

19 **(UNLAWFUL PRONG)**

20 **On behalf of the Rule 23(b)(2) Equitable Relief Class and the Rule 23(b)(3) California**

21 **Damages Class**

22 132. Plaintiffs reallege and incorporate the foregoing allegations in the Complaint as if
23 fully set forth herein.

24 133. KIND’s failure to label their KIND Fruit & Nut Almond & Apricot, KIND Fruit &
25 Nut Almond & Coconut, KIND Peanut Butter Dark Chocolate + Protein, and KIND Fruit & Nut

1 Dark Chocolate Cherry Cashew + Antioxidants bars in compliance with FDA requirements is an
2 “unlawful” practice within the meaning of the California Unfair Competition Law.

3 134. Had KIND properly labeled its products, Plaintiffs would not have purchased the
4 KIND bars.

5 135. On behalf of themselves and the California Damages Class, Plaintiffs seeks
6 injunctive and equitable relief, as well as the restitution of all monies from the sale of the KIND
7 bars which were unjustly acquired through acts of unlawful competition.

8 **FOURTH CAUSE OF ACTION**

9 **VIOLATION OF THE CALIFORNIA FALSE ADVERTISING LAW, CAL. BUS. & PROF.**

10 **CODE §§ 17500 ET. SEQ.**

11 **On behalf of the Rule 23(b)(3) California Damages Class**

12 136. Plaintiffs reallege and incorporate the foregoing allegations in the Complaint as if
13 fully set forth herein.

14 137. The California False Advertising Law (“FAL”) prohibits any statement in
15 connection with the sale of goods “which is untrue or misleading,” Cal. Bus. & Prof. Code § 17500,
16 including deceptive omissions of material fact.

17 138. KIND’s deceptive labeling on its KIND Fruit & Nut Almond & Apricot, KIND Fruit
18 & Nut Almond & Coconut, KIND Peanut Butter Dark Chocolate + Protein, and KIND Fruit & Nut
19 Dark Chocolate Cherry Cashew + Antioxidants bars was likely to deceive reasonable consumers
20 and the public.

21 139. KIND knew, or reasonably should have known, that it was deceptively omitting
22 material information, as its deceptive labeling is in violation of a number of sections of the Code of
23 Federal Regulations.

24 140. Plaintiffs and members of the Class are entitled to injunctive and equitable relief and
25 restitution.

FIFTH CAUSE OF ACTION

VIOLATIONS OF THE CALIFORNIA CONSUMERS LEGAL REMEDIES ACT, CAL.

CIV. CODE §§ 1750 *ET SEQ.*

On behalf of the Rule 23(b)(3) California Damages Class

141. Plaintiffs reallege and incorporates the foregoing allegations in the Complaint as if fully set forth herein.

142. The California Consumers Legal Remedies Act prohibits deceptive practices in connection with the conduct of a business that provides goods, property, or services primarily for personal, family, or household purposes.

143. KIND's policies, acts, and practices were designed to, and did, result in the purchase and use of the products primarily for personal, family, or household purposes, and violated and continue to violate the following sections of the California Consumers Legal Remedies Act ("CLRA"):

a. § 1770(a)(5): representing that goods have characteristics, uses, or benefits which they do not have;

b. § 1770(a)(7): representing that goods are of a particular standard, quality, or grade if they are of another;

c. § 1770(a)(9): advertising goods with intent not to sell them as advertised; and

d. § 1770(a)(16): representing the subject of a transaction has been supplied in accordance with a previous representation when it has not.

144. As a result, Plaintiffs and members of the putative Class have suffered irreparable harm and are entitled to injunctive and equitable relief, actual damages, punitive damages, and reasonable attorneys' fees and costs.

SIXTH CAUSE OF ACTION

**VIOLATIONS OF FLORIDA'S DECEPTIVE AND UNFAIR TRADE PRACTICES ACT,
FLA. STAT. §§ 501.201, ET SEQ.**

On behalf of the Rule 23(b)(3) Florida Damages Class

145. Plaintiffs reallege and incorporate the foregoing allegations in the Complaint as if fully set forth herein.

146. This cause of action is brought pursuant to the Florida Deceptive and Unfair Trade Practices Act, Sections 501.201 to 201.213, *Florida Statutes*. The express purpose of FDUTPA is to "protect the consuming public...from those who engage in unfair methods of competition, or unconscionable, deceptive, or unfair acts or practices in the conduct of any trade or commerce." Fla. Stat. § 501.202(2).

147. The sale of the Products at issue in this cause was a "consumer transaction" within the scope of the Florida Deceptive and Unfair Trade Practices Act, Sections 501.201 to 201.213, *Florida Statutes*.

148. Plaintiff is a "consumer" as defined by Section 501.203, *Florida Statutes*. Defendant's Products are a "good" within the meaning of the Act. Defendant is engaged in trade or commerce within the meaning of the Act.

149. Section 501.204(1), *Florida Statutes* declares as unlawful "unfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce."

150. Section 501.204(2), *Florida Statutes* states that "due consideration be given to the interpretations of the Federal Trade Commission and the federal courts relating to Section 5(a)(1) of the Trade Commission Act." Defendant's unfair and deceptive practices are likely to mislead – and have misled – the consumer acting reasonably under the circumstances and, therefore, violate Section 500.04, Florida Statutes and 21 U.S.C. Section 343.

151. Defendant has violated the Act by engaging in the unfair and deceptive practices

1 described above, which offend public policies and are immoral, unethical, unscrupulous and
2 substantially injurious to consumers. Specifically, Defendant has knowingly and intentionally
3 made statements and omissions on its packaging regarding the “healthiness” and positive health
4 attributes of its Products when in fact the Products are not “healthy,” do not have the positive health
5 attributes represented by Defendant, and are otherwise misbranded.

6 152. Plaintiffs and Class members have been aggrieved by Defendant’s unfair and
7 deceptive practices in that they purchased and consumed Defendant’s Products.

8 153. Reasonable consumers rely on Defendant to honestly represent the true nature of
9 their ingredients.

10 154. As described in detail above, Defendant has represented that its products are
11 “healthy” when in reality they are not.

12 155. Defendant has deceived reasonable consumers, like Plaintiff and the Class, into
13 believing its Products were something they were not—“healthy.”

14 156. The knowledge required to discern the true nature of Defendant’s Products is
15 beyond that of the reasonable consumer—namely that the Products were unlawfully branded and
16 contain ingredients, the extent of which render them unlawfully branded as “healthy” and/or not
17 healthy. Defendant’s “healthy” and other positive health attribute statements leads reasonable
18 consumers to believe that the products are healthy and that all material facts regarding the
19 healthiness of the Products was fully and properly disclosed.

20 157. Federal and State Courts decide omission and misrepresentation matters regularly.
21 Accordingly, the issue of whether Defendant’s label is misleading to a reasonable consumer is well
22 within the jurisdiction of the Court.

23 158. The damages suffered by the Plaintiff and the Class were directly and proximately
24 caused by the deceptive, misleading and unfair practices of Defendant, as described above.

25 159. Pursuant to Section 501.211(1), *Florida Statutes*, Plaintiffs and the Class seek a
26

1 declaratory judgment and court order enjoining the above described wrongful acts and practices of
2 the Defendant, and for restitution and disgorgement.

3 160. Additionally, pursuant to sections 501.211(2) and 501.2105, *Florida Statutes*,
4 Plaintiffs and the Class make claims for damages, attorney's fees and costs.

5 SEVENTH CAUSE OF ACTION

6 INTENTIONAL MISREPRESENTATION

7 On behalf of the Rule 23(b)(3) Damages Classes

8 161. Plaintiffs reallege and incorporate the foregoing allegations in the Complaint as if
9 fully set forth herein.

10 162. During the relevant time period, KIND represented that the Products were "healthy."
11 KIND represented that its KIND Peanut Butter Dark Chocolate + Protein bars contain extra protein.
12 KIND represented that its KIND Fruit & Nut Dark Chocolate Cherry Cashew + Antioxidants bars
13 contain extra antioxidants.

14 163. These representations are contained on the labels of the Products and on KIND's
15 website. The representations that were made to putative Class members were substantially similar
16 for the purposes of this litigation.

17 164. However, KIND failed to label its products in accordance with FDA requirements,
18 and thus KIND's representations were false and misleading.

19 165. When KIND made the subject representations, KIND knew they were false, and
20 made the representations with the intent to deceive and defraud Plaintiffs and members of the
21 putative Class to induce them to act in reliance on those representations, or with the expectation
22 that they would so act. The purpose of representing that the Products are "healthy" was to deceive
23 Plaintiffs and members of the putative Class into purchasing them.

24 166. Plaintiffs and members of the putative Class, at the time the representations were
25 made by KIND, and at the time they took the actions herein alleged, were ignorant of the falsity of
26

1 the representations and believed them to be true. In reliance on these representations, Plaintiffs and
2 members of the putative Class were induced to purchase and consume the Products. Had Plaintiffs
3 and members of the putative Class known the actual facts, they would not have taken such action.
4 Reliance on KIND's representations was justified because KIND was offering the bars through
5 reputable retail establishments throughout California. Plaintiffs and members of the putative
6 Classes had no reason to believe that KIND would act otherwise than as represented in its labeling
7 and advertising.

8 167. In violation of the law, KIND, under a duty to speak, suppressed material facts from
9 Plaintiffs and members of the putative Class regarding the nutritional value of the Products.

10 168. As a result of KIND's fraudulent conduct, Plaintiffs and members of the putative
11 Classes paid monies to KIND to which it was not entitled, and have suffered monetary damages in
12 an amount to be proven at trial.

13 169. The aforementioned conduct of KIND was an intentional misrepresentation,
14 omission, deceit, or concealment of a material fact or facts known to KIND with the intent to
15 deprive Plaintiffs and members of the putative Class of property or legal rights or otherwise cause
16 injury.

17 EIGHTH CAUSE OF ACTION

18 NEGLIGENT MISREPRESENTATION

19 On behalf of the Rule 23(b)(3) Damages Classes

20 170. Plaintiffs reallege and incorporate the foregoing allegations in the Complaint as if
21 fully set forth herein.

22 171. During the relevant time period, KIND represented that the Products were "healthy."
23 KIND represented that its KIND Peanut Butter Dark Chocolate + Protein bars contain extra protein.
24 KIND represented that its KIND Fruit & Nut Dark Chocolate Cherry Cashew + Antioxidants bars
25 contain extra antioxidants.

172. These representations are contained on the labels of the Products and on KIND's website. The representations that were made to Class members were substantially similar for the purposes of this litigation.

173. However, KIND failed to label its products in accordance with FDA requirements, and thus KIND's representations were false and misleading.

174. When KIND made the subject representations, KIND knew or should have known they were false, and made the representations with the intent to deceive and defraud Plaintiffs and members of the putative to induce them to act in reliance on those representations, or with the expectation that they would so act.

175. Plaintiffs and members of the putative Class, at the time the representations were made by KIND, and at the time they took the actions herein alleged, were ignorant of the falsity of the representations and believed them to be true. In reliance on these representations, Plaintiffs and members of the putative Class were induced to purchase and consume the Products. Had Plaintiffs and members of the putative Class known the actual facts, they would not have taken such action.

176. Reliance on KIND's representations was justified because KIND was offering the KIND bars for sale through reputable retail establishments throughout California and Florida. Plaintiffs and members of the putative Classes had no reason to believe that KIND would act otherwise than as represented in its labeling.

177. In violation of the law, KIND, under a duty to speak, suppressed material facts from Plaintiffs and the putative Classes regarding the nutritional value of KIND Fruit & Nut Almond & Apricot, KIND Fruit & Nut Almond & Coconut, KIND Peanut Butter Dark Chocolate + Protein, and KIND Fruit & Nut Dark Chocolate Cherry Cashew + Antioxidants bars.

178. As a result of KIND's fraudulent conduct, Plaintiffs and members of the putative Classes paid monies to KIND to which it was not entitled, and have suffered monetary damages in an amount to be proven at trial.

NINTH CAUSE OF ACTION

UNJUST ENRICHMENT

On behalf of the Rule 23(b)(3) Damages Classes

179. Plaintiffs reallege and incorporate the foregoing allegations in the Complaint as if fully set forth herein.

180. By its wrongful acts and omissions, KIND was unjustly enriched at the expense of Plaintiffs and members of the putative Class, who did not receive the goods to which they expected to receive because of KIND Fruit & Nut Almond & Apricot, KIND Fruit & Nut Almond & Coconut, KIND Peanut Butter Dark Chocolate + Protein, and KIND Fruit & Nut Dark Chocolate Cherry Cashew + Antioxidants bars are mislabeled, for the payments made to KIND, and thus Plaintiffs and members of the putative Classes were unjustly deprived.

181. It would be inequitable and unconscionable for KIND to retain the profit, benefit and/or other compensation it obtained from its deceptive, misleading, and unlawful conduct alleged herein.

182. Plaintiffs and members of the putative Classes seek restitution from KIND, and seek an Order from the Court disgorging all profits, benefits, and other compensation obtained by KIND from its wrongful conduct.

TENTH CAUSE OF ACTION

BREACH OF EXPRESS WARRANTY

On behalf of the Rule 23(b)(3) California Damages Class

183. Plaintiffs reallege and incorporate the foregoing allegations in the Complaint as if fully set forth herein.

184. KIND made an express warranty and/or approved the use of the express warranty to Plaintiffs and Class members, namely that the Products were healthy and in compliance with FDA requirements.

185. This promise regarding the nature of the KIND bars marketed by KIND, specifically related to the goods being purchased and became the basis of the bargain.

186. Plaintiffs and members of the putative Class purchased the KIND products based on the belief that they conformed to the express warranties that were made on the products' packaging.

187. KIND breached the express warranty made to Plaintiffs and Classes members by failing to supply goods that conformed to the warranty made. Instead, Plaintiffs and Class members obtained KIND bars that did not meet the nutritional requirements stated on the labels. If Plaintiffs and Class members had known of the true nature of the KIND bars, they would not have purchased the bars. As a result, Plaintiffs and Class members suffered injury, and deserve to be compensated for the damages they suffered.

188. Plaintiffs and members of the Classes are therefore entitled to recover damages of the amounts they paid for the KIND bars.

PRAYER FOR RELIEF

189. Wherefore, Plaintiffs, on behalf of themselves, all others similarly situated and the general public, prays for judgment against KIND as to each and every cause of action, including:

a. An Order certifying this as a Class action and appointing Plaintiffs and their counsel to represent the Class;

b. An Order enjoining KIND from selling KIND Fruit & Nut Almond & Apricot, KIND Fruit & Nut Almond & Coconut, KIND Peanut Butter Dark Chocolate + Protein, and KIND Fruit & Nut Dark Chocolate Cherry Cashew + Antioxidants bars so long as they are improperly labeled in violation of FDA regulations;

c. An Order compelling KIND to conduct a corrective advertising campaign;

d. An Order requiring KIND to disgorge or return all monies, revenues, and profits obtained by means of any wrongful act or practice;

e. An Order requiring KIND to pay restitution to restore all funds acquired by

means of any act or practice declared by this Court to be a fraudulent business act or practice, untrue or misleading advertising, unjust enrichment, or a violation of the UCL, FAL or CLRA, or Fla. Stat. §§ 501.201, *et seq.*, plus pre-and post-judgment interest thereon;

f. An Order requiring KIND to pay actual or statutory damages for all causes of action in which such damages are permitted;

g. An Order requiring KIND to pay punitive or exemplary damages;

h. An Order awarding costs, expenses, and reasonable attorneys' fees; and

i. Any other and further relief the Court deems necessary, just, or proper.

JURY DEMAND

Plaintiffs hereby demand a trial by jury on all issues so triable.

Dated: May 11, 2015

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JS 44 (Rev. 12/12) cand rev (1/15/13)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

MELANIE HOUSE, ERICH ZANDER, ELIZABETH LIVINGSTON, and
BONNIE BURKERT, individually and on Behalf of all Others Similarly
Situated

(b) County of Residence of First Listed Plaintiff Los Angeles County
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number)

Francis O. Scarpulla (CA SB 41059), Law Offices of Francis O.
Scarpulla, 44 Montgomery Street, Suite 3400, San Francisco, CA 94104
(415) 788-7210; (see attachment)

DEFENDANTS

KIND LLC

County of Residence of First Listed Defendant New York County
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF
THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff
- ☐ 2 U.S. Government Defendant
- ☐ 3 Federal Question
(U.S. Government Not a Party)
- ☒ 4 Diversity
(Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- | | PTF | DEF | | PTF | DEF |
|---|---------------------------------------|---------------------------------------|---|----------------------------|---------------------------------------|
| Citizen of This State | <input checked="" type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business In This State | <input type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| Citizen of Another State | <input type="checkbox"/> 2 | <input checked="" type="checkbox"/> 2 | Incorporated and Principal Place of Business In Another State | <input type="checkbox"/> 5 | <input checked="" type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES	
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excludes Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input checked="" type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Personal Injury - Medical Malpractice	PERSONAL INJURY <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 690 Other LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Management Relations <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Employee Retirement Income Security Act IMMIGRATION <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 465 Other Immigration Actions	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 375 False Claims Act <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 896 Arbitration <input type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision <input type="checkbox"/> 950 Constitutionality of State Statutes
REAL PROPERTY <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	CIVIL RIGHTS <input type="checkbox"/> 440 Other Civil Rights <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 448 Education	PRISONER PETITIONS Habeas Corpus: <input type="checkbox"/> 463 Alien Detainee <input type="checkbox"/> 510 Motions to Vacate Sentence <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty Other: <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition <input type="checkbox"/> 560 Civil Detainee - Conditions of Confinement			

V. ORIGIN (Place an "X" in One Box Only)

- ☒ 1 Original Proceeding
- ☐ 2 Removed from State Court
- ☐ 3 Remanded from Appellate Court
- ☐ 4 Reinstated or Reopened
- ☐ 5 Transferred from Another District (specify)
- ☐ 6 Multidistrict Litigation

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):
28 U.S.C. 1332(b)(2)(A)

Brief description of cause:
Mislabeling of food product

VII. REQUESTED IN COMPLAINT:

☒ CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P.

DEMAND \$

CHECK YES only if demanded in complaint:

JURY DEMAND: ☒ Yes ☐ No

VIII. RELATED CASE(S) IF ANY

(See instructions):

JUDGE

DOCKET NUMBER

DATE

05/11/2015

SIGNATURE OF ATTORNEY OF RECORD

Francis O. Scarpulla

IX. DIVISIONAL ASSIGNMENT (Civil L.R. 3-2)

(Place an "X" in One Box Only)

☐ SAN FRANCISCO/OAKLAND ☐ SAN JOSE ☐ EUREKA

JS 44: Civil Cover Sheet Attachment

MELANIE HOUSE, et al. v. KIND LLC; New Filing, 5/11/15

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