

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK**

**ROBERT O’BRIEN**, individually, and )  
on behalf of all others similarly situated, )

Plaintiff, )

v. )

**KIND, LLC**, )  
a New York limited liability company, )

Defendant. )

Case No. 15-cv-3699 (WHP)(AJP)

**DEMAND FOR JURY TRIAL**

**CLASS ACTION COMPLAINT**

Plaintiff ROBERT O’BRIEN (“Plaintiff”), individually, and on behalf of all others similarly situated, by and through counsel, brings this action against Defendant KIND, LLC (“KIND” or “Defendant”), as follows:

**NATURE OF THE CASE**

1. Plaintiff brings this action individually, and on behalf of a Class of similarly situated consumers throughout the United States, to redress the false and deceptive labeling of KIND Bars as being “healthy” and made with “All Natural” ingredients.

2. At issue in this case are four of Defendant’s snack bars: KIND Fruit & Nut Almond & Apricot; KIND Fruit & Nut Almond & Coconut; KIND Plus Peanut Butter Dark Chocolate + Protein; and KIND Plus Dark Chocolate Cherry Cashew + Antioxidants (collectively, “KIND Bars”).

3. Defendant markets the KIND Bars as, among other things, “healthy,” “healthy and tasty, convenient and wholesome,” “plus,” “good source of fiber,” and “no trans fats.” Defendant makes these and other claims on the labels of the KIND Bars and on its website touting the healthiness of the bars to consumers.

4. Despite Defendant's claims that the KIND Bars are "healthy" and contain healthy nutrients or ingredients, the KIND Bars do not meet the requirements established by the U.S. Food and Drug Administration ("FDA") to make such claims. In reality, the KIND Bars contain elevated levels of saturated fat and other ingredients or elements that indicate the KIND Bars are not truly "healthy." Furthermore, KIND Bars do not contain enough nutrients to bear the terms "+," "plus," or other health related terms.

5. On March 17, 2015, KIND received a warning letter from the FDA regarding the KIND Bars. In this letter, the FDA informed KIND that the KIND Bars "are in violation of section 403 of the Federal Food, Drug, and Cosmetic Act ["FDCA"] 21 U.S.C. § 343] and its implementing regulations found in Title 21, Code of Federal Regulations, Part 101 (21 C.F.R. § 101)." A true and correct copy of the FDA's letter dated March 17, 2015 is attached hereto as Exhibit A ("FDA Letter").

6. The FDCA enumerates various ways that "[a] food shall be deemed to be misbranded." 21 U.S.C. § 343. As described below, the KIND Bars are in violation of several of these enumerated provisions. Accordingly, the KIND Bars are misbranded within the meaning of the FDCA and are being falsely and deceptively marketed to consumers.

7. As a result of Defendant's false and misleading labeling, packaging, and marketing of the KIND Bars, Plaintiff and members of the proposed Class have suffered injuries in fact, including economic damages, and have lost money or property. Specifically, Plaintiff and members of the Class have purchased the KIND Bars under the mistaken belief that these products were "healthier" and/or had additional benefits compared to other snack products. But for Defendant's false and misleading advertising and marketing of the KIND Bars, Plaintiff and members of the Class would not have purchased or paid as much for the KIND Bars.

8. Plaintiff brings claims on behalf of himself and the proposed Class for violations of the New York Deceptive Acts and Practices Law, Gen. Bus. § 349 (“NYDAL”); the New York False Advertising Law, Gen. Bus. § 350 (“NYFAL”); breach of express warranty; breach of implied warranty of merchantability; unjust enrichment; intentional misrepresentation; negligent misrepresentation; the California Consumers Legal Remedies Act, Cal. Civ. Code §§ 1750, *et seq.* (“CLRA”); the California False Advertising Law, Cal. Bus. & Prof. Code §§ 17500, *et seq.* (“FAL”); and the California Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200, *et seq.* (“UCL”). Plaintiff seeks to permanently enjoin Defendant from using the claims “healthy,” “+” or “plus,” “good source of fiber,” and “no trans fats” on the labels of the KIND Bars and from marketing and selling the KIND Bars in the United States as currently advertised, packaged, and labeled. Further, Plaintiff seeks to obtain restitution and other appropriate relief in the amount by which Defendant was unjustly enriched as a result of its sales of the KIND Bars. Finally, Plaintiff seeks reasonable attorneys’ fees pursuant to Cal. Code Civ. Proc. § 1021.5 as this lawsuit seeks the enforcement of an important right affecting the public interest and satisfies the statutory requirements for an award of attorneys’ fees.

9. Plaintiff brings this action on behalf of himself and other similarly situated individuals, entities, and consumers throughout the United States to halt the dissemination of these false and misleading advertising messages, correct the false and misleading perception Defendant has created in the minds of purchasers, and to obtain redress for those who have purchased Defendant’s offending snack bars, as described herein.

### **PARTIES**

10. Plaintiff Robert O’Brien is, and at all times relevant to this action has been, a resident of California and, thus, is a citizen of California. Plaintiff purchased a KIND Plus

Peanut Butter Dark Chocolate + Protein bar and has purchased each of the other KIND Bars at various time periods prior to this action.

11. Defendant KIND, LLC (“KIND”) is a Delaware Limited Liability Company with its principal place of business located at 8 West 38th Street, 6th Floor, New York, New York. KIND, therefore, is a citizen of both Delaware and New York.

12. KIND is a manufacturer and global distributor of whole nut and fruit bars and snacks targeted at health conscious consumers. KIND was founded in 2004 and now sells its products throughout the United States and internationally. Defendant markets its products to specifically target health conscious consumers. In fact, KIND’s website states prominently on its “About KIND” page: “There’s healthy. There’s tasty. Then there’s healthy and tasty. At KIND, we believe you deserve both—we call it our brAND philosophy.”<sup>1</sup>

13. Until recently, Defendant was actually called “KIND Healthy Snacks.” Multiple references to the company in articles and on the Internet are to KIND Healthy Snacks<sup>2</sup> and the company’s logo—recently removed from its website contained the name KIND Healthy Snacks.



14. Using its “brAND” philosophy to market its purportedly healthy snack products, Defendant sold 458 million units in the United States in 2014.<sup>3</sup>

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<sup>1</sup> *About KIND*, KINDSNACKS, <http://www.kindsnacks.com/about/> (last accessed April 30, 2015).

<sup>2</sup> See, e.g., Mian Ridge, *Kind Healthy Snacks founder describes his long slog to success*, LA TIMES (March 22, 2015), available at: <http://www.latimes.com/business/la-fi-books-20150322-story.html>.

### **JURISDICTION AND VENUE**

15. Jurisdiction over Defendant is proper because it conducts business within this District. Therefore, Defendant has the minimum contacts necessary to fall under the jurisdiction of this Court.

16. This Court has original jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1332(d). The proposed Class involves more than 100 individuals. A member of the proposed Class is a citizen of a state different from Defendant, and the amount of controversy, in the aggregate, exceeds the sum of \$5,000,000 exclusive of interest and costs.

17. Venue is proper in this district under 28 U.S.C. § 1391, because Defendant is a resident of the state in which this District is located.

### **SUBSTANTIVE ALLEGATIONS**

18. KIND was established in 2004 as a natural foods company with eight bar varieties. Today, KIND boasts over twenty-two bars and six “Healthy Grains snackable clusters.”<sup>4</sup> Its snack products can be found in 150,000 retail stores in the United States.

19. KIND claims that its products “are made from all-natural whole nuts, fruits and whole grains,” and that consumers will “find all of our snacks are pretty much the nirvana of healthful tastiness.”<sup>5</sup>

20. KIND prides itself on being a “healthy” snack brand. Its entire company image, marketing, and branding revolves around providing consumers with healthy and tasty snacks.

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<sup>3</sup> Danielle Burger and Craig Giammona, *Kind Bars Aren't Healthy Enough for 'Healthy' Tag, FDA Says*, BLOOMBERG BUSINESS (April 14, 2015), available at: <http://www.bloomberg.com/news/articles/2015-04-14/kind-bars-aren-t-healthy-enough-for-healthy-label-fda-says>.

<sup>4</sup> *About KIND*, KINDSNACKS, <http://www.kindsnacks.com/about/> (last accessed April 30, 2015).

<sup>5</sup> *About KIND*, KINDSNACKS, <http://www.kindsnacks.com/about/> (last accessed April 30, 2015).

21. However, KIND's snack products are not as healthy as KIND represents them to be. The KIND Bars do not meet the necessary FDA or FDCA requirements to be labeled "healthy," "plus," "good source of fiber," "no trans fats," or other claims KIND makes with respect to the KIND Bars.

**KIND Fruit & Nut Almond & Apricot**

22. Defendant advertises the "KIND Fruit & Nut Almond & Apricot" KIND Bars by putting false and misleading claims on the label, stating or suggesting that the product is "All Natural," made from "natural ingredients," and is an "all natural food." Defendant further falsely claims that the product is "healthy" and "wholesome," and makes claims suggesting that the product may be useful in maintaining healthy dietary practices such as "Good Source of Fiber," "No Trans Fat," "Very Low Sodium," and "low glycemic index."

23. The ingredients in the "KIND Fruit & Nut Almond & Apricot" include "Almonds, coconut, honey, non GMO glucose, apricots, apple juice, crisp rice, vegetable glycerine, chicory root fiber, soy lecithin, citrus pectin, [and] natural apricot flavor." Additionally, one "40 [gram]" bar contains "3.5 [grams of] saturated fat."

24. Despite being advertised as "All Natural," the product contains the artificial and synthetic ingredients vegetable glycerin, soy lecithin, non-GMO glucose, and natural apricot flavor. Moreover, the product is not "healthy" because it contains levels of saturated fat in excess of FDCA regulations.

**KIND Fruit & Nut Almond & Coconut**

25. Defendant advertises the "KIND Fruit & Nut Almond & Coconut" product by putting false and misleading claims on the label, stating or suggesting that the product is "All Natural," made from "natural ingredients," and is an "all natural food." Defendant further falsely

claims that the product is “healthy” and “wholesome,” and makes claims suggesting that the product may be useful in maintaining healthy dietary practices such as “Good Source of Fiber,” “No Trans Fat,” “Very Low Sodium” and “low glycemic index.”

26. The ingredients in the “KIND Fruit & Nut Almond & Coconut” include “Almonds, coconut, honey, non GMO glucose, crisp rice, chicory root fiber, [and] soy lecithin.” Additionally, one “40 [gram]” bar contains “5 [grams of] saturated fat.”

27. Despite being advertised as “All Natural,” the product contains the artificial and synthetic ingredients soy lecithin and non-GMO glucose. Moreover, the product is not “healthy” because it contains levels of saturated fat in excess of FDCA regulations.

#### **KIND PLUS Peanut Butter Dark Chocolate + Protein**

28. Defendant advertises the “KIND Plus Peanut Butter Dark Chocolate + Protein” product by putting false and misleading claims on the label, stating or suggesting that the product is “All Natural” and is an “all natural food.” Defendant further falsely claims that the product is “healthy” and “wholesome,” and makes claims suggesting that the product may be useful in maintaining healthy dietary practices such as “Good Source of Fiber,” “No Trans Fat,” “Low Sodium,” “+ protein,” “7g protein,” and “low glycemic index.”

29. The ingredients in the “KIND Plus Peanut Butter Dark Chocolate + Protein” include “Peanuts, almonds, honey, sugar, non GMO glucose, soy protein isolate, palm kernel oil, cocoa powder, peanut butter, chicory root fiber, tapioca starch, vanilla, whole milk, soy lecithin, [and] salt.” Additionally, one “40 [gram]” bar contains “3.5 [grams of] saturated fat.”

30. Despite being advertised as “All Natural,” the product contains the artificial and synthetic ingredients soy protein isolate, palm kernel oil, non GMO glucose and soy lecithin.

Moreover, the product is not “healthy” because it contains levels of saturated fat in excess of FDCA regulations.

**KIND PLUS Dark Chocolate Cherry Cashew + Antioxidants**

31. Defendant advertises the “KIND Plus Dark Chocolate Cherry Cashew + Antioxidants” product by putting false and misleading claims on the label, stating or suggesting that the product is “All Natural” and is an “all natural food.” Defendant further falsely claims that the product is “healthy” and “wholesome,” and makes claims suggesting that the product may be useful in maintaining healthy dietary practices such as “Good Source of Fiber,” “No Trans Fat,” “Low Sodium,” “+ antioxidants,” “50% DV antioxidants vitamins A, C, and E” and “low glycemic index.”

32. The ingredients in the “KIND Plus Dark Chocolate Cherry Cashew + Antioxidants” include “Mixed nuts (almonds, cashews, peanuts), dried fruit (cherries, raisins, cranberries), sugar, honey, non GMO glucose, palm kernel oil, crisp rice, cocoa powder, chicory root fiber, soy lecithin, vanilla whole milk, salt, [and] sunflower oil. ” Additionally, one “40 [gram]” bar contains “2.5 [grams of] saturated fat.”

33. Despite being advertised as “All Natural” the product contains the artificial and synthetic ingredients palm kernel oil, non-GMO glucose, and soy lecithin. Moreover, the product is not “healthy” because it contains levels of saturated fat in excess of FDCA regulations.

**FDA LABEL REQUIREMENT VIOLATIONS**

**Saturated Fats**

34. 21 C.F.R. § 101.65(d)(2) requires that in order for a food to be labeled as “healthy” it must, among other things, be low in saturated fat.



35. In accordance with 21 C.F.R. § 101.65(d)(2), food products may only use the term “healthy” as an implied nutrient content claim on the label or in the labeling of a food provided that the food, among other things, is “low saturated fat” as defined in 21 C.F.R. § 101.62(c)(2) (*i.e.*, the food has a saturated fat content of 1 g or less per Reference Amount Customarily Consumed (RACC) and no more than 15 percent of the calories are from saturated fat). However, the KIND Bars have more than 1 gram of saturated fat.

36. The KIND Fruit & Nut Almond & Apricot bar contains 3.5 grams of saturated fat per 40 grams of the food. The KIND Fruit & Nut Almond & Coconut bar contains 5 grams of saturated fat per 40 grams of the food. The KIND Plus Peanut Butter Dark Chocolate + Protein bar contains 3.5 grams of saturated fat per 40 grams of the food. And the KIND Plus Dark Chocolate Cherry Cashew + Antioxidants bar contains 2.5 grams of saturated fat per 40 grams of the food. Each of these bars contains more than 1 gram of saturated fat per 40 grams RACC, meaning they cannot be defined as low in saturated fat, and in turn, cannot be labeled as “healthy.”

37. Moreover, those amounts exceed the maximum of 15% of calories from saturated fat in the “low saturated fat” definition. Accordingly, the KIND Bars do not meet the requirements for use of the nutrient content claim “healthy” on a food label and are misbranded pursuant to 21 C.F.R. § 101.65(d)(2) and California’s counterpart to the FDCA, known as the Sherman Law, Cal. Health & Safety Code § 109875, *et seq.*

38. A food is defined as being low in saturated fat if “[t]he food contains 1 g [gram] or less of saturated fatty acids per reference amount customarily consumed and not more than 15 percent of calories from saturated fatty acids.” 21 C.F.R. § 101.62(c)(2).

39. Because Defendant labels the KIND Bars as “healthy” despite the fact that they do not meet the requirements to bear such a claim, the KIND Bars are misbranded within the meaning of 21 U.S.C. § 343(r)(1)(A). *See also* FDA Letter, § I.a.

#### “+” and “Plus” Labels

40. Below are images depicting Defendant’s KIND Plus Peanut Butter Dark Chocolate + Protein bar and KIND Plus Dark Chocolate Cherry Cashew + Antioxidants bar:



41. Defendant labels its KIND Plus Peanut Butter Dark Chocolate + Protein and KIND Plus Dark Chocolate Cherry Cashew + Antioxidants Bars with the term “+” and/or “plus.” However, neither of these products meet the requirements set forth in 21 C.F.R. § 101.54(e), which regulates the term “plus.”

42. The “KIND Peanut Butter Dark Chocolate + Protein” and “KIND Dark Chocolate Cherry Cashew + Antioxidants” products bear the term “+” (plus) as part of the product name but the products do not comply with the requirements governing the use of that term. The term “+” read in conjunction with “7 g Protein” and “50% DV Antioxidant, vitamins A, C and E,” meets the definition for a nutrient content claim because it characterizes the products’ level of vitamins and minerals, which are nutrients of the type required to be in nutrition labeling. *See* 21 C.F.R. § 101.13(b).

43. 21 C.F.R. § 101.54(e) states, in part, that the term “plus”

. . . may be used on the label or in labeling of foods to describe the level of protein, vitamins, minerals, dietary fiber, or potassium . . . provided that:

(i) The food contains at least 10 percent more of the RDI [Reference Daily Intake] for vitamins or minerals or of the DRV [Daily Reference Value] for protein, dietary fiber, or potassium (expressed as a percent of the Daily Value) per reference amount customarily consumed than an appropriate reference food; and

(ii) Where the claim is based on a nutrient that has been added to the food, that fortification is in accordance with the policy on fortification of foods in [21 C.F.R.] § 104.20; and

(iii) [the claim bears the required information for relative claims as described in 21 C.F.R. § 101.13(j)(2) and 101.54(e)(1)(iii)].

21 C.F.R. § 101.54(e).

44. Defendant's KIND Plus Peanut Butter Dark Chocolate + Protein bar does not contain a reference to, or a percentage of, how much more protein the product contains in comparison to the RDI or DRV of protein in immediate proximity to the term "plus." Further, Defendant's KIND Plus Dark Chocolate Cherry Cashew + Antioxidants bar does not contain a reference to, or a percentage of, the amount of antioxidants in the product that exceeds the RDI or DRV of the antioxidant ingredient in the product in immediate proximity to the term "plus."

45. Because Defendant labels its KIND Plus Peanut Butter Dark Chocolate + Protein and KIND Plus Dark Chocolate Cherry Cashew + Antioxidants bars with the term "+" and/or "plus" despite the fact that they do not meet the requirements to bear such a claim, the KIND Bars are misbranded within the meaning of 21 U.S.C. § 343(r)(1)(A). *See also* FDA Letter, Exhibit A, § 1.b.

#### **"No Trans Fats"**

46. Defendant labels the KIND Bars with the phrase "no trans fats." However, none of the KIND Bars meet the requirements set forth in 21 C.F.R. § 101.9(c)(2)(iii) and (iv) to be labeled as containing "no trans fats."

47. 21 C.F.R. § 101.9(c)(2)(iii) and (iv) require that in order for a food to be labeled as containing “no trans fats,” a manufacturer must include the amount of polyunsaturated and monounsaturated fatty acids, respectively, on the food label.

48. Defendant fails to include the levels of polyunsaturated and monounsaturated fatty acids on the labeling of the KIND Bars as required by federal regulations. Accordingly, Defendant cannot make a claim about fatty acids on the labeling of the KIND Bars, including using the phrase “no trans fats.”

49. Because Defendant labels the KIND Bars as having “no trans fats” despite the fact that they do not meet the requirements to bear such a claim, the KIND Bars are misbranded within the meaning of 21 U.S.C. § 343(q)(2)(A). *See also* FDA Letter, Exhibit A, § 3.a.

50. The KIND Bars are also misbranded because the nutrition information is not disclosed in accordance with 21 C.F.R. § 101.9. Specifically, the labels bear a claim about fatty acids (*i.e.*, “no trans fat”) but fail to include the levels of monounsaturated fatty acids and polyunsaturated fatty acids in the nutrition information as required by §§ 21 C.F.R. § 101.9 (c)(2)(iii) and (iv). The “KIND Plus Peanut Butter Dark Chocolate + Protein” product label includes the nutrient content claims: “+ protein” and “plus 7 g protein” on the principal display panel; however, the nutrition label fails to include the percent DV for protein as required when the label bears a nutrient content claim for protein as required by 21 C.F.R. § 101.9(c)(7)(i).

**“Good Source of Fiber”**

51. All four of the KIND Bars are further misbranded within the meaning of 21 U.S.C. § 343(r)(2)(A)(v), because the labels include the nutrient content claim “Good Source of Fiber” without including the required statement disclosing that the food is not low in total fat in immediate proximity to the claim. Pursuant to 21 C.F.R. § 101.54(d), if a product label makes a

claim with respect to the level of dietary fiber (*e.g.*, that the product is a good source of fiber) and the food is not “low” in total fat as defined in 21 C.F.R. § 101.62(b)(2), then the label must disclose the level of total fat per serving.

52. The KIND Bars exceed the maximum of 3 grams of total fat per 40 gram in the “low fat” definition of RACC. Therefore, the KIND Bars are not “low” in total fat and Defendant is required to disclose that fact on its labels in immediate proximity to the claims that the KIND Bars are a “good source of fiber.”

53. Defendant labels the KIND Bars with the phrase “good source of fiber.” However, none of the KIND Bars meet the requirements set forth in 21 C.F.R. § 101.54(d) to be labeled as being a “good source of fiber.”

54. 21 C.F.R. § 101.54(d) requires that if a food is labeled as being a “good source of fiber,” and the food is not “low” in total fat, then the label must disclose the level of total fat per serving in immediate proximity to the claim that the food is a “good source of fiber.”

55. 21 C.F.R. § 101.62(b)(2) defines a food as being “low” in fat if it has a RACC greater than 30 g or greater than 2 tablespoons and contains 3 g or less of fat per RACC, or has a RACC of 30 g or less or 2 tablespoons or less and contains 3 g or less of fat per RACC and per 50 g of food.

56. The KIND Fruit & Nut Almond & Apricot bar contains 10 g of total fat per 40 g of the food. The KIND Fruit & Nut Almond & Coconut bar contains 12 g of total fat per 40 g of the food. The KIND Plus Peanut Butter Dark Chocolate + Protein bar contains 13 g of total fat per 40 g of the food. And the KIND Fruit & Nut Dark Chocolate Cherry Cashew + Antioxidants bar contains 9 g of total fat per 40 g of the food. Each of these bars contains more than 3 g of total fat per 40 g RACC, meaning they are *not* “low” in total fat. Thus, they cannot be labeled as

being a “good source of fiber” unless Defendant also discloses the level of total fat per serving in immediate proximity to that claim.

57. Because Defendant labels the KIND Bars as a “good source of fiber” despite the fact that they do not meet the requirements to bear such a claim, the KIND Bars are misbranded within the meaning of 21 U.S.C. § 343(r)(2)(A)(V). *See also* FDA Letter, Exhibit A, § 2.

58. KIND Bars are also misbranded within the meaning of 21 U.S.C. § 343(a) because their labeling is false or misleading. Reasonable consumers, including Plaintiff and Class members, expect that the KIND Bars are properly labeled as “healthy,” “+” or “plus,” “no trans fats,” and “good source of fiber.” Because the KIND Bars bear these claims but do not meet the requirements to do so, their labeling is false or misleading within the meaning of the FDCA.

#### **ARTIFICIAL INGREDIENTS IN THE KIND BARS**

59. Webster’s New World Dictionary defines “natural” as “produced or existing in nature; not artificial or manufactured.”<sup>6</sup> “All” is defined as “the whole extent or quantity of.”<sup>7</sup> Thus, the combined use of “All Natural” on the labels of the KIND Bars indicate to the average reasonable person that “the whole extent or quantity of” the ingredients contained in the KIND Bars are “produced or existing in nature; not artificial or manufactured.”

60. KIND made a far broader and more encompassing representation by labeling its KIND Bars as “All Natural” as opposed to simply saying they were “natural.” While federal regulators have established policies or regulations addressing the meaning of “natural” when used in food labeling, no regulations have specifically addressed the broader representation made

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<sup>6</sup> WEBSTER’S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE, 2nd College Ed. (Simon & Schuster, 1984), “natural.”

<sup>7</sup> *Id.*, “all.”

by labeling the product as “All Natural,” and the only policy to address “All Natural” labeling requires disclosure of any synthetic or artificial ingredients so as to indicate they are not natural. However, it is noteworthy that although the broader “All Natural” representation was made on KIND Bars’ labeling, the presence of the synthetic and artificial ingredients in them also violates the federal regulators’ policy and regulations for the narrower “natural” representation.

61. The FDA has not promulgated a regulation defining the term “natural” or “All Natural.” However, the agency has stated that it “will maintain its policy regarding the use of ‘natural,’ as meaning that nothing artificial or synthetic (including all color additives regardless of source) has been included in, or has been added to, a food that would not normally be expected to be in the food.” 58 Fed. Reg. 2302, 2407. Although this definition is not a regulation, it is the “most definitive statement of the agency’s view.”<sup>8</sup>

62. Courts and trade members have requested that the FDA provide a regulatory definition of “natural,” however, the FDA has declined to provide a determination because the time required to conduct a public hearing “would take two to three years to complete,” and the agency’s resources are currently devoted to other, higher priorities.”<sup>9</sup>

63. Similar to the FDA, the United States Department of Agriculture (“USDA”), which regulates the labeling of meat and poultry, has also set limits on the use of the term “natural.” The USDA’s Food Safety and Inspection Service states that the term “natural” may be used on labeling of meat and poultry products so long as “(1) the product does not contain any artificial flavor or flavorings, color ingredient, or chemical preservative . . . or any other artificial

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<sup>8</sup> See Letter from Michael M. Landa, Acting Director, Center for Food Safety and Applied Nutrition, to Judge Jerome B. Simandle dated September 16, 2010, filed in *Ries et al., v. Hornell Brewing Co., Inc.*, Case No. 10-1139 (N.D. Cal.), Docket No. 54 (hereinafter “Letter to Judge Simandle”).

<sup>9</sup> See *id.* (Letter to Judge Simandle).

or synthetic ingredient, and (2) the product and its ingredients are not more than minimally processed.”<sup>10</sup>

64. Under the USDA’s guidelines, if a product is severely processed, the product can be labeled “All Natural” if the ingredient would not significantly change the character of the product to the point that it could no longer be considered a natural product. However, even in that case, “the natural claim must be qualified to clearly and conspicuously identify the ingredient, *e.g.*, all natural or all natural ingredients except dextrose, modified food starch, etc.”<sup>11</sup>

65. Congress has defined “synthetic” to mean “a substance that is formulated or manufactured by a chemical process or by a process that chemically changes a substance extracted from naturally occurring plant, animal, or mineral sources, except that such term shall not apply to substances created by naturally occurring biological processes.” 7 U.S.C. § 6502 (21); *see also* 7 C.F.R. § 205.1, *et seq.* (defining, in USDA’s National Organic Program regulations, a “nonsynthetic” as “a substance that is derived from mineral, plant, or animal matter and does not undergo a synthetic process as defined in section 6502(21) of the Act (7 U.S.C. § 6502(21))”).

66. The KIND Bars contain several synthetic ingredients described below.

### **Soy Lecithin and Soy Protein Isolate**

67. Each of the KIND Bars contains the artificial ingredient soy lecithin. In addition, the “KIND Plus Peanut Butter Dark Chocolate + Protein” contains the artificial ingredient Soy

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<sup>10</sup> *See The United States Department of Agriculture Food Standards and Labeling Policy Book*, UNITED STATES DEPARTMENT OF AGRICULTURE (August 2005), *available at* [www.fsis.usda.gov/OPPDE/larc/Policies/Labeling\\_Policy\\_Book\\_082005.pdf](http://www.fsis.usda.gov/OPPDE/larc/Policies/Labeling_Policy_Book_082005.pdf).

<sup>11</sup> *Id.*



Protein Isolate. These soy products are all heavily processed to remove the natural bean flavor so that the finished “soy” product no longer tastes like soy. These soy products are further refined through unnatural processes using chemical additives. Soy lecithin and soy protein isolate are commonly refined through the use of a volatile synthetic solvent, hexane. Hexane is obtained from petroleum products. *See* 40 C.F.R. § 799.2155.

### **Non GMO Glucose**

68. Non-GMO glucose is more commonly known as glucose syrup, dried glucose syrup, or corn syrup. *See* 21 C.F.R. § 184.1865. Each of the KIND Bars contains “non GMO glucose.” Glucose syrup is the liquid form of starch and can be derived from wheat, potato, or rice. Most companies, however, use cornstarch to produce glucose syrup. The non-GMO glucose found in the KIND Bars is derived from cornstarch. To leach the starch from the corn kernel, the shelled corn is soaked for several hours in a dilute sulfur dioxide solution, which is a synthetic substance. Once the starch is leached, it is then further processed to produce the glucose syrup.

69. The KIND Bars’ ingredient statements declare “non GMO glucose.” This is not an appropriate common or usual name for glucose syrup or dried glucose syrup in accordance with 21 C.F.R. § 101.4 and 168.120 or 168.121.

### **Vegetable Glycerin**

70. The “KIND Fruit & Nut Almond & Apricot” product contains the artificial ingredient vegetable glycerin. It is used in some food products as a sweetener or a preservative. Vegetable glycerin is commonly produced commercially through the hydrolysis of fats and oils during the manufacturing of soap products, or synthesized from the hydrogenolysis of carbohydrates or from petrochemicals. Vegetable glycerin is a well-recognized synthetic product. *See* 21 C.F.R. § 172.866; 7 C.F.R. § 205.605(b); 7 C.F.R. § 205.603; 21 C.F.R. § 178.3500.

### **Palm Kernel Oil**

71. The “KIND Plus Peanut Butter Dark Chocolate + Protein” and the “KIND Plus Dark Chocolate Cherry Cashew + Antioxidants” Bars both contain the artificial ingredient Palm Kernel Oil. This ingredient is mechanically extracted from the palm kernel nut most often through the use of synthetic solvents such as hexane.

### **Additional FDCA Violations**

72. The “KIND Plus Dark Chocolate Cherry Cashew + Antioxidants” product ingredient list does not meet the requirements in 21 C.F.R. § 101.4(b), which requires that the name of an ingredient shall be a specific name and not a collective (generic) name. This product lists the collective terms “mixed nuts,” “dried fruits,” and “vitamins” as multicomponent foods and declares the specific nuts, fruits, and vitamins as sub-ingredients. The regulations do not allow the collective listing of nuts, fruits, or vitamins.

73. The “KIND Plus Peanut Butter Dark Chocolate + Protein” product ingredient list does not meet the requirements in 21 C.F.R. § 101.4(b)(2) because the label declares the standardized multicomponent food, peanut butter, but does not declare the sub-ingredients as required by 21 C.F.R. § 101.4(b)(2)(i). Pursuant to section 101.4(b)(2)(ii), if the ingredients of the standardized food are incorporated in the finished food ingredient list, then the name of the standardized ingredient must not be listed.

### **CALIFORNIA’S SHERMAN FOOD, DRUG, AND COSMETIC LAW**

74. California’s Sherman Law incorporates many of the FDA’s regulations into California state law governing the labeling and branding of food products. *See* Cal. Health & Safety Code §§ 109925, 110110, 111550; *Simpson v. Kroger Corp.*, 162 Cal. Rptr. 3d 652, 659 (Ct. App. 2013).

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

76. The Sherman Law also regulates the misbranding of food. For example, section 110660 states that “[a]ny food is misbranded if its labeling is false or misleading in any particular.” Section 110665 states that “[a]ny food is misbranded if its labeling does not conform with the requirements for nutrition labeling as set forth in Section 403(q) (21 U.S.C. Sec. 343(q)) of the federal act and the regulations adopted pursuant thereto.” Section 110670 states that “[a]ny food is misbranded if its labeling does not conform with the requirements for nutrient content or health claims as set forth in Section 403(r) (21 U.S.C. Sec. 343(r)) of the federal act and the regulations adopted pursuant thereto.”

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

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

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

80. As a result of Defendant’s conduct detailed herein, Defendant has violated the aforementioned provisions of the Sherman Law.

**RELIANCE AND INJURY**

81. All of Defendant's false and misleading claims challenged herein relate to matters that are material and important to a reasonable consumer's purchasing decision, as they concern the ingredients of the KIND Bars, the qualities and/or composition of the KIND Bars and the reason for which they are sold.

82. Consumers frequently rely on food label representations and information in making purchase decisions. Here, Plaintiff and Class members reasonably relied to their detriment on Defendant's misleading representations and omissions.

83. Defendant's uniform claims in its marketing and promotional materials are intended to, and did, induce Plaintiff and members of the Classes, defined herein to rely upon those representations that KIND Bars were "All Natural" and "Healthy." These representations were a substantial factor in causing Plaintiff and members of the Class to purchase KIND Bars.

84. At the time members of the Class purchased the KIND Bars, they were unaware of the fact that the KIND Bars contained synthetic ingredients and were misbranded as "healthy."

85. Plaintiff also sustained legally cognizable injury in the form of lost money as a result of Defendant's misbranding, which also was in the nature of an omission, *i.e.*, Defendant's failure to adequately disclose the KIND Bars' synthetic ingredients. Had Defendant labeled the KIND Bars in conformance with applicable FDCA and state law food regulations, Plaintiff would not have purchased the KIND Bars.

86. Plaintiff and members of the Class have been injured in fact and have suffered out of pocket losses. Plaintiff and members of the Class therefore seek a full refund and/or rescission of the transaction and all further equitable and injunctive relief as provided by applicable law.

### CLASS ALLEGATIONS

87. **Class Definition:** Plaintiff brings this action pursuant to Fed. R. Civ. P. 23 on behalf of himself and a nationwide Class of similarly situated individuals, defined as follows:

All individuals and entities in the United States who purchased “KIND Fruit & Nut Almond & Apricot”, “KIND Fruit & Nut Almond & Coconut”, “KIND Plus Peanut Butter Dark Chocolate + Protein”, or “KIND Plus Dark Chocolate Cherry Cashew + Antioxidants.”

Furthermore, the Class consists of the following subclasses:

*The New York subclass:* All individuals and entities in New York who purchased “KIND Fruit & Nut Almond & Apricot”, “KIND Fruit & Nut Almond & Coconut”, “KIND Plus Peanut Butter Dark Chocolate + Protein”, or “KIND Plus Dark Chocolate Cherry Cashew + Antioxidants.”

*The California subclass:* All individuals and entities in California who purchased “KIND Fruit & Nut Almond & Apricot”, “KIND Fruit & Nut Almond & Coconut”, “KIND Plus Peanut Butter Dark Chocolate + Protein”, or “KIND Plus Dark Chocolate Cherry Cashew + Antioxidants.”

Excluded from the Class are: (1) Defendant, Defendant’s agents, subsidiaries, parents, successors, predecessors, and any entity in which Defendant or its parents have a controlling interest, and those entities’ current and former employees, officers, and directors; (2) the Judge to whom this case is assigned and the Judge’s immediate family; (3) any person who executes and files a timely request for exclusion from the Class; (4) any person who has had their claims in this matter finally adjudicated and/or otherwise released; and (5) the legal representatives, successors and assigns of any such excluded person. Any claims for personal injury or consequential damages, not otherwise permitted under the facts pled herein, are expressly excluded from this action. Plaintiff reserves the right to amend the Class definition as necessary.

88. **Numerosity:** Upon information and belief, the Class comprises thousands of consumers throughout the nation, and is so numerous that joinder of all members of the Class is impracticable. While the exact number of Class members is presently unknown and can only be ascertained through discovery, Plaintiff believes that there are thousands of Class members based upon the fact that (1) KIND Bars are available in over 60,000 stores nationwide, (2) KIND had

over \$120 million in revenue in 2012, and (3) KIND advertises and sells its KIND Bars nationally and internationally.

89. **Ascertainability:** Class members can be easily identified through Defendant's records, documents produced by Plaintiff or Class members, and by other means.

90. **Commonality and Predominance:** There is a well-defined community of interest in the question of law and fact presented in this case. Several questions of law and fact common to the claims of the Plaintiff and members of the putative Class predominate over any individual issues, including:

- a. Whether Defendant violated provisions of the FDCA and federal regulations through the labeling, packaging, and marketing of the KIND Bars;
- b. Whether the KIND Bars contain artificial or synthetic ingredients;
- c. Whether the KIND Bars are misbranded within the meaning of the FDCA and/or the Sherman Law;
- d. Whether Defendant's labeling, packaging, and marketing of the KIND Bars was false and misleading;
- e. Whether Defendant's conduct constitutes intentional misrepresentation;
- f. Whether Defendant's conduct constitutes negligent misrepresentation;
- g. Whether Defendant's conduct constitutes a violation of the Consumers Legal Remedies Act (Cal. Civ. Code §§ 1750, *et seq.*);
- h. Whether Defendant's conduct constitutes a violation of California's false advertising law (Cal. Bus. & Prof. Code §§ 17500, *et seq.*);
- i. Whether Defendant's conduct constitutes an unfair, unlawful, and/or fraudulent business practice in violation of California's unfair competition law (Cal. Bus. & Prof. Code §§ 17200, *et seq.*);

- j. Whether Defendant's conduct constitutes a breach of express warranty;
- k. Whether Defendant's conduct constitutes a breach of implied warranty of merchantability;
- l. Whether Defendant's conduct constitutes an unlawful deceptive acts practice in violation of New York's deceptive acts and practices law (N.Y. Gen. Bus. § 349, *et seq.*);
- m. Whether Defendant's conduct constitutes a violation of New York's false advertising law (N.Y. Gen. Bus. § 350, *et seq.*);
- n. Whether Defendant's conduct constitutes a violation of the laws of the other States' various and several Deceptive Practice Acts as enumerated below;
- o. Whether Defendant was unjustly enriched by its conduct;
- p. Whether Plaintiff and Class members are entitled to compensatory damages, and if so, the nature of such damages;
- q. Whether Plaintiff and Class members are entitled to restitutionary relief;
- r. Whether Plaintiff and Class members are entitled to injunctive relief;
- s. Whether Plaintiff and Class members are entitled to an award of punitive damages.

91. **Typicality:** Plaintiff's claims are typical of the claims of the proposed Class. All claims are based on the same legal and factual issues. Defendant's conduct was common and uniform to all Class members.

92. **Adequacy of Representation:** Plaintiff will fairly and adequately represent and protect the interests of the proposed Class. Plaintiff does not have any interests antagonistic to those of the proposed Class. Plaintiff has retained competent counsel experienced in the prosecution of this type of litigation. The questions of law and fact common to the proposed Class members predominate over any questions affecting only individual Class members.

93. **Superiority:** A class action is superior to other available methods for the fair and efficient adjudication of this controversy. The expense and burden of individual litigation would make it impracticable or impossible for proposed Class members to prosecute their claims individually. The trial and the litigation of Plaintiff's claims are manageable.

94. Unless a class is certified, Defendant will retain monies received as a result of its conduct that was wrongfully taken from Plaintiff and Class members. Unless an injunction is issued, Defendant will continue to commit the violations alleged, and the members of the proposed Class and the general public will continue to be misled.

95. Defendant has acted and refuses to act on grounds generally applicable to the proposed Class, making appropriate final injunctive relief with respect to the proposed Class as a whole.

**COUNT I**  
**VIOLATION OF THE NEW YORK DECEPTIVE ACTS AND PRACTICES LAW**  
**(N.Y. GEN. BUS. § 349, *et seq.*)**  
***(On Behalf of Plaintiff and the New York Class)***

96. Plaintiff repeats and realleges paragraphs one (1) through ninety-five (95) with the same force and effect as though fully set forth herein.

97. By the acts and conduct alleged herein, Defendant committed unfair or deceptive acts and practices in the state of New York by making the misrepresentations described above.

98. The foregoing acts and practices were directed at consumers.

99. The foregoing deceptive acts and practices are misleading in a material way because the fundamentally misrepresent the ingredients in the KIND Bars.

100. Plaintiff and members of the Class were injured as a direct and proximate result of Defendant's violation of the NYDAL G.B.L. § 349 because they paid for the product, which they would not have purchased had they known the true facts.



101. Plaintiff and the Class seek to enjoin the unlawful acts and practices described herein, to recover actual damages or fifty dollars, whichever is greater, and reasonable attorneys' fees and costs.

**COUNT II**  
**VIOLATION OF THE NEW YORK FALSE ADVERTISING LAW**  
**(N.Y. GEN. BUS. § 350, *et seq.*)**  
***(On Behalf of Plaintiff and the New York Class)***

102. Plaintiff repeats and realleges paragraphs one (1) through ninety-five (95) with the same force and effect as though fully set forth herein.

103. By the acts and conduct alleged herein, Defendant committed false advertising in the conduct of business, trade or commerce in the state of New York contrary to the NYFAL, G.B.L. § 350, *et seq.*

104. NYFAL defines "false advertising" as "advertising, including labeling, of a commodity, or of the kind, character, terms or conditions of any employment opportunity if such advertising is misleading in a material respect." The foregoing acts and practices were directed at consumers. G.B.L. § 350-a.

105. The foregoing false advertisements are misleading in a material way because they fundamentally misrepresent the nature of the ingredients in the KIND Bars to induce consumers to purchase the KIND Bars.

106. Plaintiff and members of the Class were injured as a direct and proximate result of Defendant's violation of NYFAL because they paid for the KIND Bars, which they would not have purchased had they known the true facts.

107. Plaintiff and the Class seek to enjoin the unlawful acts and practices described herein, to recover actual damages or fifty dollars, whichever is greater, and reasonable attorneys' fees.

**COUNT III**  
**BREACH OF EXPRESS WARRANTY**  
*(On Behalf of Plaintiff and the Nationwide Class)*

108. Plaintiff repeats and realleges paragraphs one (1) through ninety-five (95) with the same force and effect as though fully set forth herein.

109. Defendant, as a manufacturer, marketer, distributor, or seller, expressly warranted that the KIND Bars are “all natural” and “healthy.” Specifically, Defendant made the following express warranties in the quoted language below with respect to each of the KIND Bars:

- “All Natural”
- “Natural Ingredients”
- “Natural foods”
- “Healthy”
- “Wholesome”

110. Defendant breached each of the warranties in the above-quoted language because the KIND Bars contain synthetic ingredients and are branded as healthy even though the products contains levels of saturated fat in excess of FDCA regulations.

111. Plaintiff and Class members were injured as a direct and proximate result of Defendant’s breach because they would not have purchased the KIND Bars if the true facts had been known.

112. Defendant breached its express warranty by selling KIND Bars that contain artificial ingredients and that are not healthy.

113. Plaintiff, on behalf of himself and the Class, seeks actual damages for Defendant’s breach of warranty.

**COUNT IV**  
**BREACH OF IMPLIED WARRANTY OF MERCHANTABILITY**  
**(CAL. CIV. CODE § 1792)**  
***(On Behalf of Plaintiff, the Nationwide Class, and California Subclass)***

114. Plaintiff repeats and realleges paragraphs one (1) through ninety-five (95) with the same force and effect as though fully set forth herein.

115. Defendant, as the designer, manufacturer, marketer, distributor, and seller impliedly warranted that the KIND Bars were fit for their intended purpose in that the KIND Bars were all natural and healthy. Defendant did so with the intent to induce Plaintiff and members of the Class to purchase the KIND Bars.

116. Defendant breached its implied warranties in the contract for the sale of the KIND Bars because the KIND Bars are not all natural or healthy.

117. In reliance upon Defendant's skill and judgment and the implied warranties discussed above, Plaintiff and the Class members purchased the KIND Bars.

118. The KIND Bars were not altered by Plaintiff or the Class Members.

119. Plaintiff, on behalf of himself and the Class, seeks actual damages for Defendant's breach of warranty.

**COUNT V**  
**UNJUST ENRICHMENT**  
***(On Behalf of Plaintiff, the Nationwide Class, and California Subclass)***

120. Plaintiff repeats and realleges paragraphs one (1) ninety-five (95) with the same force and effect as though fully set forth herein.

121. Plaintiff and Class members conferred a benefit on Defendant by purchasing the KIND Bars.

122. Defendant has been unjustly enriched in retaining the revenues derived from Plaintiff's and Class members' purchases of the KIND Bars, which retention under these

circumstances is unjust and inequitable because Defendant misrepresented the facts concerning the ingredients in the KIND Bars and caused Plaintiff and the Class to lose money as a result thereof.

123. Plaintiff and Class members were injured as a direct and proximate result of Defendant's misrepresentations and omissions because they would not have purchased the KIND Bars if the true facts had been known. Because Defendant's retention of the non-gratuitous benefit conferred on it by Plaintiff and Class members is unjust and inequitable, Defendant must pay restitution to Plaintiff and Class members for its unjust enrichment, as ordered by the Court. Additionally, Plaintiff and the Class seek attorneys' fees and costs for their unjust enrichment claim.

**COUNT VI**  
**INTENTIONAL MISREPRESENTATION**  
*(On Behalf of Plaintiff and the Nationwide Class)*

124. Plaintiff repeats and realleges paragraphs one (1) through ninety-five (95) with the same force and effect as though fully set forth herein.

125. Defendant represented to the public, including to Plaintiff and the Class, that the KIND Bars were all natural and healthy.

126. Defendant's misrepresentations were false and misleading.

127. At the time Defendant made statements or representations regarding the nature and qualities of the KIND Bars, Defendant knew that the statements and representations were false and misleading.

128. Defendant made the misrepresentations alleged herein with the intention of inducing and persuading Plaintiff and the class to purchase the KIND Bars.

129. Defendant further withheld and omitted material information about the KIND Bars with the intention of inducing and persuading Plaintiff and the class to purchase the KIND Bars.

130. Plaintiff and the class, by purchasing the KIND Bars, reasonably relied on Defendant's false and misleading statements and misrepresentations, and on the absence of the material information that Defendant omitted.

131. As a direct and proximate result of Defendant's intentional misrepresentations and deceptive omissions, Plaintiff and Class members were induced to pay for worthless KIND Bars.

132. Plaintiff and Class members were damaged through their purchase and use of the KIND Bars.

133. Plaintiff's and Class members' reliance on Defendant's statements and representations of the nature and characteristics of the KIND Bars was reasonable. As a result, Defendant is guilty of malice, oppression, and fraud, and Plaintiff and Class members are therefore entitled to recover exemplary or punitive damages. Additionally, Plaintiff and Class members seek attorneys' fees and costs as allowed by statute.

**COUNT VII**  
**NEGLIGENT MISREPRESENTATION**  
*(On Behalf of Plaintiff and the Nationwide Class)*

134. Plaintiff repeats and realleges paragraphs one (1) through ninety-five (95) with the same force and effect as though fully set forth herein.

135. In marketing, advertising and promoting the KIND Bars, Defendant carelessly and negligently made representations regarding the KIND Bars that Defendant knew or should reasonably have known or reasonably foreseen misrepresented material facts and omitted to state material facts.

136. Defendant represented to consumers through the labeling, packaging, and marketing of the KIND Bars that the KIND Bars were, among other things, “healthy,” “plus,” “good source of fiber,” and “no trans fats.” Defendant made these representations knowing that such claims would be material to a reasonable consumer’s purchasing decision.

137. Defendant’s representations that the KIND Bars were “healthy,” “plus,” “good source of fiber,” and “no trans fats” were false because the KIND Bars did not meet the requirements to bear such claims.

138. Defendant’s careless, unreasonable and negligent misrepresentations and omissions, as set forth in this complaint, are material in that they relate to matters to which reasonable persons, including Plaintiff and the members of the Class, would attach importance in their purchasing decisions or conduct regarding the purchase of KIND Bars.

139. Defendant’s material misrepresentations concerning the health, characteristics, composition, and quality of the KIND Bars were false and made without reasonable grounds for believing them to be true.

140. Defendant has a pecuniary interest in the marketing, advertising and promotion of the KIND Bars and in making the careless, unreasonable and negligent misrepresentations and omissions alleged herein, including to Plaintiff and members of the Class.

141. Under the circumstances, Defendant had a duty to disclose material, truthful information that they omitted in its careless, unreasonable and negligent misrepresentations and omissions, as set forth in this complaint.

142. Plaintiff and Class members reasonably relied on Defendant’s material misrepresentations in choosing to purchase and consume the KIND Bars.

143. As a direct and proximate result of Defendant's conduct, Plaintiff and the Class have incurred damages in an amount to be proven at trial.

**COUNT VIII**  
**VIOLATION OF THE CONSUMERS LEGAL REMEDIES ACT**  
**(CAL. CIV. CODE §§ 1750, *et seq.*)**  
***(On Behalf of Plaintiff and the California Subclass)***

144. Plaintiff repeats and realleges paragraphs one (1) through ninety-five (95) with the same force and effect as though fully set forth herein.

145. Plaintiff and each proposed Class member is a "consumer," as that term is defined in Cal. Civ. Code § 1761(d).

146. The KIND Bars are "goods," as that term is defined in Cal. Civ. Code § 1761(a).

147. Defendant is a "person," as that term is defined in Cal. Civ. Code § 1761(c).

148. Plaintiff's and each proposed Class Member's purchase of the KIND Bars constituted a "transaction," as that term is defined in Cal. Civ. Code § 1761(e).

149. Defendant violated and continues to violate the Act by engaging in the following practices proscribed by California Legal Remedies Act ("CLRA"), Cal. Civil Code §§ 1750, *et seq.*, in transactions with Plaintiff and the Class which were intended to result in, and did result in, the sale of the KIND Bars:

(5) Representing that [the products have] . . . characteristics . . . uses [or] benefits . . . which it does not have . . .

\*\*\*

(7) Representing that [the products are] of a particular standard, quality or grade . . . if [they are] of another. . .

\*\*\*

(9) Advertising a good . . . with intent not to sell it as advertised.

\*\*\*

(16) Representing that [the products have] been supplied in accordance with a previous representation when [it have] not.  
Cal. Civ. Code § 1770(a).

150. Defendant violated CLRA by representing false or deceptive information in the labeling of the KIND Bars as described above, when it knew, or should have known, that the representations and advertisements were false or misleading.

151. Defendant has engaged in and continues to engage in business practices in violation CLRA by using the following terms on the labeling and packaging of the KIND Bars:

- a. The term “healthy” on the KIND Fruit & Nut Almond & Apricot bar, KIND Fruit & Nut Almond & Coconut bar, KIND Plus Peanut Butter Dark Chocolate + Protein bar, and KIND Plus Dark Chocolate Cherry Cashew + Antioxidants bar;
- b. The term “plus” or “+” on the KIND Plus Peanut Butter Dark Chocolate + Protein bar and KIND Plus Dark Chocolate Cherry Cashew + Antioxidants bar;
- c. The phrase “good source of fiber” on the KIND Fruit & Nut Almond & Apricot bar, KIND Fruit & Nut Almond & Coconut bar, KIND Plus Peanut Butter Dark Chocolate + Protein bar, and KIND Plus Dark Chocolate Cherry Cashew + Antioxidants bar; and
- d. The phrase “no trans fats” on the KIND Fruit & Nut Almond & Apricot bar, KIND Fruit & Nut Almond & Coconut bar, KIND Plus Peanut Butter Dark Chocolate + Protein bar, and KIND Plus Dark Chocolate Cherry Cashew + Antioxidants bar.

152. Defendant has also engaged in and continues to engage in business practices in violation of the CLRA by failing to disclose certain information on the labeling and packaging of the KIND Bars that it is required to disclose. Specifically, Defendant has failed to disclose:

- a. The levels of monounsaturated fatty acids and polyunsaturated fatty acids in the nutrition information of the KIND Fruit & Nut Almond & Apricot bar, KIND Fruit & Nut Almond & Coconut bar, KIND Plus Peanut Butter Dark Chocolate + Protein bar, and KIND Plus Dark Chocolate Cherry Cashew + Antioxidants bar; and



- b. The percent DV for protein on the label of the KIND Plus Peanut Butter Dark Chocolate + Protein bar.

153. Defendant has engaged in unfair or deceptive acts or practices intended to result in the sale of the KIND Bars in violation of California Civil Code § 1770. Defendant knew and/or should have known that its misrepresentations and/or omissions of material fact regarding the characteristics, composition, and quality of the KIND Bars were likely to mislead the public.

154. Plaintiff and other members of the Class reasonably relied upon the Defendant's representations as to the quality and attributes of the KIND Bars.

155. Plaintiff and other Class members would not have purchased the KIND Bars had they known the Defendant's claims were untrue, and had they known the true nature of the KIND Bars.

156. Defendant's conduct alleged herein violates the CLRA, including but not limited to, the following provisions: (1) using deceptive representations in connection with goods or services in violation of Civil Code § 1770(a)(4); (2) representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have in violation of Civil Code § 1770(a)(5); and/or (3) advertising goods or services with intent not to sell them as advertised in violation of Civil Code § 1770(a)(9). As a direct and proximate result of Defendant's conduct, as set forth herein, Defendant has received ill-gotten gains and/or profits, including but not limited to, money. Therefore, Defendant has been unjustly enriched.

157. Pursuant to California Civil Code §§ 1780(a) and (e), Plaintiff and members of the Class seek: (1) an order enjoining Defendant's unlawful business practices as alleged herein; (2) restitution; (3) ancillary relief; and (4) attorneys' fees and costs to the full extent allowed by law.

**COUNT IX**  
**VIOLATION OF CALIFORNIA'S FALSE ADVERTISING LAW**  
**(CAL. BUS. & PROF. CODE §§ 17500, *et seq.*)**  
***(On Behalf of Plaintiff and the California Subclass)***

158. Plaintiff repeats and realleges paragraphs one (1) ninety-five (95) with the same force and effect as though fully set forth herein.

159. Defendant's actions as described herein constitute unfair competition within the meaning of the California False Advertising Law ("FAL"), Cal. Bus. & Prof. Code §§ 17500, *et seq.*, insofar as it has disseminated untrue and/or misleading representations in connection with the sale of the KIND Bars.

160. Plaintiff has standing to pursue this claim as Plaintiff has suffered injury in fact as a result of Defendant's actions as set forth herein. Specifically, prior to the filing of this action, Plaintiff purchased each of the KIND Bars in reliance upon Defendant's marketing claims.

161. Defendant has engaged in and continues to engage in false advertising in violation of FAL by making untrue and/or misleading representations concerning the health, characteristics, composition, and quality of the KIND Bars without having any reasonable basis for doing so. Plaintiff is informed and believes and thereon alleges that Defendant has intentionally falsely labeled and advertised the KIND Bars as "healthy" and other health-related terms detailed herein, such as "plus" or "+," "Good Source of Fiber," and "no trans fats." Reasonable consumers purchased the KIND Bars upon the belief that they were "healthy" and featured the other health-related characteristics and qualities detailed herein.

162. As a direct and proximate result of Defendant's violation of the FAL, Plaintiff and the Class have suffered an injury in fact and have suffered economic harm by losing money as a result of purchasing the KIND Bars.

163. Defendant's wrongful business practices constitute a continuing course of conduct of false advertising since Defendant is continuously marketing and selling the KIND Bars in a manner likely to deceive the public. Plaintiff and the Class seek an order of this Court enjoining Defendant from continuing to engage in unlawful and unfair business practices and any other act prohibited by law, including those set forth in this Complaint.

164. As a direct and proximate result of Defendant's conduct, as set forth herein, Defendant has received ill-gotten gains and/or profits. Therefore, Plaintiff requests restitution and restitutionary disgorgement for all sums obtained in violation of the FAL.

**COUNT X**  
**UNLAWFUL, FRAUDULENT & UNFAIR BUSINESS PRACTICES**  
**(CAL. BUS. & PROF. CODE §§ 17200 *et seq.*)**  
***(On Behalf of Plaintiff and the California Subclass)***

165. Plaintiff repeats and realleges paragraphs one (1) through ninety-five (95) with the same force and effect as though fully set forth herein.

166. The California Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code § 17200, *et seq.*, prohibits any "unlawful, unfair or fraudulent business act or practice."

167. The acts, omissions, misrepresentations, practices, and non-disclosures of Defendant as alleged herein constitute "unlawful" business acts and practices in that Defendant's conduct violates the False Advertising Law and the Consumer Legal Remedies Act.

168. Defendant's conduct is further "unlawful" because it violates the FDCA and its implementing regulations in the following ways:

- a. The KIND Bars bear the labeling claims "Healthy and tasty, Convenient and wholesome" in conjunction with other labeling claims like "good source of fiber," "no trans fats," "very low sodium" [Kind Fruit & Nut Almond & Apricot, Kind Fruit & Nut Almond & Coconut, and Kind Plus Dark Chocolate Cherry Cashew + Antioxidants], "low sodium" [Kind Plus Peanut Butter Dark Chocolate + Protein], "+ antioxidants" [Kind Plus Dark Chocolate Cherry Cashew + Antioxidants], "50% DV antioxidants

vitamins A, C and E” [Kind Plus Dark Chocolate Cherry Cashew + Antioxidants], “+ protein” [Kind Plus Peanut Butter Dark Chocolate + Protein], and “7g protein” [Kind Plus Peanut Butter Dark Chocolate + Protein].” However, none of the KIND Bars meet the requirements for use of the claim “healthy” that are set forth in 21 C.F.R. § 101.65(d)(2). In accordance with 21 C.F.R. § 101.65(d)(2), food products may only use the term “healthy” as an implied nutrient content claim on the label or in the labeling of a food provided that the food, among other things, is “low saturated fat” as defined in 21 C.F.R. § 101.62(c)(2) (*i.e.*, the food has a saturated fat content of 1 g or less per Reference Amount Customarily Consumed (RACC) and no more than 15 percent of the calories are from saturated fat). However, the KIND Bars have more than 1 gram of saturated fat.

- b. The “KIND Peanut Butter Dark Chocolate + Protein” and “KIND Dark Chocolate Cherry Cashew + Antioxidants” products bear the term “+” (plus) as part of the product name but the products do not comply with the requirements governing the use of that term. The term “+” read in conjunction with “7 g Protein” and “50% DV Antioxidant, vitamins A, C and E,” meets the definition for a nutrient content claim because it characterizes the products’ level of vitamins and minerals, which are nutrients of the type required to be in nutrition labeling. *See* 21 C.F.R. § 101.13(b).
- c. The term “plus” is defined in 21 C.F.R. § 101.54(e). This term may be used on the label or in labeling of foods to describe the level of nutrients (such as vitamins and minerals) in the food, provided that:
  - (1). the food contains at least 10 percent more of the Reference Daily Intake (RDI) or Daily Reference Value (DRV) for the nutrient per RACC consumed than an appropriate reference food,
  - (2). where the claim is based on nutrients that are added to the food, that the fortification is in accordance with the policy on fortification of foods in 21 C.F.R. § 104.20, and
  - (3). the claim bears the required information for relative claims as described in 21 C.F.R. § 101.13(j)(2) and 101.54(e)(1)(iii).

However, neither labels for the “KIND Peanut Butter Dark Chocolate + Protein” and “KIND Dark Chocolate Cherry Cashew + Antioxidants” state the identity of the reference food and the percentage (or fraction) that the nutrient is greater relative to the RDI or DRV declared in immediate proximity to the most prominent such claim. Accordingly, these products are misbranded within the meaning of section 403(r)(1)(A) of the Act because they bear the nutrient content claim “plus” but do not comply with

the regulations governing the use of this claim. All four of the KIND Bars are further misbranded within the meaning of 21 U.S.C. § 343(r)(2)(A)(v), because the labels include the nutrient content claim “Good Source of Fiber” without including the required statement disclosing that the food is not low in total fat in immediate proximity to the claim. Pursuant to 21 C.F.R. § 101.54(d), if a product label makes a claim with respect to the level of dietary fiber (*e.g.*, that the product is a good source of fiber) and the food is not “low” in total fat as defined in 21 C.F.R. § 101.62(b)(2), then the label must disclose the level of total fat per serving.

- d. The KIND Bars exceed the maximum of 3 grams of total fat per 40 gram in the “low fat” definition of RACC. Therefore, the KIND Bars are not “low” in total fat and Defendant is required to disclose that fact on its labels in immediate proximity to the claims that the KIND Bars are a “good source of fiber.”
- e. The KIND Bars are also misbranded because the nutrition information is not disclosed in accordance with 21 C.F.R. § 101.9. Specifically, the labels bear a claim about fatty acids (*i.e.*, “no trans fat”) but fail to include the levels of monounsaturated fatty acids and polyunsaturated fatty acids in the nutrition information as required by 21 C.F.R. § 101.9 (c)(2)(iii) and (iv). The “KIND Plus Peanut Butter Dark Chocolate + Protein” product label includes the nutrient content claims: “+ protein” and “plus 7 g protein” on the principal display panel; however, the nutrition label fails to include the percent DV for protein as required when the label bears a nutrient content claim for protein as required by 21 C.F.R. § 101.9(c)(7)(i).

The “KIND Plus Dark Chocolate Cherry Cashew + Antioxidants” product ingredient list does not meet the requirements in 21 C.F.R. § 101.4(b), which requires that the name of an ingredient shall be a specific name and not a collective (generic) name. This product lists the collective terms “mixed nuts,” “dried fruits,” and “vitamins” as multicomponent foods and declares the specific nuts, fruits, and vitamins as sub-ingredients. The regulations do not allow the collective listing of nuts, fruits, or vitamins.

- f. The “KIND Plus Peanut Butter Dark Chocolate + Protein” product ingredient list does not meet the requirements in 21 C.F.R. § 101.4(b)(2) because the label declares the standardized multicomponent food, peanut butter, but does not declare the sub-ingredients as required in 21 C.F.R. § 101.4(b)(2)(i). In accordance with 101.4(b)(2)(ii), if the ingredients of the standardized food are incorporated in the finished food ingredient list, then the name of the standardized ingredient must not be listed.
- g. The KIND Bars’ ingredient statements declare “non GMO glucose.” This is not an appropriate common or usual name for glucose syrup or dried glucose syrup in accordance with 21 C.F.R. § 101.4, 168.120, or 168.121.

169. Defendant's conduct is further "unlawful" because it violates the California Sherman Food, Drug, and Cosmetic Law, see Cal. Health & Safety Code § 109875-111900, which incorporates the provisions of the FDCA. *See id.* §§ 110110-110115.

170. Defendant profited from its sales of the falsely, deceptively, or unlawfully advertised KIND Bars to unwary consumers.

171. The acts, omissions, misrepresentations, practices, and non-disclosures of Defendant as alleged herein also constitute "unfair" business acts and practices under the UCL in that Defendant's conduct is immoral, unscrupulous, and offends public policy by seeking to profit from consumers' desire to eat healthy foods. Further, the gravity of Defendant's conduct outweighs any conceivable benefit of such conduct.

172. The acts, omissions, misrepresentations, practices, and non-disclosures of Defendant as alleged herein constitute "fraudulent" business acts and practices under the UCL in that Defendant's claims are false, misleading, and have a tendency to deceive the Class and the general public, as detailed herein.

173. Defendant profited from its sales of the fraudulently, falsely and deceptively advertised KIND Bars to unwary consumers.

174. In accordance with Bus. & Prof. Code § 17203, Plaintiff seeks an order enjoining Defendant from continuing to conduct business through unlawful, unfair, and/or fraudulent acts and practices, and to commence a corrective advertising campaign.

175. Plaintiff further seeks an order for the disgorgement and restitution of all profit earned from the sale of the Defendant's KIND Bars, which were acquired through acts of unlawful, unfair, and/or fraudulent competition by Defendant. Plaintiff also seeks attorneys' fees and costs as allowed by statute.

**COUNT XI**  
**VIOLATION OF THE CONSUMER FRAUD AND DECEPTIVE TRADE PRACTICES**  
**ACTS OF THE VARIOUS STATES AND DISTRICT OF COLUMBIA**  
*(On Behalf of Plaintiff and the Nationwide Class)*

176. Plaintiff repeats and realleges paragraphs one (1) through ninety-five (95) with the same force and effect as though fully set forth herein.

177. Plaintiff brings this Count individually, and on behalf of all similarly situated residents of each of the other states and the District of Columbia for violations of the respective state statutory consumer protection laws, as follows:

- A. the Alabama Deceptive Trade Practices Act, Ala.Code 1975, § 8–19–1, *et seq.*
- B. the Alaska Unfair Trade Practices and Consumer Protection Act, AS § 45.50.471, *et seq.*;
- C. the Arizona Consumer Fraud Act, A.R.S §§ 44-1521, *et seq.*;
- D. the Arkansas Deceptive Trade Practices Act, Ark.Code §§ 4-88-101, *et seq.*;
- E. the Colorado Consumer Protection Act, C.R.S.A. §6-1-101, *et seq.*;
- F. the Connecticut Unfair Trade Practices Act, C.G.S.A. § 42-110, *et seq.*;
- G. the Delaware Consumer Fraud Act, 6 Del. C. § 2513, *et seq.*;
- H. the D.C. Consumer Protection Procedures Act, DC Code § 28-3901, *et seq.*;
- I. the Florida Deceptive and Unfair Trade Practices Act, FSA § 501.201, *et seq.*;
- J. the Georgia Fair Business Practices Act, OCGA § 10-1-390, *et seq.*;
- K. the Hawaii Unfair Competition Law, H.R.S. § 480-1, *et seq.*;
- L. the Idaho Consumer Protection Act, I.C. § 48-601, *et seq.*;
- M. the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 501/1 *et seq.*;
- N. the Indiana Deceptive Consumer Sales Act, IN ST § 24-5-0.5-2, *et seq.*;

- O. the Iowa Private Right of Action for Consumer Frauds Act, Iowa Code Ann. § 714H.1, *et seq.*;
- P. the Kansas Consumer Protection Act, K.S.A. § 50-623, *et seq.*;
- Q. the Kentucky Consumer Protection Act, KRS 367.110, *et seq.*;
- R. the Louisiana Unfair Trade Practices and Consumer Protection Law, LSA-R.S. 51:1401, *et seq.*;
- S. the Maine Unfair Trade Practices Act, 5 M.R.S.A. § 205-A, *et seq.*;
- T. the Maryland Consumer Protection Act, MD Code, Commercial Law, § 13-301, *et seq.*;
- U. the Massachusetts Regulation of Business Practices for Consumers Protection Act, M.G.L.A. 93A, *et seq.*;
- V. the Michigan Consumer Protection Act, M.C.L.A. 445.901, *et seq.*;
- W. the Minnesota Prevention of Consumer Fraud Act, Minn. Stat. § 325F.68, *et seq.*;
- X. the Mississippi Consumer Protection Act, Miss. Code Ann. § 75-24-1, *et seq.*;
- Y. the Missouri Merchandising Practices Act, V.A.M.S. § 407, *et seq.*;
- Z. the Montana Unfair Trade Practices and Consumer Protection Act of 1973, Mont. Code Ann. § 30-14-101, *et seq.*;
- AA. the Nebraska Consumer Protection Act, Neb.Rev.St. §§ 59-1601, *et seq.*;
- BB. the Nevada Deceptive Trade Practices Act, N.R.S. 41.600, *et seq.*;
- CC. the New Hampshire Regulation of Business Practices for Consumer Protection, N.H.Rev.Stat. § 358-A:1, *et seq.*;
- DD. the New Jersey Consumer Fraud Act, N.J.S.A. 56:8, *et seq.*;
- EE. the New Mexico Unfair Practices Act, N.M.S.A. §§ 57-12-1, *et seq.*;
- FF. the North Carolina Unfair and Deceptive Trade Practices Act, N.C. Gen Stat. § 75-1.1, *et seq.*;
- GG. the North Dakota Consumer Fraud Act, N.D. Cent.Code Chapter 51-15, *et seq.*;
- HH. the Ohio Consumer Sales Practices Act, R.C. 1345.01, *et seq.*;



- II. the Oklahoma Consumer Protection Act, 15 O.S.2001, §§ 751, *et seq.*;
- JJ. the Oregon Unlawful Trade Practices Act, ORS 646.605, *et seq.*;
- KK. the Pennsylvania Unfair Trade Practices and Consumer Protection Law, 73 P.S. § 201-1, *et seq.*;
- LL. the Rhode Island Deceptive Trade Practices Act, G.L.1956 § 6-13.1-5.2(B), *et seq.*;
- MM. the South Carolina Unfair Trade Practices Act, SC Code 1976, §§ 39-5-10, *et seq.*;
- NN. the South Dakota Deceptive Trade Practices and Consumer Protection Act, SDCL § 37-24-1, *et seq.*;
- OO. the Tennessee Consumer Protection Act, T.C.A. § 47-18-101, *et seq.*;
- PP. the Texas Deceptive Trade Practices-Consumer Protection Act, V.T.C.A., Bus. & C. § 17.41, *et seq.*;
- QQ. the Utah Consumer Sales Practices Act, UT ST § 13-11-1, *et seq.*;
- RR. the Vermont Consumer Fraud Act, 9 V.S.A. § 2451, *et seq.*;
- SS. the Virginia Consumer Protection Act of 1977, VA ST § 59.1-196, *et seq.*;
- TT. the Washington Consumer Protection Act, RCWA 19.86.010, *et seq.*;
- UU. the West Virginia Consumer Credit And Protection Act, W.Va.Code § 46A-1-101, *et seq.*;
- VV. the Wisconsin Deceptive Trade Practices Act, WIS.STAT. § 100.18, *et seq.*; and
- WW. the Wyoming Consumer Protection Act, WY ST § 40-12-101, *et seq.*

178. KIND Bars are consumer goods and Plaintiff and the Class are consumers of those goods.

179. Defendant engaged, and still engages in, unfair or deceptive acts or practices in marketing and selling KIND Bars to consumers.

180. Defendant misrepresents the health and nutritional characteristics of KIND Bars, which they do not have, by representing that the KIND Bars, *inter alia*, are “healthy,” are a “Good Source of Fiber” and contain “No Trans Fat.”

181. Defendant intended, and still intends, that Plaintiff and the members of the Class rely upon Defendant’s misrepresentations and omissions concerning the health and nutritional characteristics of its KIND Bars.

182. Defendant’s misrepresentations and omissions possess the tendency or capacity to mislead and create the likelihood of deception to consumers.

183. The above-described deceptive and unfair acts and practices were used or employed in the conduct of trade or commerce, namely, the marketing, sale, and distribution of the KIND Bars to Plaintiff and the Class members.

184. The above-described deceptive and unfair acts offend public policy and cause substantial injury to consumers.

185. Acting as reasonable consumers, had Plaintiff and the Class known that the KIND Bars did not possess the health and nutritional characteristics claimed by Defendant, they would not have purchased the KIND Bars.

186. As a direct and proximate result of these unfair, deceptive and unconscionable commercial practices, Plaintiff and the members of the Class have suffered damages in the form of the money they paid to purchase the KIND Bars. Plaintiff, individually, and on behalf of the Class, seeks these damages, along with reasonable attorney’s fees and costs.

187. Due to Defendant’s misrepresentations and omissions described above, Plaintiff, individually, and on behalf of the Class, also seeks injunctive relief. Plaintiff seeks an order (1) requiring Defendant cease the deceptive and unfair practices described herein; (2) requiring

Defendant to change its packaging, marketing and advertising materials, including its website, to reflect KIND bars actual nutritional characteristics; and (3) requiring Defendant to remove the false and misleading descriptions of the KIND Bars from its packaging, marketing and advertising materials, including its website.

**PRAYER FOR RELIEF**

WHEREFORE, Plaintiff and members of the Class pray for relief and judgment against Defendant, as follows:

- a. For an order certifying the Class, appointing Plaintiff and his counsel to represent the Class and notice to the Class to be paid by Defendant;
- b. For damages suffered by Plaintiff and the Class;
- c. For restitution to Plaintiff and the Class of all monies wrongfully obtained by Defendant;
- d. For injunctive relief requiring Defendant to cease and desist from engaging in the unlawful, unfair, and/or deceptive practices alleged in the Complaint;
- e. An order awarding declaratory relief, retrospective and prospective injunctive relief as permitted by law or equity, including enjoining Defendant from continuing the unlawful practices as set forth herein, and injunctive relief to remedy Defendant's past conduct;
- f. An order compelling Defendant to engage in a corrective advertising campaign to inform the public concerning the true nature of the KIND Bars, including a recall of the falsely and deceptively labeled KIND Bars;
- g. For Plaintiff's reasonable attorneys' fees, as permitted by law;
- h. For Plaintiff's costs incurred;
- i. For pre-judgment and post-judgment interest at the maximum allowable rate on any amounts awarded; and
- j. For such other and further relief that this Court deems just and proper under equity or law, including the award of punitive damages.

**JURY DEMAND**

Plaintiff demands a trial by jury on all counts so triable.

Dated: May 13, 2015

Plaintiff ROBERT O'BRIEN, individually, and on behalf of all others similarly situated,



By: \_\_\_\_\_

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