

1 **BURSOR & FISHER, P.A.**
 L. Timothy Fisher (State Bar No. 191626)
 2 Joel D. Smith (State Bar No. 244902)
 3 Yeremey O. Krivoshey (State Bar No. 295032)
 1990 North California Blvd., Suite 940
 4 Walnut Creek, CA 94596
 Telephone: (925) 300-4455
 5 Facsimile: (925) 407-2700
 E-Mail: ltfisher@bursor.com
 6 jsmith@bursor.com
 7 ykrivoshey@bursor.com

8
 9
 10
 11
 12
 13
 14
 15
 16
 17
 18
 19
 20
 21
 22
 23
 24
 25
 26
 27
 28

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

ANDREW GASSER, on behalf of himself and
 all others similarly situated,

 Plaintiff,

 v.

 KISS MY FACE, LLC,

 Defendant.

Case No.

CLASS ACTION COMPLAINT

JURY TRIAL DEMANDED

1 Plaintiff Andrew Gasser (“Plaintiff”) brings this action on behalf of himself and all others
2 similarly situated against Kiss My Face, LLC (“Kiss My Face” or “Defendant”). Plaintiff makes the
3 following allegations based upon information and belief, except as to the allegations specifically
4 pertaining to himself, which are based on personal knowledge.

5 INTRODUCTION

6 1. Defendant markets itself as a “pioneer” in the area of “natural cosmetics,” and “a
7 respected leader in natural body care with over 100 naturally effective bath and body products sold in
8 over 19 countries worldwide.” Among other purportedly “natural” products, Defendant
9 manufactures, distributes, advertises and sells Kiss My Face brand skin care products, including Kiss
10 My Face® 2-in-1 Deep Moisturizing Body Lotion (“KMF Body Lotion”) and Kiss My Face® Bath
11 and Body Wash (“KMF Body Wash,” and collectively, “the Products”).

12 2. Consistent with Defendant’s self-promotion as a leader in natural cosmetics, the front
13 packaging of every KMF Body Lotion and KMF Body Wash product states in prominent, bold
14 lettering “**nourish naturally.**” To reinforce the message that the Products are natural products, the
15 front packaging of every Product displays pictures of leaves and flowers and highlights the Product’s
16 “botanical blends,” while the back labeling states that the Products are “naturally effective.”

17 3. Contrary to the labeling, however, every purportedly natural Product contains
18 phenoxyethanol and/or ethylhexylglycerin. In April 2016, the Federal Trade Commission (“FTC”)
19 filed complaints against three cosmetics manufacturers for representing that their products were
20 “natural” when they contained one or both of those two ingredients. All three companies agreed to
21 cease marketing the products in question as being “natural.”¹

22 4. Plaintiff and members of the classes described below paid a premium for Defendant’s
23 Products over comparable products that did not purport to be natural products. Contrary to
24 representations on the Products’ labeling, instead of receiving natural products, consumers receive
25 products with unnatural and/or synthetic ingredients.

26 ¹ [https://www.ftc.gov/news-events/press-releases/2016/04/four-companies-agree-stop-falsely-](https://www.ftc.gov/news-events/press-releases/2016/04/four-companies-agree-stop-falsely-promoting-their-personal-care)
27 [promoting-their-personal-care](https://www.ftc.gov/news-events/press-releases/2016/04/four-companies-agree-stop-falsely-promoting-their-personal-care) (last visited March 21, 2017).

1 5. Defendant’s representation that the Products are “natural” is unfair, unlawful, and
2 fraudulent conduct, and is likely to deceive members of the public. As such, Defendant’s practices
3 violate California’s Consumer Legal Remedies Act, Cal. Civ. Code § 1750 *et seq.* (“CLRA”),
4 California’s Unfair Competition Law, Cal. Bus. & Prof. Code § 17200 *et seq.* (“UCL”), and
5 California’s False Advertising Law, Cal. Bus. & Prof. Code § 17500 *et seq.* (“FAL”). Plaintiff also
6 brings claims for fraud, unjust enrichment and breach of express warranty.

7 **JURISDICTION AND VENUE**

8 6. This Court has personal jurisdiction over Defendant. Defendant purposefully avails
9 itself of the California consumer market and distributes the Products to hundreds of locations
10 within this County and thousands of retail locations throughout California, where the Products are
11 purchased by thousands of consumers every day.

12 7. This Court has original subject-matter jurisdiction over this proposed class action
13 pursuant to 28 U.S.C. § 1332(d), which, under the provisions of the Class Action Fairness Act
14 (“CAFA”), explicitly provides for the original jurisdiction of the federal courts in any class action
15 in which at least 100 members are in the proposed plaintiff class, any member of the plaintiff class
16 is a citizen of a State different from any defendant, and the matter in controversy exceeds the sum
17 of \$5,000,000.00, exclusive of interest and costs. Plaintiff alleges that the total claims of individual
18 members of the proposed Class (as defined herein) are well in excess of \$5,000,000.00 in the
19 aggregate, exclusive of interest and costs.

20 8. Venue is proper in this District under 28 U.S.C. § 1391(a). Substantial acts in
21 furtherance of the alleged improper conduct, including the dissemination of false and misleading
22 information regarding the nature, quality, and/or ingredients of the Products, occurred within this
23 District.

24 //

25 //

26 //

27 //

28

PARTIES

1
2 9. Plaintiff Andrew Gasser is a citizen of California, residing in San Francisco. In the
3 last approximately two years, Mr. Gasser made several purchases of KMF Body Lotion from
4 various stores in and near San Francisco, California. Prior to purchasing KMF Body Lotion, Mr.
5 Gasser saw and read the front of the product packaging, and relied on the representation and
6 warranty that the product would “nourish naturally.” Mr. Gasser understood that representation to
7 mean that KMF Body Lotion did not contain synthetic chemicals. Mr. Gasser purchased KMF
8 Body Lotion at a substantial price premium, and would not have bought the product had he known
9 that the labeling he relied on was false, misleading, deceptive and unfair.

10 10. Mr. Gasser would purchase the Products again in the future if Defendant changed
11 the composition of the Products so that they conformed to their “natural” labeling and marketing.

12 11. Defendant Kiss My Face, LLC is a New York Limited Liability Corporation that
13 has its principal place of business at 144 Main St., Gardiner, New York.

14 12. Defendant produces, markets and distributes various consumer skin care and
15 hygiene products in retail stores across the United States. Among others, those products include
16 KMF Body Lotion and KMF Body Wash (the “Products”). Defendant knew that the labeling of
17 the Products is false and misleading to a reasonable consumer, because the Products contain
18 phenoxyethanol and/or ethylhexylglycerin, which are inconsistent with the product labeling.

19 **FACTS COMMON TO ALL CAUSES OF ACTION**

20 13. Consumers have become increasingly concerned about the effects of synthetics and
21 chemical ingredients in cosmetic products. As a result, consumers are willing to pay, and have
22 paid, a premium for products labeled “natural” over ordinary products that contain synthetic
23 ingredients.

24 14. The FTC has warned marketers that the use of the term “natural” may be deceptive:
25 Marketers that are using terms such as natural must ensure that they
26 can substantiate whatever claims they are conveying to reasonable
27 consumers. If reasonable consumers could interpret a natural claim
28

1 as representing that a product contains no artificial ingredients, then
2 the marketer must be able to substantiate that fact.²

3 15. Likewise, the Food and Drug Administration (“FDA”) warns that any “natural”
4 labeling on cosmetic products must be “truthful and not misleading.”³

5 16. Kiss My Face is a brand of skin care and hygiene products manufactured and
6 marketed by Defendant and sold in drug and grocery stores nationwide. On its website, Defendant
7 touts that “[f]or 35 years, Kiss My Face has been striving to give you naturally effective skin care
8 and body products, using natural ingredients while maintaining a healthy respect for our planet.
9 And to this day, we are obsessively passionate about staying true to our values.”⁴

10 17. KMF Body Lotion comes in six varieties, all of which contain phenoxyethanol
11 and/or ethylhexylglycerin: Olive & Aloe®, Vitamin A & E™, Honey & Calendula™, Tropical
12 Coconut™, Peaches & Crème®, and Lavender Shea™.

13 18. KMF Body Wash comes in eight varieties, all of which contain phenoxyethanol
14 and/or ethylhexylglycerin: Active Athletic®, Anti-Stress™, Cold & Flu®, Peaceful Patchouli®,
15 Early to Bed®, Early to Rise®, Silky Soft™, and Tropical Indulgence.

16 //

17 //

18 //

19 //

20 //

21 //

22 //

23 //

24 //

25 ² 75 Fed. Reg. 63552, 63586 (Oct. 15, 2010).

26 ³ FDA, Small Business & Homemade Cosmetics: Fact Sheet, *available at*
27 <http://www.fda.gov/Cosmetics/ResourcesForYou/Industry/ucm388736.htm#7>.

28 ⁴ <http://kissmyface.com/> (last visited March 2, 2017).

1 19. The front label of every KMF Body Lotion and KMF Body Wash package states
2 prominently in bold lettering the words “**nourish naturally**”:



22 20. Some of the Products are labeled with the alternative phrase, “naturally nourishing.”

23 21. The Products have been labeled “nourish naturally” and/or “naturally nourishing” at
24 all times during the last four years, at least.

25 22. Based on the language that appears on the front of each product, Plaintiff reasonably
26 believed that KMF Body Lotion contained only natural ingredients.

1 d. whether Defendant breached express warranties to Plaintiff and the
2 classes;

3 e. whether Plaintiff and the classes have sustained damages with
4 respect to the common-law claims asserted, and if so, the proper measure of their
5 damages.

6 28. Plaintiff's claims are typical of those of other class members because Plaintiff, like
7 all members of the classes, purchased Defendant's Products bearing the natural representations and
8 Plaintiff sustained damages from Defendant's wrongful conduct.

9 29. Plaintiff will fairly and adequately protect the interests of the classes and has
10 retained counsel that is experienced in litigating complex class actions. Plaintiff has no interests
11 which conflict with those of the classes.

12 30. A class action is superior to other available methods for the fair and efficient
13 adjudication of this controversy.

14 31. The prerequisites to maintaining a class action for equitable relief are met as
15 Defendant has acted or refused to act on grounds generally applicable to the classes, thereby
16 making appropriate equitable relief with respect to the classes as a whole.

17 32. The prosecution of separate actions by members of the classes would create a risk of
18 establishing inconsistent rulings and/or incompatible standards of conduct for Defendant. For
19 example, one court might enjoin Defendant from performing the challenged acts, whereas another
20 might not. Additionally, individual actions could be dispositive of the interests of the classes even
21 where certain Class members are not parties to such actions.

22 **COUNT I**
23 **Violation Of California's Consumers Legal Remedies Act ("CLRA"),**
24 **California Civil Code §§ 1750, *et seq.***

25 33. Plaintiff hereby incorporates by reference the allegations contained in all preceding
26 paragraphs of this complaint.

27 34. Plaintiff brings this claim individually and on behalf of the members of the
28 proposed California Subclass against Defendant.

1 44. Plaintiff brings this claim individually and on behalf of the members of the
2 proposed California Subclass against Defendant.

3 45. Defendant is subject to California’s Unfair Competition Law, Cal. Bus. & Prof.
4 Code §§ 17200, *et seq.* The UCL provides, in pertinent part: “Unfair competition shall mean and
5 include unlawful, unfair or fraudulent business practices and unfair, deceptive, untrue or
6 misleading advertising”

7 46. Defendant violated the “unlawful” prong of the UCL by violating the CLRA and the
8 FAL, as alleged herein.

9 47. Defendant’s misrepresentations and other conduct, described herein, violated the
10 “unfair” prong of the UCL in that their conduct is substantially injurious to consumers, offends
11 public policy, and is immoral, unethical, oppressive, and unscrupulous, as the gravity of the
12 conduct outweighs any alleged benefits.

13 48. Defendant violated the “fraudulent” prong of the UCL by misrepresenting that the
14 Products are “natural” when, in fact, they are made with synthetic ingredients.

15 49. Plaintiff and the California Subclass lost money or property as a result of
16 Defendant’s UCL violations because: because: (a) they would not have purchased the Products on
17 the same terms if they knew that the Products were made with unnatural and synthetic ingredients
18 (b) they paid a substantial price premium compared to other skin care and hygiene products due to
19 Defendant’s misrepresentations; and (c) the Products do not have the characteristics, uses, or
20 benefits as promised.

21 **COUNT III**

22 **Violation Of California’s False Advertising Law (“FAL”),**
23 **California Business & Professions Code §§ 17500, *et seq.***

24 50. Plaintiff hereby incorporates by reference the allegations contained in all preceding
25 paragraphs of this complaint.

26 51. Plaintiff brings this claim individually and on behalf of the members of the
27 proposed California Subclass against Defendant.
28

1 52. California’s False Advertising Law, Cal. Bus. & Prof. Code §§ 17500, *et seq.*,
2 makes it “unlawful for any person to make or disseminate or cause to be made or disseminated
3 before the public in this state, ... in any advertising device ... or in any other manner or means
4 whatever, including over the Internet, any statement, concerning ... personal property or services,
5 professional or otherwise, or performance or disposition thereof, which is untrue or misleading and
6 which is known, or which by the exercise of reasonable care should be known, to be untrue or
7 misleading.”

8 53. Defendant committed acts of false advertising, as defined by §§17500, *et seq.*, by
9 misrepresenting that the Products are “natural” when they are not.

10 54. Defendant knew or should have known through the exercise of reasonable care (i.e.
11 pre-market testing) that their representations about the Products were untrue and misleading.

12 55. Defendant’s actions in violation of §§ 17500, *et seq.* were false and misleading such
13 that the general public is and was likely to be deceived.

14 56. Plaintiff and the California Subclass lost money or property as a result of
15 Defendant’s FAL violations because: (a) they would not have purchased the Products on the same
16 terms if they knew that the Products were made with unnatural and synthetic ingredients; (b) they
17 paid a substantial price premium compared to other skin care and hygiene products due to
18 Defendant’s misrepresentations; and (c) the Products do not have the characteristics, uses, or
19 benefits as promised.

20 **COUNT IV**
21 **Breach of Express Warranty**

22 57. Plaintiff hereby incorporates by reference the allegations contained in all preceding
23 paragraphs of this complaint.

24 58. Plaintiff brings this claim individually and on behalf of the proposed Class and
25 California Subclass against Defendant.

26 59. Defendant, as the designer, manufacturer, marketer, distributor, and/or seller,
27 expressly warranted that the Products are “natural.”
28

COUNT VI
Fraud

1
2
3 68. Plaintiff hereby incorporates by reference the allegations contained in all preceding
4 paragraphs of this complaint.

5 69. Plaintiff brings this claim individually and on behalf of the proposed Class and
6 California Subclass against Defendant.

7 70. As discussed above, Defendant provided Plaintiff and Class members with false or
8 misleading material information about the Products by representing that they are “natural.”
9 Defendant made that misrepresentation knowing it was false.

10 71. Defendant’s misrepresentations, upon which Plaintiff and class members reasonably
11 and justifiably relied, were intended to induce and actually induced Plaintiff and class members to
12 purchase the Products.

13 72. Defendant’s fraudulent actions harmed Plaintiff and class members, who are entitled
14 to damages and other legal and equitable relief as a result.

PRAYER FOR RELIEF

15
16 WHEREFORE, Plaintiff demands judgment on behalf of himself and members of the Class
17 and California Subclass as follows:

- 18 A. For an order certifying the nationwide Class and California Subclass under Rule 23
19 of the Federal Rules of Civil Procedure; naming Plaintiff as Class and Subclass
20 representative; and naming Plaintiff’s attorneys as Class Counsel representing the
21 Class and Subclass members;
- 22 B. For an order finding in favor of Plaintiff, the nationwide Class, and the California
23 Subclass on all counts asserted herein;
- 24 C. For an order awarding compensatory, treble, and punitive damages in amounts to be
25 determined by the Court and/or jury;
- 26 D. For injunctive relief enjoining the illegal acts detailed herein;
- 27 E. For prejudgment interest on all amounts awarded;
- 28 F. For an order of restitution and all other forms of equitable monetary relief;

1 G. For an order awarding Plaintiff his reasonable attorneys' fees and expenses and
2 costs of suit.

3 **JURY TRIAL DEMANDED**

4 Plaintiff demands a trial by jury on all claims so triable.

5 Dated: March 27, 2017

6 Respectfully submitted,

7 **BURSOR & FISHER, P.A.**

8 By: /s/ Joel D. Smith
9 Joel D. Smith

10 L. Timothy Fisher (State Bar No. 191626)
11 Joel D. Smith (State Bar No. 244902)
12 Yeremey O. Krivoshey (State Bar No. 295032)
13 1990 North California Blvd., Suite 940
14 Walnut Creek, CA 94596
15 Telephone: (925) 300-4455
16 Facsimile: (925) 407-2700
17 Email: ltfisher@bursor.com
18 jsmith@bursor.com
19 ykrivoshey@bursor.com
20
21
22
23
24
25
26
27
28

CLRA Venue Declaration Pursuant to California Civil Code Section 1780(d)

I, Andrew Gasser, declare as follows:

1. I am a plaintiff in this action and a citizen of the State of California. I have personal knowledge of the facts stated herein and, if called as a witness, I could and would testify competently thereto.

2. The complaint filed in this action is filed in the proper place for trial under California Civil Code Section 1780(d) in that Defendants do business in this District and I purchased Kiss My Face Body Lotion in this District.

3. Specifically, I purchased Kiss My Face Body Lotion from various stores located in or near San Francisco, California. In purchasing Kiss My Face Body Lotion, I relied on the natural labeling on Defendant's products. I understood that representation to mean that the Kiss My Face Body Lotion did not contain unnatural, synthetic chemicals. That representation was a substantial factor influencing my decision to purchase Kiss My Face Body Lotion, and I would not have purchased Kiss My Face Body Lotion had I known that the representation was false and misleading.

I declare under the penalty of perjury under the laws of the State of California that the foregoing is true and correct, executed on March 24, 2017 at San Francisco, California.

DocuSigned by:
Andrew Gasser
1F859D06CF0D4C9...

Andrew Gasser

CIVIL COVER SHEET

The JS-CAND 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 in its original form by the Judicial Conference of the United States in September 1974, is required for the Clerk of Court to initiate the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS
ANDREW GASSER, on behalf of himself and all others similarly situated.
(b) County of Residence of First Listed Plaintiff San Francisco
(c) Attorneys (Firm Name, Address, and Telephone Number)
Joel D. Smith (State Bar No. 244902)
Bursor & Fisher, P.A.
1990 N. California Blvd., Suite 940
Walnut Creek, CA 94596

DEFENDANTS
KISS MY FACE, LLC
County of Residence of First Listed Defendant
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
Citizen of This State
Citizen of Another State
Citizen or Subject of a Foreign Country
1 2 3
4 5 6
Incorporated or Principal Place of Business In This State
Incorporated and Principal Place of Business In Another State
Foreign Nation

IV. NATURE OF SUIT (Place an "X" in One Box Only)
CONTRACT: 110 Insurance, 120 Marine, 130 Miller Act, 140 Negotiable Instrument, 150 Recovery of Overpayment Of Veteran's Benefits, 151 Medicare Act, 152 Recovery of Defaulted Student Loans, 153 Recovery of Overpayment of Veteran's Benefits, 160 Stockholders' Suits, 190 Other Contract, 195 Contract Product Liability, 196 Franchise
REAL PROPERTY: 210 Land Condemnation, 220 Foreclosure, 230 Rent Lease & Ejectment, 240 Torts to Land, 245 Tort Product Liability, 290 All Other Real Property
PERSONAL INJURY: 310 Airplane, 315 Airplane Product Liability, 320 Assault, Libel & Slander, 330 Federal Employers' Liability, 340 Marine, 345 Marine Product Liability, 350 Motor Vehicle, 355 Motor Vehicle Product Liability, 360 Other Personal Injury, 362 Personal Injury - Medical Malpractice
PERSONAL INJURY: 365 Personal Injury - Product Liability, 367 Health Care/Pharmaceutical Personal Injury Product Liability, 368 Asbestos Personal Injury Product Liability
PERSONAL PROPERTY: 370 Other Fraud, 371 Truth in Lending, 380 Other Personal Property Damage, 385 Property Damage Product Liability
FORFEITURE/PENALTY: 625 Drug Related Seizure of Property 21 USC § 881, 690 Other
LABOR: 710 Fair Labor Standards Act, 720 Labor/Management Relations, 740 Railway Labor Act, 751 Family and Medical Leave Act, 790 Other Labor Litigation, 791 Employee Retirement Income Security Act
IMMIGRATION: 462 Naturalization Application, 465 Other Immigration Actions
BANKRUPTCY: 422 Appeal 28 USC § 158, 423 Withdrawal 28 USC § 157
PROPERTY RIGHTS: 820 Copyrights, 830 Patent, 840 Trademark
SOCIAL SECURITY: 861 HIA (1395ff), 862 Black Lung (923), 863 DIWC/DIWW (405(g)), 864 SSID Title XVI, 865 RSI (405(g))
FEDERAL TAX SUITS: 870 Taxes (U.S. Plaintiff or Defendant), 871 IRS-Third Party 26 USC § 7609
OTHER STATUTES: 375 False Claims Act, 376 Qui Tam (31 USC § 3729(a)), 400 State Reapportionment, 410 Antitrust, 430 Banks and Banking, 450 Commerce, 460 Deportation, 470 Racketeer Influenced and Corrupt Organizations, 480 Consumer Credit, 490 Cable/Sat TV, 850 Securities/Commodities/Exchange, 890 Other Statutory Actions, 891 Agricultural Acts, 893 Environmental Matters, 895 Freedom of Information Act, 896 Arbitration, 899 Administrative Procedure Act/Review or Appeal of Agency Decision, 950 Constitutionality of State Statutes

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-Transfer
8 Multidistrict Litigation-Direct File

VI. CAUSE OF ACTION
Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):
28 USC section 1332(d).
Brief description of cause:
Defendant made false statements regarding its "natural" products

VII. REQUESTED IN COMPLAINT:
CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, Fed. R. Civ. P.
DEMAND \$
CHECK YES only if demanded in complaint:
JURY DEMAND: Yes No

VIII. RELATED CASE(S), IF ANY (See instructions):
JUDGE
DOCKET NUMBER

IX. DIVISIONAL ASSIGNMENT (Civil Local Rule 3-2)
(Place an "X" in One Box Only)
SAN FRANCISCO/OAKLAND
SAN JOSE
EUREKA-MCKINLEYVILLE

DATE: 03/27/2017
SIGNATURE OF ATTORNEY OF RECORD: /s/ Joel D. Smith