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11 **UNITED STATES DISTRICT COURT**
 12 **CENTRAL DISTRICT OF CALIFORNIA**
 13 **SOUTHERN DIVISION**

14 CHARLIE MCDONALD and
 15 BENJAMIN KARTER, individually
 16 and on behalf of all others similarly
 17 situated and the general public,

18 Plaintiffs,

19 KIND, LLC,

20 Defendant.

Case No.:

CLASS ACTION

COMPLAINT FOR:

**1) BREACH OF EXPRESS
 WARRANTY;**

**2) BREACH OF IMPLIED
 WARRANTY OF
 MERCHANTABILITY;**

3) UNJUST ENRICHMENT;

**4) INTENTIONAL
 MISREPRESENTATION;**

**5) NEGLIGENT
 MISREPRESENTATION;**

**6) VIOLATIONS OF VARIOUS
 CONSUMER FRAUD LAWS.**

DEMAND FOR JURY TRIAL

1 Plaintiffs Charlie McDonald and Benjamin Karter (“Plaintiffs”) by and through
2 their attorneys of record, bring this action on behalf of themselves, all others similarly
3 situated, and the general public, against Defendant KIND, LLC. (“Defendant” or
4 “KIND”).

5 INTRODUCTION

6 1. Defendant is the manufacturer and distributor of KIND bars that are
7 falsely and deceptively labeled as being “healthy” and made with “All Natural”
8 ingredients. This complaint concerns Defendant’s “KIND Fruit & Nut Almond &
9 Apricot,” “KIND Fruit & Nut Almond & Coconut,” “KIND Plus Peanut Butter Dark
10 Chocolate + Protein,” and “KIND Plus Dark Chocolate Cherry Cashew +
11 Antioxidants” (collectively the “KIND Products”).

12 2. Defendant claims in a uniform manner on the KIND Products’ labels that
13 “KIND is a brand of delicious, all natural foods made from ingredients you can see &
14 Pronounce. ® At KIND, we do things differently and try to avoid false compromises.
15 Instead of ‘or’ we say ‘and.’ Healthy *and* tasty, convenient *and* wholesome,
16 economically sustainable *and* socially impactful.” Furthermore, the front of the KIND
17 Products’ label prominently says “All Natural.” However, the KIND products are
18 neither “healthy” nor “all natural foods.” Instead, the KIND Products contain unlawful
19 levels of saturated fat and artificial ingredients such as soy lecithin, soy protein
20 isolate, palm kernel oil, and vegetable glycerin.

21 3. Defendant has engaged in a widespread marketing campaign to mislead
22 consumers about the nature of the ingredients in its KIND Products. Specifically,
23 Defendant conveyed to consumers that the Products are “All Natural” and “healthy”
24 even though Defendant knew that such statements were false and misleading.

25 4. By deceiving consumers about the nature, quality, and/or ingredients of
26 the Products as detailed herein, thereby distinguishing them from similar products,
27 such as generic-brand nutritional bars, Defendant was able to command a premium
28 price for the Products. Defendant was motivated to mislead consumers for no other

1 reason than to take away market share from competing products, thereby increasing its
2 own sales and profits.

3 **JURISDICTION AND VENUE**

4 5. This Court has original jurisdiction pursuant to 28 U.S.C. §1332(d)(2), as
5 amended by the Class Action Fairness Act of 2005, because the matter in controversy,
6 exclusive of interest and costs, exceeds the sum or value of \$5,000,000 and is a class
7 action in which some members of the Class of Plaintiffs are citizens of states different
8 than Defendant. Further, greater than two-thirds of the Class members reside in states
9 other than the state in which Defendant is incorporated or has its principal place of
10 business.

11 6. This Court has original jurisdiction pursuant to 28 U.S.C. § 1332(a)
12 because Plaintiffs are residents of California, Defendant maintains its principal place
13 of business in New York, and the matter in controversy exceeds the sum or value of
14 \$75,000, exclusive of interest and costs.

15 7. This Court has supplemental jurisdiction over the state law claims
16 pursuant to 28 U.S.C. §1367.

17 8. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b)(2) because
18 many of the acts and transactions, including the purchases and sales giving rise to this
19 action, occurred in this district and because Defendant (i) is authorized to conduct
20 business in this district, (ii) has intentionally availed itself of the laws and markets
21 within this district through its promotion, marketing, distribution and sale of its
22 products in this district; (iii) does substantial business in this district; (iv) advertises to
23 consumers residing in this district, and (v) is subject to personal jurisdiction in this
24 district.

25 **THE PARTIES**

26 9. Plaintiff Charlie McDonald is a resident of Santa Ana, California who
27 purchased Defendant's "KIND Fruit & Nut Almond & Apricot," "KIND Fruit & Nut
28 Almond & Coconut," "KIND Plus Peanut Butter Dark Chocolate + Protein," and

1 “KIND Plus Dark Chocolate Cherry Cashew + Antioxidants.” Plaintiff McDonald
2 began purchasing the Products in or around the summer of 2013 and continued to buy
3 the Products on about a weekly basis from Von’s and Office Depot stores in or near
4 Santa Ana, California until on or around April 5, 2015. Plaintiff McDonald paid
5 approximately \$2.00 for each KIND Product that he purchased.

6 10. Plaintiff Ben Karter is a resident of Irvine, California who purchased
7 Defendant’s “KIND Fruit & Nut Almond & Apricot,” “KIND Fruit & Nut Almond &
8 Coconut,” “KIND Plus Peanut Butter Dark Chocolate + Protein,” and “KIND Plus
9 Dark Chocolate Cherry Cashew + Antioxidants.” Plaintiff Krater began purchasing
10 the Products in or around 2010 and continued to buy the Products on about a weekly
11 basis from Sprouts and Starbucks stores in or near Irvine, California until on or around
12 March of 2015. Plaintiff Krater paid approximately \$2.00 for each KIND Product that
13 he purchased.

14 11. Defendant KIND, LLC is a Delaware Limited Liability Company
15 headquartered at 8 West 38th Street, 6th Floor, New York, New York 10018. KIND is a
16 manufacturer and distributor of whole nut and fruit bars and snacks targeted at health
17 conscious consumers. The company was founded in 2004 and now sells its products
18 throughout the United States and internationally.

19 **THE KIND PRODUCTS**

20 **KIND Fruit & Nut Almond & Apricot**

21 12. Defendant advertises the “KIND Fruit & Nut Almond & Apricot” Product
22 by putting false and misleading claims on the label, stating or suggesting that the
23 Product is “All Natural,” made from “natural ingredients,” and is an “all natural food.”
24 Defendant further falsely claims that the Product is “healthy” and “wholesome” and
25 further makes claims suggesting that the product may be useful in maintaining healthy
26 dietary practices such as “Good Source of Fiber,” “No Trans Fat,” “Very Low
27 Sodium,” and “low glycemic index.”
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13. 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, the serving size for one bar is “40 [grams] and the product contains “3.5 [grams of] saturated fat.”

14. Plaintiffs read and relied on each of the quoted statements above in paragraphs 12 through 13 that are found on the “KIND Fruit & Nut Almond & Apricot” packaging.

15. 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 unlawful levels of saturated fat.

16. Plaintiffs would consider buying the Product again in future if it was advertised truthfully.

KIND Fruit & Nut Almond & Coconut

17. 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 further makes claims suggesting that the product may be useful in maintaining

1 healthy dietary practices such as “Good Source of Fiber,” “No Trans Fat,” “Very Low
2 Sodium” and “low glycemic index.”



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11 18. The ingredients in the “KIND Fruit & Nut Almond & Coconut” include
12 “Almonds, coconut, honey, non GMO glucose, crisp rice, chicory root fiber, [and] soy
13 lecithin” Additionally, the serving size for one bar is “40 [grams] and the product
14 contains “5 [grams of] saturated fat.”

15 19. Plaintiffs read and relied on each of the quoted statements above in
16 paragraphs 17 through 18 that are found on the “KIND Fruit & Nut Almond &
17 Coconut” packaging.

18 20. Despite being advertised as “All Natural,” the Product contains the
19 artificial and synthetic ingredients soy lecithin and non GMO glucose. Moreover, the
20 Product is not “healthy” because it contains unlawful levels of saturated fat.

21 21. Plaintiffs would consider buying the Product again in future if it was
22 advertised truthfully.

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

24 22. Defendant advertises the “KIND Plus Peanut Butter Dark Chocolate +
25 Protein” Product by putting false and misleading claims on the label, stating or
26 suggesting that the Product is “All Natural” and is an “all natural food.” Defendant
27 further falsely claims that the Product is “healthy” and “wholesome” and further
28 makes claims suggesting that the product may be useful in maintaining healthy dietary

1 practices such as “Good Source of Fiber,” “No Trans Fat,” and “Low Sodium,” “+
2 protein,” “7g protein,” and “low glycemic.”



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

16 24. Plaintiffs read and relied on each of the quoted statements above in
17 paragraphs 22 through 33 that are found on the “KIND Plus Peanut Butter Dark
18 Chocolate + Protein” packaging.

19 25. Despite being advertised as “All Natural,” the product contains the
20 artificial and synthetic ingredients soy protein isolate, palm kernel oil, non GMO
21 glucose and soy lecithin. Moreover, the Product is not “healthy” because it contains
22 unlawful levels of saturated fat.

23 26. Plaintiffs would consider buying the Product again in future if it was
24 advertised truthfully.

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

26 27. Defendant advertises the “KIND Plus Dark Chocolate Cherry Cashew +
27 Antioxidants” Product by putting false and misleading claims on the label, stating or
28 suggesting that the Product is “All Natural” and is an “all natural food.” Defendant

1 further falsely claims that the Product is “healthy” and “wholesome” and further
2 makes claims suggesting that the product may be useful in maintaining healthy dietary
3 practices such as “Good Source of Fiber,” “No Trans Fat,” and “Low Sodium,” “+
4 antioxidants,” and “50% DV antioxidants vitamins A, C, and E” and “low glycemic
5 index.”



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

19 29. Plaintiffs read and relied on each of the quoted statements above in
20 paragraphs 27 through 28 that are found on the “KIND Plus Dark Chocolate Cherry
21 Cashew + Antioxidants” packaging.

22 30. Despite being advertised as “All Natural” the product contains the
23 artificial and synthetic ingredients palm kernel oil, non GMO glucose, and soy
24 lecithin. Moreover, the Product is not “healthy” because it contains unlawful levels of
25 saturated fat.

26 31. Plaintiffs would consider buying the Product again in future if it was
27 advertised truthfully.

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1 2302, 2407. Although this definition is not a regulation, it is the “most definitive
2 statement of the agency’s view.”³

3 35. Courts and trade members have requested that the FDA provide a
4 regulatory definition of “natural,” however, the FDA has declined to provide a
5 determination because the time required to conduct a public hearing “would take two
6 to three years to complete,” and the agency’s resources are currently devoted to other,
7 higher priorities.”⁴

8 36. Similar to the FDA, the United States Department of Agriculture
9 (“USDA”), which regulates the labeling of meat and poultry, has also set limits on the
10 use of the term “natural.” The USDA’s Food Safety and Inspection Service states that
11 the term “natural” may be used on labeling of meat and poultry products so long as
12 “(1) the product does not contain any artificial flavor or flavorings, color ingredient,
13 or chemical preservative ... or any other artificial or synthetic ingredient, and (2) the
14 product and its ingredients are not more than minimally processed.”⁵

15 37. Under the USDA’s guidelines, if a product is severely processed, the
16 product can be labeled “All Natural” if the ingredient would not significantly change
17 the character of the product to the point that it could no longer be considered a natural
18 product. However, even in that case, “the natural claim must be qualified to clearly
19 and conspicuously identify the ingredient, e.g., all natural or all natural ingredients
20 except dextrose, modified food starch, etc.”⁶

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23 ³ See letter from Michael M. Landa, Acting Director, Center for Food Safety and
24 Applied Nutrition to Judge Jerome B. Simandle dated September 16, 2010, filed in
25 *Ries et al., v. Hornell Brewing Co., Inc.*, Case No. 10-1139 (N.D. Cal.), Docket No.
54.

26 ⁴ See *id.* (Letter to Judge Simandle).

27 ⁵ See the United States Department of Agriculture Food Standards and Labeling
28 Policy book available at
http://www.fsis.usda.gov/OPPDE/larc/Policies/Labeling_Policy_Book_082005.pdf
(last visited April 17, 2015).

⁶ *Id.*

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

9 39. The KIND products contain several synthetic ingredients described
10 below.

11 **Soy Lecithin and Soy Protein Isolate**

12 40. Each of the KIND Products contains the artificial ingredient soy lecithin.
13 In addition, the “KIND Plus Peanut Butter Dark Chocolate + Protein” contains the
14 artificial ingredient Soy Protein Isolate. Soy lecithin and soy protein isolate are used to
15 increase protein content without increasing the carbohydrate and fat content. These
16 soy products are all heavily processed to remove the natural bean flavor so that the
17 finished “soy” product no longer tastes like soy. These soy products are further refined
18 through unnatural processes using chemical additives. Soy lecithin and soy protein
19 isolate are commonly refined through the use of a volatile synthetic solvent, hexane.
20 Hexane is obtained from petroleum products. 40 C.F.R. § 99.2155. Moreover, the
21 lecithin contained in soy lecithin is considered synthetic by federal regulators. *See* 721
22 C.F.R. § 205.605(b).

23 **Non GMO Glucose**

24 41. Non GMO glucose is more commonly known as glucose syrup, dried
25 glucose syrup, or corn syrup. *See* 21 C.F.R. 184.1865 Each of the KIND Products
26 contain “non GMO glucose.” Glucose syrup is the liquid form of starch and can be
27 derived from wheat, potato, or rice. Most companies, however, use cornstarch to
28 produce glucose syrup. Plaintiffs aver and allege that the Non GMO glucose found in

1 the KIND products is derived from corn starch. To leach the starch from the corn
2 kernel, the shelled corn is soaked for several hours in a dilute sulfur dioxide solution,
3 which is a synthetic substance. Once the starch is leached, it is then further processed
4 to produce the glucose syrup.

5 **Vegetable Glycerin**

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

13 **Palm Kernel Oil**

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

18 **Natural Apricot Flavor**

19 44. The “KIND Fruit & Nut Almond & Apricot” contains the ingredient
20 “natural apricot flavor.” Natural flavors must be derived from a spice, fruit or fruit
21 juice, vegetable or vegetable juice, edible yeast, herb, bark, bud, root, leaf or similar
22 plant material, meat, seafood, poultry, eggs, dairy products, or fermentation products
23 thereof.” 21 C.F.R. § 101.22. It is unknown at this time whether the processing used
24 to derive the “natural apricot flavor” from the natural source renders the final
25 ingredient so heavily processed that it can longer be considered to be a “natural”
26 ingredient. Further discovery is, therefore, necessary with regard to that issue.

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1 **THE KIND PRODUCTS ARE MISBRANDED AS “HEALTHY”**

2 45. California’s counterpart to the FDCA, known as the Sherman Law,
3 incorporates the FDCA’s food and drug regulations. Cal. Health & Safety Code §§
4 109925, 110110, 111550.

5 46. On March 17, 2015, the FDA sent a “warning letter” to Defendant
6 informing it that the KIND Products are misbranded under the FDCA.⁷

7 47. Specifically, the KIND Products bear the labeling claims “Healthy and
8 tasty, Convenient and wholesome” in conjunction with other labeling claims like
9 “good source of fiber,” “no trans fats,” “very low sodium” [Kind Fruit & Nut Almond
10 & Apricot, Kind Fruit & Nut Almond & Coconut, and Kind Plus Dark Chocolate
11 Cherry Cashew + Antioxidants], “low sodium” [Kind Plus Peanut Butter Dark
12 Chocolate + Protein], “+ antioxidants” [Kind Plus Dark Chocolate Cherry Cashew +
13 Antioxidants], “50% DV antioxidants vitamins A, C and E” [Kind Plus Dark
14 Chocolate Cherry Cashew + Antioxidants], “+ protein” [Kind Plus Peanut Butter Dark
15 Chocolate + Protein], and “7g protein” [Kind Plus Peanut Butter Dark Chocolate +
16 Protein].” However, none of the KIND products meet the requirements for use of the
17 claim “healthy” that are set forth in 21 CFR 101.65(d)(2).

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

25 49. Specifically, the “KIND Fruit & Nut Almond & Apricot” product
26 contains 3.5 grams of saturated fat, the “KIND Fruit & Nut Almond & Coconut”

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28 ⁷ See March 17, 2015 FDA Warning Letter to KIND, LLC, *available at*
<http://www.fda.gov/ICECI/EnforcementActions/WarningLetters/ucm440942.htm> (last
visited April 17, 2015).

1 product contains 5 grams of saturated fat, the “KIND Plus Peanut Butter Dark
2 Chocolate + Protein” product contains 3.5 grams of saturated fat, and the “KIND Fruit
3 & Nut Dark Chocolate Cherry Cashew + Antioxidants” contains 2.5 grams of
4 saturated fat.

5 50. Moreover, those amounts exceed the maximum of 15% of calories from
6 saturated fat in the “low saturated fat” definition. Accordingly, the KIND Products do
7 not meet the requirements for use of the nutrient content claim “healthy” on a food
8 label and are misbranded pursuant to 21 CFR 101.65(d)(2) and California’s Sherman
9 Law.

10 **Additional FDCA Violations**

11 51. Aside from being misbranded as healthy, the KIND Products are further
12 misbranded under the FDCA.

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

20 53. The term “plus” is defined in 21 CFR 101.54(e). This term may be used
21 on the label or in labeling of foods to describe the level of nutrients (such as vitamins
22 and minerals) in the food, provided that:

23 (1) The food contains at least 10 percent more of the Reference Daily Intake
24 (RDI) or Daily Reference Value (DRV) for the nutrient per RACC consumed
25 than an appropriate reference food,

26 (2) Where the claim is based on nutrients that are added to the food, that the
27 fortification is in accordance with the policy on fortification of foods in 21 CFR
28 104.20, and

1 (3) The claim bears the required information for relative claims as described in
2 21 CFR 101.13(j)(2) and 101.54(e)(1)(iii).

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

10 55. All four of the KIND Products are further misbranded within the meaning
11 of 21 U.S.C. § 343(r)(2)(A)(v), because the labels include the nutrient content claim
12 “Good Source of Fiber” without including the required statement disclosing that the
13 food is not low in total fat in immediate proximity to the claim. Pursuant to 21 CFR
14 101.54(d), if a product label makes a claim with respect to the level of dietary fiber
15 (e.g., that the product is a good source of fiber) and the food is not “low” in total fat as
16 defined in 21 CFR 101.62(b)(2), then the label must disclose the level of total fat per
17 serving.

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

23 57. The KIND Products are also misbranded because the nutrition
24 information is not disclosed in accordance with 21 C.F.R. § 101.9. Specifically, the
25 labels bear a claim about fatty acids (i.e., “no trans fat”) but fail to include the levels
26 of monounsaturated fatty acids and polyunsaturated fatty acids in the nutrition
27 information as required by §§ 21 CFR 101.9 (c)(2)(iii) and (iv). The “KIND Plus
28 Peanut Butter Dark Chocolate + Protein” product label includes the nutrient content

1 claims: “+ protein” and “plus 7 g protein” on the principal display panel; however, the
2 nutrition label fails to include the percent DV for protein as required when the label
3 bears a nutrient content claim for protein as required by 21 C.F.R § 101.9(c)(7)(i).

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

11 59. The “KIND Plus Peanut Butter Dark Chocolate + Protein” product
12 ingredient list does not meet the requirements in 21 CFR 101.4(b)(2) because the label
13 declares the standardized multicomponent food, peanut butter, but does not declare the
14 sub-ingredients as required in 21 CFR 101.4(b)(2)(i). In accordance with
15 101.4(b)(2)(ii), if the ingredients of the standardized food are incorporated in the
16 finished food ingredient list, then the name of the standardized ingredient must not be
17 listed.

18 60. The KIND Products’ ingredient statements declare “non GMO glucose.”
19 This is not an appropriate common or usual name for glucose syrup or dried glucose
20 syrup in accordance with 21 CFR 101.4 and 168.120 or 168.121.

21 **RELIANCE AND INJURY**

22 61. All of Defendant’s false and/or misleading claims challenged herein relate
23 to matters that are material and important to a consumer’s purchasing decision, as they
24 concern the ingredients of the KIND Products, the qualities and/or composition of the
25 Products and the reason for which they are sold.

26 62. Consumers frequently rely on food label representations and information
27 in making purchase decisions. Here, Plaintiffs and other class members reasonably
28 relied to their detriment on Defendant’s misleading representations and omissions.

1 63. Defendant’s uniform claims in its marketing and promotional materials
2 are intended to, and did, induce Plaintiffs and members of the Classes defined herein
3 to rely upon those representations that Defendant’s Products were “All Natural” and
4 “Healthy.” These representations were a substantial factor in causing Plaintiffs and
5 members of the Classes to purchase Defendant’s Products.

6 64. At the time members of the Classes purchased the Products, they were
7 unaware of the fact that the Products contained synthetic ingredients and are
8 misbranded as “healthy.”

9 65. Plaintiffs also sustained legally cognizable injury in the form of lost
10 money as a result of Defendant’s misbranding, which also was in the nature of an
11 omission, i.e., Defendant’s failure to adequately disclose the KIND Products’
12 synthetic ingredients. Had Defendant labeled the KIND Products in conformance with
13 applicable FDCA and state law food regulations, Plaintiffs would not have purchased
14 them at all.

15 66. Plaintiffs and members of the Classes have been injured in fact and have
16 suffered out of pocket losses. Plaintiffs and members of the Classes therefore seek a
17 full refund and/or rescission of the transaction and all further equitable and injunctive
18 relief as provided by applicable law.

19 **CLASS ACTION ALLEGATIONS**

20 67. Pursuant to Rules 23(a), (b)(3) and/or (b)(2) of the Federal Rules of Civil
21 Procedure, Plaintiffs bring this action on behalf of themselves and consumer classes
22 initially defined as follows:

23 **The Nationwide Class**

24 All purchasers of KIND Products in the United States labeled “KIND Fruit
25 & Nut Almond & Apricot,” “KIND Fruit & Nut Almond & Coconut,”
26 “KIND Plus Peanut Butter Dark Chocolate + Protein,” “KIND Plus Dark
27 Chocolate Cherry Cashew + Antioxidants” for personal or household use
28 and not for resale, during the applicable statute of limitations period.

1 Excluded from the Class are governmental entities, Defendant, any entity in
2 which Defendant has a controlling interest, Defendant’s employees, officers,
3 directors, legal representatives, heirs, successors and wholly or partly owned
4 subsidiaries or affiliated companies, including all parent companies, and
5 their employees; and the judicial officers, their immediate family members
6 and court staff assigned to this case.

7 **The California Sub-Class**

8 All purchasers of KIND Products in California and states with similar
9 consumer protection laws labeled “KIND Fruit & Nut Almond & Apricot,”
10 “KIND Fruit & Nut Almond & Coconut,” “KIND Plus Peanut Butter Dark
11 Chocolate + Protein,” “KIND Plus Dark Chocolate Cherry Cashew +
12 Antioxidants” for personal or household use and not for resale, during the
13 applicable statute of limitations period. Excluded from the Class are
14 governmental entities, Defendant, any entity in which Defendant has a
15 controlling interest, Defendant’s employees, officers, directors, legal
16 representatives, heirs, successors and wholly or partly owned subsidiaries or
17 affiliated companies, including all parent companies, and their employees;
18 and the judicial officers, their immediate family members and court staff
19 assigned to this case.

20 68. The proposed Classes are so numerous that individual joinder of all the
21 members is impracticable. Due to the nature of the trade and commerce involved,
22 however, Plaintiffs believe the total number of Class members is at least in the
23 hundreds of thousands and members of the Classes are numerous. While the exact
24 number and identities of the Class members are unknown at this time, such
25 information can be ascertained through appropriate investigation and discovery. The
26 disposition of the claims of the Class members in a single class action will provide
27 substantial benefits to all parties and to the Court.

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1 69. Pursuant to Rule 23(b)(2), Defendant has acted or refused to act on
2 grounds generally applicable to the Classes, thereby making final injunctive relief or
3 corresponding declaratory relief and damages as to the Products appropriate with
4 respect to the Classes as a whole. In particular, Defendant has failed to disclose the
5 true nature of the Products being marketed as described herein.

6 70. There is a well-defined community of interest in the questions of law and
7 fact involved, affecting the Plaintiffs and the Classes and these common questions of
8 fact and law include, but are not limited to, the following:

- 9 a. Whether the claims discussed above are true, misleading, or reasonably
10 likely to deceive;
- 11 b. Whether the KIND Products contain artificial or synthetic ingredients;
- 12 c. Whether the KIND Products are misbranded under the FDCA;
- 13 d. Whether Defendant's alleged conduct violates public policy;
- 14 e. Whether the alleged conduct constitutes violations of the laws asserted
15 herein;
- 16 f. Whether Defendant engaged in false or misleading advertising;
- 17 g. Whether Plaintiffs and Class members have sustained monetary loss
18 and the proper measure of that loss;
- 19 h. Whether Plaintiffs and Class members are entitled to an award of
20 punitive damages; and;
- 21 i. Whether Plaintiffs and Class members are entitled to declaratory and
22 injunctive relief.
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24 71. Plaintiffs' claims are typical of the claims of the members of the Classes.
25 Plaintiffs and all members of the Classes have been similarly affected by Defendant's
26 common course of conduct since they all relied on Defendant's representations
27 concerning the KIND Products and purchased the Products based on those
28 representations.

1 72. Plaintiffs will fairly and adequately represent and protect the interests of
2 the Classes. Plaintiffs have retained counsel with substantial experience in handling
3 complex class action litigation in general and scientific claims, including for food
4 products in particular. Plaintiffs and their counsel are committed to vigorously
5 prosecuting this action on behalf of the Classes and have the financial resources to do
6 so.

7 73. Plaintiffs and the members of the Classes suffered, and will continue to
8 suffer harm as a result of the Defendant's unlawful and wrongful conduct. A class
9 action is superior to other available methods for the fair and efficient adjudication of
10 the present controversy. Individual joinder of all members of the Classes is
11 impracticable. Even if individual Class members had the resources to pursue
12 individual litigation, it would be unduly burdensome to the courts in which the
13 individual litigation would proceed. Individual litigation magnifies the delay and
14 expense to all parties in the court system of resolving the controversies engendered by
15 Defendant's common course of conduct. The class action device allows a single court
16 to provide the benefits of unitary adjudication, judicial economy, and the fair and
17 efficient handling of all Class members' claims in a single forum. The conduct of this
18 action as a class action conserves the resources of the parties and of the judicial
19 system and protects the rights of the class members. Furthermore, for many, if not
20 most, a class action is the only feasible mechanism that allows an opportunity for legal
21 redress and justice.

22 74. Adjudication of individual Class members' claims with respect to
23 Defendant would, as a practical matter, be dispositive of the interests of other
24 members not parties to the adjudication, and could substantially impair or impede the
25 ability of other class members to protect their interests.

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FIRST CAUSE OF ACTION

BREACH OF EXPRESS WARRANTY

(By the Nationwide Class and the California Sub-Class)

75. Plaintiffs and the Class members reallege and incorporate by reference each allegation set forth above and further allege as follows.

76. Plaintiffs bring this second cause of action individually and on behalf of the members of the Class against Defendant.

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

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

78. Defendant breached each of the warranties in the above-quoted language because the KIND Products contain synthetic ingredients and are branded as healthy even though the products contain unlawful levels of saturated fat.

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

80. Defendant breached its express warranty by selling Products that contain artificial ingredients and that are not healthy.

81. Plaintiffs, on behalf of themselves and the class, seek actual damages for Defendant’s breach of warranty.

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SECOND CAUSE OF ACTION

BREACH OF IMPLIED WARRANTY OF MERCHANTABILITY

(By the Nationwide Class and the California Sub-Class (Cal. Civ. Code § 1792))

82. Plaintiffs and the Class members repeat and reallage each and every allegation above, as if set forth in full herein.

83. Plaintiffs bring this second cause of action individually and on behalf of the members of the Class against Defendant.

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

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

86. In reliance upon Defendant’s skill and judgment and the implied warranties discussed above, Plaintiff and the Class members purchased the KIND Products.

87. The KIND Products were not altered by Plaintiffs or the Class Members.

88. Plaintiffs, on behalf of themselves and the class, seek actual damages for Defendant’s breach of warranty.

THIRD CAUSE OF ACTION

UNJUST ENRICHMENT

(By the Nationwide Class and the California Sub-Class)

89. Plaintiffs and the Class members incorporate by reference and re-allege each and every allegation set forth above as though fully set forth herein.

90. Plaintiffs bring this fourth cause of action individually and on behalf of the members of the Class against Defendant.

91. “The unjust enrichment claim can be made from common class wide proof.” *Westways World Travel, Inc. v. AMR Corp.*, 218 F.R.D. 223, 239 (C.D. Cal.

1 2003) (certifying a nationwide class where plaintiffs alleged defendants were unjustly
2 enriched through a common scheme.). "Although there are numerous permutations of
3 the elements of the unjust enrichment cause of action in the various states, there are
4 few real differences. In all states, the focus of an unjust enrichment claim is whether
5 the defendant was unjustly enriched. At the core of each state's law are two
6 fundamental elements - the defendant received a benefit from the plaintiff and it
7 would be inequitable for the defendant to retain that benefit without compensating the
8 plaintiff. The focus of the inquiry is the same in each state." *In re Mercedes-Benz Tele*
9 *Aid Contract Litig.*, 257 F.R.D. 46, 58 (D.N.J. Apr. 24, 2009), quoting *Powers v.*
10 *Lycoming Engines*, 245 F.R.D. 226,231 (E.D. Pa. 2007).

11 92. Plaintiffs and the Class members conferred a benefit on Defendant by
12 purchasing the KIND Products.

13 93. Defendant has been unjustly enriched in retaining the revenues derived
14 from Class members' purchases of the KIND Products, which retention under these
15 circumstances is unjust and inequitable because Defendant misrepresented the facts
16 concerning the ingredients in the Products and caused Plaintiffs and the Class to lose
17 money as a result thereof.

18 94. Plaintiffs and the Class members were injured as a direct and proximate
19 result of Defendant's breach because they would not have purchased the KIND
20 Products if the true facts had been known. Because Defendant's retention of the non-
21 gratuitous benefit conferred on it by Plaintiffs and Class members is unjust and
22 inequitable, Defendant must pay restitution to Plaintiffs and Class members for its
23 unjust enrichment, as ordered by the Court. Additionally, Plaintiffs and the Class seek
24 attorneys' fees and costs for their unjust enrichment claim.

25 **FOURTH CAUSE OF ACTION**

26 **INTENTIONAL MISREPRESENTATION**

27 **(By the Nationwide Class and the California Sub-Class)**

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1 95. Plaintiffs and the Class members incorporate by reference and re-allege
2 each and every allegation set forth above as though fully set forth herein.

3 96. Plaintiffs bring this fifth cause of action individually and on behalf of the
4 members of the Class against Defendant.

5 97. Defendant represented to the public, including to Plaintiffs and the Class,
6 that the KIND products were all natural and healthy.

7 98. Defendant's misrepresentations were false and misleading.

8 99. At the time Defendant made statements or representations regarding the
9 nature and qualities of the KIND products, Defendant knew that the statements and
10 representations were false and misleading.

11 100. Defendant made the misrepresentations alleged herein with the intention
12 of inducing and persuading Plaintiffs and the class to purchase the KIND Products.

13 101. Defendant further withheld and omitted material information about the
14 KIND Products with the intention of inducing and persuading Plaintiffs and the class
15 to purchase the products.

16 102. Plaintiffs and the class, by purchasing the KIND products, reasonably
17 relied on Defendant's false and misleading statements and misrepresentations, and on
18 the absence of the material information that Defendant omitted.

19 103. As a direct and proximate result of Defendant's intentional
20 misrepresentations and deceptive omissions, Plaintiffs and the class were induced to
21 pay for worthless products.

22 104. Plaintiffs and the Class were damaged through their purchase and use of
23 the KIND Products.

24 105. Plaintiffs' and the Class's reliance on Defendant's statements and
25 representations of the nature and characteristics of the KIND Products was reasonable.
26 As a result, Defendant is guilty of malice, oppression, and fraud, and Plaintiffs and the
27 Class are therefore entitled to recover exemplary or punitive damages. Additionally,
28 Plaintiffs and the Class seek attorneys' fees and costs as allowed by statute.

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FIFTH CAUSE OF ACTION
NEGLIGENT MISREPRESENTATION

(By the Nationwide Class and the California Sub-Class)

106. Plaintiffs and the Class members incorporate by reference and re-allege each and every allegation set forth above as though fully set forth herein.

107. Plaintiffs bring this fifth cause of action individually and on behalf of the members of the Class against Defendant.

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

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

110. In its marketing, advertising and promoting of the KIND Products and in making the careless, unreasonable and negligent misrepresentations and omissions alleged herein, including the representations made to Plaintiffs and the members of the Class, Defendant was in a superior position than Plaintiffs and the members of the Class to know the material facts.

111. In its marketing, advertising and promoting of the KIND Products and in making the careless, unreasonable and negligent misrepresentations and omissions alleged herein, including the representations made to Plaintiffs and the members of the Class, Defendant should have reasonably foreseen that Plaintiffs and members of the Class were likely to rely upon the misrepresentations.

112. 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 Plaintiffs and the members of the Class, would

1 attach importance in their purchasing decisions or conduct regarding the purchase of
2 KIND Products.

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

6 114. As alleged in this complaint, Plaintiffs and the members of the Class
7 uniformly relied on Defendant's careless, unreasonable and negligent
8 misrepresentations and omissions, and under the circumstances described above such
9 reliance was reasonable and justifiable.

10 115. As a result of Defendant's careless, unreasonable and negligent statements
11 and omissions as described herein, Plaintiffs and the members of the Class have been
12 injured and have suffered loss of money and property, and they are entitled to recover
13 damages from Defendant and attorneys' fees and costs as allowed by statute.

14 **SIXTH CAUSE OF ACTION**

15 **VIOLATION OF NEW YORK GENERAL BUSINESS LAW § 349, *et seq.***

16 **(By the Nationwide Class)**

17 116. Plaintiffs and the Class members incorporate by reference and re-allege
18 each and every allegation set forth above as though fully set forth herein.

19 117. Plaintiffs bring this sixth cause of action individually and on behalf of the
20 members of the Class against Defendant.

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

24 119. The foregoing acts and practices were directed at consumers.

25 120. The foregoing deceptive acts and practices are misleading in a material
26 way because the fundamentally misrepresent the ingredients in the KIND Products.

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1 121. Plaintiffs and members of the Class were injured as a direct and
2 proximate result of Defendant's violation of G.B.L. § 349 because they paid for the
3 Product, which they would not have purchased had they known the true facts.

4 122. Application of G.B.L. § 349 to all Class members throughout the country,
5 regardless of their state or residence, is appropriate because, *inter alia*:

- 6 a) Defendant's nationwide sales operations are controlled, directed and originate
7 from New York;
- 8 b) Defendant's marketing operations, including the decisions regarding how to
9 advertise, promote and sell the KIND Products, are made in New York, and
10 internal marketing personnel and external marketing consultants all are based
11 there;
- 12 c) Defendant's sales force, customer service, and Internet website and advertising
13 operations are controlled, directed and originate in New York;
- 14 d) Defendant's principal place of business is in New York;
- 15 e) All significant employees of Defendant are based in New York;
- 16 f) The facts and circumstances of this case include such numerous contacts with
17 the State of New York as to create a state interest in applying New York's
18 consumer laws to Defendant, making application of New York law to the entire
19 Class appropriate.
20

21 136. Plaintiffs and the Class seek to enjoin the unlawful acts and practices described
22 herein, to recover actual damages or fifty dollars, whichever is greater, three times
23 actual damages, and reasonable attorneys' fees and costs.

24 **SEVENTH CAUSE OF ACTION**

25 **VIOLATION OF NEW YORK GENERAL BUSINESS LAW § 350, *et seq.***

26 **(By the Nationwide Class)**

27 123. Plaintiffs and the Class members incorporate by reference and re-allege
28 each and every allegation set forth above as though fully set forth herein.

1 124. Plaintiffs bring this seventh cause of action individually and on behalf of
2 the members of the Class against Defendant.

3 125. By the acts and conduct alleged herein, Defendant committed false
4 advertising in the conduct of business, trade or commerce in the state of New York.

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

9 127. The foregoing false advertisements are misleading in a material way
10 because they fundamentally misrepresent the nature of the ingredients in the KIND
11 Products to induce consumers to purchase the products.

12 128. Plaintiffs and members of the Class were injured as a direct and proximate
13 result of Defendant's violation of G.B.L. § 350 because they paid for the Products,
14 which they would not have purchased had they known the true facts.

15 129. Application of G.B.L. § 350 to all Class members throughout the country,
16 regardless of their state or residence, is appropriate because, *inter alia*:

- 17 g) Defendant's nationwide sales operations are controlled, directed and originate
18 from New York;
- 19 h) Defendant's marketing operations, including the decisions regarding how to
20 advertise, promote and sell the KIND Products, are made in New York, and
21 internal marketing personnel and external marketing consultants all are based
22 there;
- 23 i) Defendant's sales force, customer service, and Internet website and advertising
24 operations are controlled, directed and originate in New York;
- 25 j) Defendant's principal place of business is in New York;
- 26 k) All significant employees of Defendant are based in New York;
- 27 l) The facts and circumstances of this case include such numerous contacts with
28 the State of New York as to create a state interest in applying New York's

1 consumer laws to Defendant, making application of New York law to the entire
2 Class appropriate.

3 130. Plaintiffs and the Class seek to enjoin the unlawful acts and practices
4 described herein, to recover actual damages or fifty dollars, whichever is greater, three
5 times actual damages, and reasonable attorneys' fees.

6 **EIGHTH CAUSE OF ACTION**

7 **VIOLATION OF CALIFORNIA'S CONSUMERS LEGAL REMEDIES ACT**

8 **(By the California Sub-Class)**

9 131. Plaintiffs and the Class members incorporate by reference and re-allege
10 each and every allegation set forth above as though fully set forth herein.

11 132. Plaintiffs bring this eighth cause of action individually and on behalf of
12 the members of the California Sub-Class against Defendant.

13 133. This cause of action is brought pursuant to the Consumers Legal
14 Remedies Act, California Civil Code §1750, *et seq.* (the "Act"). Plaintiffs are
15 consumers as defined by California Civil Code §1761(d). The Products are goods
16 within the meaning of the Act.

17 134. Defendant violated and continues to violate the Act by engaging in the
18 following practices proscribed by California Civil Code §1770(a) in transactions with
19 Plaintiffs and the Class which were intended to result in, and did result in, the sale of
20 the KIND Products:

- 21 (5) Representing that [the Products have] ... characteristics ... uses [or]
22 benefits ... which it does not have ... ***
- 23 (7) Representing that [the Products are] of a particular standard, quality or
24 grade... if [they are] of another. ***
- 25 (9) Advertising a good... with intent not to sell it as advertised. ***
- 26 (16) Representing that [the Products have] been supplied in accordance with a
27 previous representation when [it have] not.
28

1 135. Defendant violated the Act by representing false or deceptive information
2 in the labeling of the Products as described above, when they knew, or should have
3 known, that the representations and advertisements were false or misleading.

4 136. Plaintiffs and other members of the Class reasonably relied upon the
5 Defendant's representations as to the quality and attributes of the KIND Products.

6 137. Plaintiffs and other members of the Class were deceived by Defendant's
7 representations about the quality and attributes of the Products, including but not
8 limited to the benefits and characteristics of the Products, taken as a whole, as
9 described herein. Plaintiffs and other Class members would not have purchased the
10 Products had they known the Defendant's claims were untrue, and had they known the
11 true nature of the Products.

12 138. Plaintiffs and the Class seek an order of this Court awarding Plaintiffs and
13 the Class prospective and retrospective injunctive relief, and attorneys' fees and costs
14 as allowed by statute. Plaintiffs are not seeking damages or punitive damages at this
15 time for their CLRA claim, but will amend their complaint 30 days after Defendant
16 has received their CLRA letter to seek damages and punitive damages.

17 **NINTH CAUSE OF ACTION**

18 **VIOLATION OF CALIFORNIA'S FALSE ADVERTISING LAW**

19 **(By the California Sub-Class)**

20 139. Plaintiffs and the Class members incorporate by reference and re-allege
21 each and every allegation set forth above as though fully set forth herein.

22 140. Plaintiffs bring this ninth cause of action individually and on behalf of the
23 members of the California Sub-Class against Defendant.

24 141. Plaintiffs have standing to pursue this claim as Plaintiffs have suffered
25 injury in fact as a result of Defendant's actions as set forth herein. Specifically, prior
26 to the filing of this action, Plaintiffs purchased the KIND Products in reliance upon
27 Defendant's marketing claims.

28

1 142. Defendant’s business practices as alleged herein constitute unfair,
2 deceptive, untrue, and misleading advertising pursuant to California Business and
3 Professions Code section 17500, *et seq.* because Defendant advertises the Products
4 Plaintiffs purchased in a manner that is untrue and misleading, and that is known or
5 reasonably should have been known to Defendant to be untrue or misleading.

6 143. Defendant’s wrongful business practices have caused injury to Plaintiffs
7 and the Class.

8 144. Pursuant to section 17535 of the California Business and Professions
9 Code, Plaintiff s as well as the California Sub-Class seek an order of this court
10 enjoining Defendant from continuing to engage in deceptive business practices, false
11 advertising, and any other act prohibited by law, including those set forth in the
12 complaint.

13 145. Plaintiffs also seek an order for the disgorgement and restitution of all
14 monies from the sale of the Products which were unjustly acquired through acts of
15 unlawful, unfair, and/or fraudulent competition.

16 **TENTH CAUSE OF ACTION**

17 **VIOLATION OF CALIFORNIA’S UNFAIR COMPETITION LAW**

18 **(By the California Sub-Class)**

19 146. Plaintiffs and the Class members incorporate by reference and re-allege
20 each and every allegation set forth above as though fully set forth herein.

21 147. Plaintiffs bring this tenth cause of action individually and on behalf of the
22 members of the California Sub-Class against Defendant.

23 148. California Business and Professional Code § 17200 prohibits any
24 “unlawful, unfair or fraudulent business act or practice.”

25 *****Unlawful*****

26 149. The acts, omissions, misrepresentations, practices, and non-disclosures of
27 Defendant as alleged herein constitute “unlawful” business acts and practices in that
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1 Defendant’s conduct violates the False Advertising Law and the Consumer Legal
2 Remedies Act.

3 150. Defendant’s conduct is further “unlawful” because it violates the FDCA
4 and its implementing regulations in the following ways:

5 a. The KIND Products bear the labeling claims “Healthy and tasty,
6 Convenient and wholesome” in conjunction with other labeling claims like
7 “good source of fiber,” “no trans fats,” “very low sodium” [Kind Fruit & Nut
8 Almond & Apricot, Kind Fruit & Nut Almond & Coconut, and Kind Plus Dark
9 Chocolate Cherry Cashew + Antioxidants], “low sodium” [Kind Plus Peanut
10 Butter Dark Chocolate + Protein], “+ antioxidants” [Kind Plus Dark Chocolate
11 Cherry Cashew + Antioxidants], “50% DV antioxidants vitamins A, C and E”
12 [Kind Plus Dark Chocolate Cherry Cashew + Antioxidants], “+ protein” [Kind
13 Plus Peanut Butter Dark Chocolate + Protein], and “7g protein” [Kind Plus
14 Peanut Butter Dark Chocolate + Protein].” However, none of the KIND
15 products meet the requirements for use of the claim “healthy” that are set forth
16 in 21 CFR 101.65(d)(2). In accordance with 21 CFR 101.65(d)(2), food
17 products may only use the term “healthy” as an implied nutrient content claim
18 on the label or in the labeling of a food provided that the food, among other
19 things, is “low saturated fat” as defined in 21 CFR 101.62(c)(2) (i.e., the food
20 has a saturated fat content of 1 g or less per Reference Amount Customarily
21 Consumed (RACC) and no more than 15 percent of the calories are from
22 saturated fat). However, the KIND Products have more than 1 gram of saturated
23 fat.
24

25 b. The “KIND Peanut Butter Dark Chocolate + Protein” and “KIND Dark
26 Chocolate Cherry Cashew + Antioxidants” products bear the term “+” (plus) as
27 part of the product name but the products do not comply with the requirements
28 governing the use of that term. The term “+” read in conjunction with “7 g

1 Protein” and “50% DV Antioxidant, vitamins A, C and E,” meets the definition
2 for a nutrient content claim because it characterizes the Products’ level of
3 vitamins and minerals, which are nutrients of the type required to be in nutrition
4 labeling. *See* 21 CFR 101.13(b).

5 c. The term “plus” is defined in 21 CFR 101.54(e). This term may be used
6 on the label or in labeling of foods to describe the level of nutrients (such as
7 vitamins and minerals) in the food, provided that:

- 8 (1) the food contains at least 10 percent more of the Reference Daily
9 Intake (RDI) or Daily Reference Value (DRV) for the nutrient per RACC
10 consumed than an appropriate reference food,
- 11 (2) where the claim is based on nutrients that are added to the food, that
12 the fortification is in accordance with the policy on fortification of foods
13 in 21 CFR 104.20, and
- 14 (3) the claim bears the required information for relative claims as
15 described in 21 CFR 101.13(j)(2) and 101.54(e)(1)(iii).

16 However, neither labels for the “KIND Peanut Butter Dark Chocolate +
17 Protein” and “KIND Dark Chocolate Cherry Cashew + Antioxidants” state the
18 identity of the reference food and the percentage (or fraction) that the nutrient is
19 greater relative to the RDI or DRV declared in immediate proximity to the most
20 prominent such claim. Accordingly, these products are misbranded within the
21 meaning of section 403(r)(1)(A) of the Act because they bear the nutrient
22 content claim "plus" but do not comply with the regulations governing the use
23 of this claim. All four of the KIND Products are further misbranded within the
24 meaning of 21 U.S.C. § 343(r)(2)(A)(v), because the labels include the nutrient
25 content claim “Good Source of Fiber” without including the required statement
26 disclosing that the food is not low in total fat in immediate proximity to the
27 claim. Pursuant to 21 CFR 101.54(d), if a product label makes a claim with
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1 respect to the level of dietary fiber (e.g., that the product is a good source of
2 fiber) and the food is not “low” in total fat as defined in 21 CFR 101.62(b)(2),
3 then the label must disclose the level of total fat per serving.

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

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

19
20 The “KIND Plus Dark Chocolate Cherry Cashew + Antioxidants”
21 product ingredient list does not meet the requirements in 21 CFR § 101.4(b),
22 which requires that the name of an ingredient shall be a specific name and not a
23 collective (generic) name. This product lists the collective terms “mixed nuts,”
24 “dried fruits,” and “vitamins” as multicomponent foods and declares the
25 specific nuts, fruits, and vitamins as sub-ingredients. The regulations do not
26 allow the collective listing of nuts, fruits, or vitamins.

27 f. The “KIND Plus Peanut Butter Dark Chocolate + Protein” product
28 ingredient list does not meet the requirements in 21 CFR 101.4(b)(2) because

1 the label declares the standardized multicomponent food, peanut butter, but
2 does not declare the sub-ingredients as required in 21 CFR 101.4(b)(2)(i). In
3 accordance with 101.4(b)(2)(ii), if the ingredients of the standardized food are
4 incorporated in the finished food ingredient list, then the name of the
5 standardized ingredient must not be listed.

6 g. The KIND Products' ingredient statements declare "non GMO glucose."
7 This is not an appropriate common or usual name for glucose syrup or dried
8 glucose syrup in accordance with 21 CFR 101.4 and 168.120 or 168.121.

9 151. Defendant's conduct is further "unlawful" because it violates the
10 California Sherman Food, Drug, and Cosmetic Law, see Cal. Health & Safety Code §
11 109875-111900, which incorporates the provisions of the FDCA. See id. §§ 110110-
12 110115.

13 72. Defendant profited from its sales of the falsely, deceptively, or unlawfully
14 advertised Product to unwary consumers.

15 *****Unfair*****

16 152. The acts, omissions, misrepresentations, practices, and non-disclosures of
17 Defendant as alleged herein also constitute "unfair" business acts and practices under
18 the UCL in that Defendant's conduct is immoral, unscrupulous, and offends public
19 policy by seeking to profit from male vulnerability to false or deceptive virility or
20 aphrodisiac claims. Further, the gravity of Defendant's conduct outweighs any
21 conceivable benefit of such conduct.

22 *****Fraudulent*****

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

27 154. Defendant profited from its sales of the fraudulently, falsely and
28 deceptively advertised Product to unwary consumers.

1 155. In accordance with Bus. & Prof. Code § 17203, Plaintiffs seek an order
2 enjoining Defendant from continuing to conduct business through unlawful, unfair,
3 and/or fraudulent acts and practices, and to commence a corrective advertising
4 campaign.

5 156. Plaintiffs further seeks an order for the disgorgement and restitution of all
6 profit earned from the sale of the Defendant's Products, which were acquired through
7 acts of unlawful, unfair, and/or fraudulent competition by Defendant. Plaintiffs also
8 seek attorneys' fees and costs as allowed by statute.

9 **PRAYER FOR RELIEF**

10 Wherefore, Plaintiffs, on behalf of themselves, all others similarly situated and
11 the general public, pray for judgment against Defendant as to each and every cause of
12 action, including:

- 13 A. An order declaring this action to be a proper Class Action and
14 requiring Defendant to bear the costs of class notice;
15 B. An order appointing Plaintiffs as class representatives and the Law
16 Offices of Ronald A. Marron as Class Counsel.
17 C. An order awarding Plaintiffs and the proposed Class members
18 damages, and punitive damages in the amount to be determined at
19 trial;
20 D. An order awarding restitution and disgorgement of Defendant's
21 revenues from the Products to Plaintiffs and the proposed Class
22 members;
23 E. An order awarding attorneys' fees and costs to Plaintiffs;
24 F. An order awarding declaratory relief, retrospective and prospective
25 injunctive relief as permitted by law or equity, including enjoining
26 Defendant from continuing the unlawful practices as set forth
27 herein, and injunctive relief to remedy Defendant's past conduct;
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G. An order compelling Defendant to engage in a corrective advertising campaign to inform the public concerning the true nature of the Products, including a recall of the falsely and deceptively labeled Products.

H. An order providing for all other such equitable relief as may be just and proper.

JURY DEMAND

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

Dated: April 17, 2015

/s/ Ronald A. Marron
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