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10 UNITED STATES DISTRICT COURT
11 CENTRAL DISTRICT OF CALIFORNIA
12 WESTERN DIVISION

13 MAYRA GALVEZ and CHRIS C.
14 GALVEZ, Individually and on Behalf of
15 All Others Similarly Situated

16 Plaintiffs,

17 vs.

18 KIND LLC d/b/a KIND FOODS LLC,

19 Defendant.

No. 2:15-cv-3082

CLASS ACTION COMPLAINT

DEMAND FOR JURY TRIAL

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1 Plaintiffs Mayra and Chris Galvez (“Plaintiffs”), allege the following based
2 upon personal knowledge as to themselves and their own acts, and upon
3 information and belief and investigation by Plaintiffs’ counsel, which included,
4 among other things, a review of public documents, FDA letters, marketing
5 materials, and announcements made by KIND LLC d/b/a KIND FOODS LLC
6 (“KIND” or “Defendant”) as to all other matters. Plaintiffs believe that substantial
7 additional evidentiary support exists for the allegations set forth herein and will be
8 available after a reasonable opportunity for discovery.

9 INTRODUCTION

10 1. This action seeks to remedy the unfair, deceptive, and unlawful
11 business practices of Defendant with respect to the marketing, advertising,
12 labeling, and sales of four of Defendant’s snack bars: KIND Fruit & Nut Almond
13 & Apricot; KIND Fruit & Nut Almond & Coconut; KIND Plus Peanut Butter Dark
14 Chocolate + Protein; and KIND Plus Dark Chocolate Cherry Cashew +
15 Antioxidants (collectively, the “KIND Snack Bars”).

16 2. Defendant is a global manufacturer of snack products, including fruit
17 & nut bars and granola bars. Defendant markets these products under the KIND
18 brand throughout the United States and specifically targets health conscious
19 consumers. KIND’s website states prominently on its “About KIND” page:
20 “There’s healthy. There’s tasty. Then there’s healthy and tasty. At KIND, we
21 believe you deserve both—we call it our brAND philosophy.”¹

22 3. Until recently, Defendant was marketed as “KIND Healthy Snacks,”
23 which can be found in numerous references to the company in articles.² The
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25 _____
26 ¹ <http://www.kindsnacks.com/about/> (last visited April 24, 2015).

27 ² See, e.g., Mian Ridge, *Kind Healthy Snacks founder describes his long slog to*
28 *success, Los Angeles Times*, March 22, 2015, [http://www.latimes.com/business/la-](http://www.latimes.com/business/la-fi-books-20150322-story.html)

1 company's logo – largely removed from its website, but still visible on several
2 pages – prominently displayed the phrase “KIND Healthy Snacks.”



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9 4. Using its “brAND” philosophy to market its purportedly healthy
10 snack products, KIND sold 458 million units in the United States in 2014.³

11 5. Defendant markets the KIND Snack Bars as, among other things,
12 “healthy,” “healthy and tasty, convenient and wholesome,” “plus,” “good source of
13 fiber,” and “no trans fats.” Defendant makes these and other claims on the labels
14 of the KIND Snack Bars, on its website, and via other marketing and informational
15 forums, touting the supposed healthiness of the bars to consumers.

16 6. Despite Defendant’s claims that KIND Snack Bars are “healthy” or
17 contain healthy nutrients or ingredients, the KIND Snack Bars do not meet the
18 requirements established by the U.S. Food and Drug Administration (“FDA”) to
19 make such claims. In reality, KIND Snack Bars contain elevated levels of
20 saturated fat, not enough nutrients to bear the terms “+,” “plus,” or other health-
21 related terms, and other ingredients or elements that indicate the KIND Snack Bars
22 are not truly “healthy.”

23 7. On March 17, 2015, KIND received a warning letter from the FDA
24 (the “FDA Letter”) regarding KIND Snack Bars. In this letter, the FDA informed

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26 ³ Danielle Burger and Craig Giammona, *Kind Bars Aren’t Healthy Enough for*
27 *‘Healthy’ Tag, FDA Says*, Bloomberg Business, April 14, 2015,
28 <http://www.bloomberg.com/news/articles/2015-04-14/kind-bars-aren-t-healthy-enough-for-healthy-label-fda-says>.

1 KIND that KIND Snack Bars “are in violation of section 403 of the Federal Food,
2 Drug, and Cosmetic Act (the Act) [21 U.S.C. §343] and its implementing
3 regulations found in Title 21, Code of Federal Regulations, Part 101 (21 CFR
4 101).” A true and correct copy of the FDA Letter is attached hereto as Exhibit A.

5 8. Section 403 of the Federal Food, Drug, and Cosmetic Act (“FDCA”)
6 enumerates various ways that “[a] food shall be deemed to be misbranded.” 21
7 U.S.C. §343. As shown below, KIND Snack Bars are in violation of several of
8 these enumerated provisions. Accordingly, KIND Snack Bars are misbranded
9 within the meaning of the FDCA and are being falsely and deceptively marketed to
10 consumers.

11 9. As a result of Defendant’s false and misleading labeling, packaging,
12 and marketing of KIND Snack Bars, Plaintiffs and members of the proposed
13 Classes (defined below) have suffered injury in fact, including economic damages,
14 and have lost money or property. Specifically, Plaintiffs and members of the
15 Classes have purchased the KIND Snack Bars under the mistaken belief that these
16 products were healthier and/or had additional benefits compared to other snack
17 products. But for Defendant’s false and misleading advertising and marketing of
18 KIND Snack Bars, Plaintiffs and members of the Classes would not have
19 purchased or paid as much for KIND Snack Bars.

20 10. Plaintiffs bring claims on behalf of themselves and the proposed
21 Classes for unjust enrichment; breach of express warranty; breach of implied
22 warranty of merchantability; and violations of the Consumers Legal Remedies Act,
23 Cal. Civ. Code §§1750, et seq. (“CLRA”); and the Unfair Competition Law, Cal.
24 Bus. & Prof. Code §§17200, et seq. (“UCL”). Plaintiffs seek to permanently
25 enjoin Defendant from using the claims “healthy,” “+” or “plus,” “good source of
26 fiber,” and “no trans fats” on the labels of the KIND Snack Bars and from
27 marketing and selling the KIND Snack Bars in the United States as currently
28 advertised, packaged, and labeled. Further, Plaintiffs seek to obtain restitution and

1 other appropriate relief in the amount by which Defendant was unjustly enriched as
2 a result of its sales of the KIND Snack Bars. Finally, Plaintiffs seek reasonable
3 attorneys' fees pursuant to Cal. Code Civ. Proc. §1021.5 as this lawsuit seeks the
4 enforcement of an important right affecting the public interest and satisfies the
5 statutory requirements for an award of attorneys' fees.

6 **PARTIES**

7 11. Plaintiff Mayra Galvez is a citizen of California and resident of Los
8 Angeles County, California. Throughout the Classes Period (defined below), Ms.
9 Galvez purchased one or more KIND Snack Bars from various Starbucks stores in
10 Los Angeles County. Specifically, Ms. Galvez purchased KIND Snack Bars in
11 January, February, March, September, and November 2014, and in January and
12 March 2015. Ms. Galvez relied on Defendant's deceptive labeling, packaging, and
13 marketing in her decisions to purchase the KIND Snack Bars. Were it not for
14 Defendant's deceptive labeling, packaging, and marketing, Ms. Galvez would not
15 have purchased or paid as much for the KIND Snack Bars.

16 12. Plaintiff Chris C. Galvez is a citizen of California and resident of Los
17 Angeles County, California. Throughout the Classes Period (defined below), Mr.
18 Galvez purchased one or more KIND Snack Bars from various Starbucks stores in
19 Los Angeles County. Specifically, Mr. Galvez purchased KIND Snack Bars in
20 January, February, March, September, and November 2014, and in January and
21 March 2015. Mr. Galvez relied on Defendant's deceptive labeling, packaging, and
22 marketing in his decisions to purchase the KIND Snack Bars. Were it not for
23 Defendant's deceptive labeling, packaging, and marketing, Mr. Galvez would not
24 have purchased or paid as much for the KIND Snack Bars.

25 13. Defendant KIND is a Delaware limited liability company with its
26 principal place of business located in New York, New York. KIND is an
27 international manufacturer, distributor, and seller of various snack products,
28 including fruit & nut bars and granola bars.

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JURISDICTION AND VENUE

14. This Court has jurisdiction over this action under the Class action Fairness Act, 28 U.S.C. §1332(d). The aggregated claims of the individual Class members exceed the sum or value of \$5,000,000, exclusive of interests and costs, and this is a Class action in which the Defendant is not a citizen of the forum state.

15. This Court has personal jurisdiction over Defendant because Defendant has systematically and continuously conducted business in and throughout the State of California, and intentionally avails itself of the markets within California through the promotion, sale, marketing, and distribution of its products. Moreover, Defendant’s wrongful conduct, as described herein, foreseeably affects consumers in California.

16. Venue is proper in this District under 28 U.S.C. §1391(a) because a substantial part of the events or omissions giving rise to Plaintiffs’ claims occurred in this District. Alternatively, Defendant has distributed, marketed, advertised, labeled, and sold the KIND Snack Bars in this District. Thus, under 28 U.S.C. §§1391(c)(2) and (d), Defendant is deemed to reside in this District. As such, venue is proper in this judicial district under 28 U.S.C. §1391(b)(1) because Defendant is deemed to reside in this District and under 28 U.S.C. §1391(b)(2) because Defendant conducts business in this District and a substantial part of the acts or omissions giving rise to the claims set forth herein occurred in this District.

17. A venue affidavit pursuant to California Civil Code §1780(d) is attached hereto as Exhibit B.

FACTUAL ALLEGATIONS

A. KIND’s “Healthy” Branding and Marketing of its Products

18. KIND was established in 2004 as a natural foods company with eight bar varieties. Today, KIND sells over twenty-two bars and six “Healthy Grains

1 snackable clusters.”⁴ Its snack products can be found in 150,000 retail stores in
2 the United States.

3 19. KIND currently offers six product lines, all marketed consistently
4 with its “healthy” brand image: Fruit & Nut; Plus; Nuts & Spices; STRONG &
5 KIND; Healthy Grains Bars; and Healthy Grains Clusters.⁵ KIND claims that its
6 products “are made from all-natural whole nuts, fruits and whole grains,” and that
7 consumers will “find all of our snacks are pretty much the nirvana of healthful
8 tastiness.”⁶

9 20. It is clear that KIND prides itself on being a “healthy” snack brand.
10 Its entire company image, marketing, and branding revolves around providing
11 consumers with purportedly healthy and tasty snacks.

12 21. Unfortunately, KIND’s snack products are not as healthy as KIND
13 represents them to be. KIND Snack Bars do not meet the necessary requirements
14 to be labeled “healthy,” “plus,” “good source of fiber,” “no trans fats,” or other
15 claims Defendant makes with respect to the KIND Snack Bars.

16 **B. KIND’s Violations of Food Labeling Regulations**

17 **1. “Healthy”**

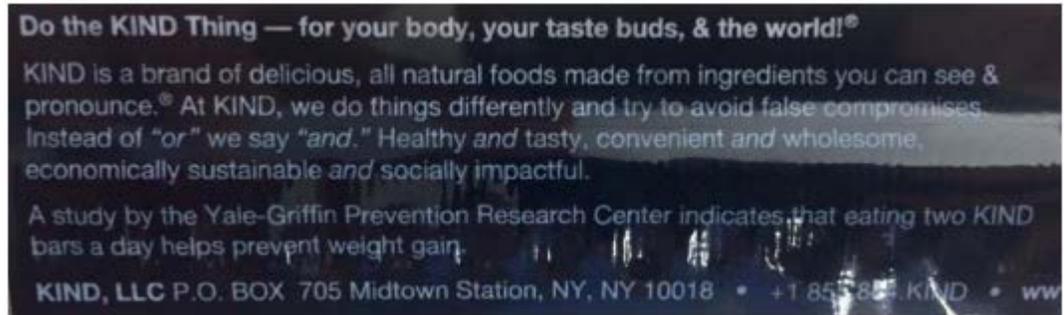
18 22. The FDCA and its implementing regulations found in Title 21, Code
19 of Federal Regulations, Part 101, govern food labeling, including the labeling of
20 the KIND Snack Bars, which are a food.

21 23. Below is an example of the label on the KIND Snack Bars bearing the
22 term “healthy”:
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26 ⁴ <http://www.kindsnacks.com/about/> (last visited April 24, 2015).

27 ⁵ <http://www.kindsnacks.com/store/> (last visited April 24, 2015).

28 ⁶ <http://www.kindsnacks.com/about/> (last visited April 24, 2015).



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8 24. Defendant labels and markets the KIND Snack Bars using the term
9 “healthy.” However, none of the KIND Snack Bars meet the requirements set
10 forth in 21 C.F.R. §101.65(d)(2) to be labeled as “healthy.”

11 25. 21 C.F.R. §101.65(d)(2) requires that in order for a food to be labeled
12 as “healthy” it must, among other things, be low in saturated fat.

13 26. A food is defined as being low in saturated fat if “[t]he food contains
14 1 g or less of saturated fatty acids per reference amount customarily consumed and
15 not more than 15% of calories from saturated fatty acids.” 21 C.F.R.
16 §101.62(c)(2)(i).

17 27. The KIND Fruit & Nut Almond & Apricot bar contains 3.5 g of
18 saturated fat per 40g of the food. The KIND Fruit & Nut Almond & Coconut bar
19 contains 5 g of saturated fat per 40g of the food. The KIND Plus Peanut Butter
20 Dark Chocolate + Protein bar contains 3.5 g of saturated fat per 40 g of the food.
21 And the KIND Plus Dark Chocolate Cherry Cashew + Antioxidants bar contains
22 2.5 g of saturated fat per 40 g of the food. Each of these bars thus contains more
23 than 1 g of saturated fat per the reference amount customarily consumed
24 (“RACC”) of 40 g, meaning they cannot be defined as low in saturated fat, and in
25 turn, cannot be labeled as “healthy.”

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

3 **2. “+” and “Plus”**

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



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

19 31. 21 C.F.R. §101.54(e) states, in part, that the term “plus” “may be used
20 on the label or in labeling of foods to describe the level of protein, vitamins,
21 minerals, dietary fiber, or potassium . . . provided that: (i) [t]he food contains at
22 least 10 percent more of the RDI [Reference Daily Intake] for vitamins or minerals
23 or of the DRV [Daily Reference Value] for protein, dietary fiber, or potassium
24 (expressed as a percent of the Daily Value) per reference amount customarily
25 consumed than an appropriate reference food; (ii) [w]here the claim is based on a
26 nutrient that has been added to the food, that fortification is in accordance with the
27 policy on fortification of foods in [21 C.F.R.] § 104.20”; and (iii) the claim bears

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

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

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

15 **3. "No Trans Fats"**

16 34. Defendant labels the KIND Snack Bars with the phrase "no trans
17 fats." However, none of the KIND Snack Bars meet the requirements set forth in
18 21 C.F.R. §101.9(c)(2)(iii) and (iv) to be labeled as containing "no trans fats."

19 35. 21 C.F.R. §101.9(c)(2)(iii) and (iv) require that in order for a food to
20 be labeled as containing "no trans fats," a manufacturer must include the amount of
21 polyunsaturated and monounsaturated fatty acids, respectively, on the food label.

22 36. Defendant fails to include the levels of polyunsaturated and
23 monounsaturated fatty acids on the labeling of the KIND Snack Bars as required
24 by federal regulations. Accordingly, Defendant cannot make a claim about fatty
25 acids on the labeling of the KIND Snack Bars, including using the phrase "no trans
26 fats."

27 37. Because Defendant labels the KIND Snack Bars as having "no trans
28 fats" despite the fact that they do not meet the requirements to bear such a claim,

1 the KIND Snack Bars are misbranded within the meaning of 21 U.S.C.
2 §343(q)(2)(A). *See also* FDA Letter at §3.a.

3 **4. “Good Source of Fiber”**

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

7 39. 21 C.F.R. §101.54(d) requires that if a food is labeled as being a
8 “good source of fiber,” and the food is not “low” in total fat, then the label must
9 disclose the level of total fat per serving in immediate proximity to the claim that
10 the food is a “good source of fiber.”

11 40. 21 C.F.R. §101.62(b)(2) defines a food as being “low” in fat if it has a
12 RACC greater than 30 g or greater than 2 tablespoons and contains 3 g or less of
13 fat per RACC, or has a RACC of 30 g or less or 2 tablespoons or less and contains
14 3 g or less of fat per RACC and per 50 g of food.

15 41. The KIND Fruit & Nut Almond & Apricot bar contains 10 g of total
16 fat per 40 g of the food. The KIND Fruit & Nut Almond & Coconut bar contains
17 12 g of total fat per 40 g of the food. The KIND Plus Peanut Butter Dark
18 Chocolate + Protein bar contains 13 g of total fat per 40 g of the food. And the
19 KIND Fruit & Nut Dark Chocolate Cherry Cashew + Antioxidants bar contains 9 g
20 of total fat per 40 g of the food. Each of these bars contains more than 3 g of total
21 fat per 40 g RACC, meaning they are not “low” in total fat. Thus, they cannot be
22 labeled as being a “good source of fiber” unless Defendant also discloses the level
23 of total fat per serving in immediate proximity to that claim.

24 42. Because Defendant labels the KIND Snack Bars as a “good source of
25 fiber” despite the fact that they do not meet the requirements to bear such a claim,
26 the KIND Snack Bars are misbranded within the meaning of 21 U.S.C.
27 §343(r)(2)(A)(V). *See also* FDA Letter at §2.

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1 43. In addition to the above reasons why the KIND Snack Bars are
2 misbranded, they are also misbranded within the meaning of 21 U.S.C. §343(a)
3 because their labeling is false or misleading. Reasonable consumers, including
4 Plaintiffs and Class members, expect that the KIND Snack Bars are properly
5 labeled as “healthy,” “+” or “plus,” “no trans fats,” and “good source of fiber.”
6 Because the KIND Snack Bars bear these claims but do not meet the requirements
7 to do so, their labeling is false or misleading within the meaning of the FDCA.

8 **C. California’s Sherman Food, Drug, and Cosmetic Law**

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

13 45. Section 110100(a) of the Sherman Law states: “All food labeling
14 regulations and any amendments to those regulations adopted pursuant to the
15 federal act [FDCA], in effect on January 1, 1993, or adopted on or after that date
16 *shall be the food regulations of this state.*” Cal. Health & Safety Code
17 §110100(a).

18 [emphasis added]

19 46. Article 6 of the Sherman Law, Cal. Health & Safety Code §§110660,
20 *et seq.*, concerns the misbranding of food. Section 110660 states that “[a]ny food
21 is misbranded if its labeling is false or misleading in any particular.” Section
22 110665 states that “[a]ny food is misbranded if its labeling does not conform with
23 the requirements for nutrition labeling as set forth in Section 403(q) (21 U.S.C.
24 Sec. 343(q)) of the federal act [FDCA] and the regulations adopted pursuant
25 thereto.” Section 110670 states that “[a]ny food is misbranded if its labeling does
26 not conform with the requirements for nutrient content or health claims as set forth
27 in Section 403(r) (21 U.S.C. Sec. 343(r)) of the federal act [FDCA] and the
28 regulations adopted pursuant thereto.”

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

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

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

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

13 **DAMAGES TO PLAINTIFF AND THE CLASS**

14 51. Plaintiffs purchased the KIND Snack Bars based on Defendant’s
15 labeling, advertising, and marketing that the KIND Snack Bars are, among other
16 things, “healthy” or “plus” products, as described above.

17 52. Defendant created, manufactured, distributed, and sold products that
18 are misbranded. Misbranded products cannot be legally manufactured, distributed,
19 sold, or held, and have no economic value and are legally worthless as a matter of
20 law.

21 53. Moreover, Plaintiffs and the members of the Classes would not have
22 purchased and/or paid a premium to purchase the KIND Snack Bars over
23 comparable products that do not purport to be “healthy” or “plus” products.

24 **RULE 9(b) ALLEGATIONS**

25 54. Federal Rule of Civil Procedure 9(b) provides that “[i]n alleging fraud
26 or mistake, a party must state with particularity the circumstances constituting
27 fraud or mistake.” Fed. R. Civ. P. 9(b). To the extent necessary, as detailed in the
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1 paragraphs above and below, Plaintiffs have satisfied the requirements of Rule 9(b)
2 by establishing the following elements with sufficient particularity:

3 55. WHO: Defendant KIND LLC made material misrepresentations and
4 omissions of fact in the labeling, packaging, and marketing of the KIND Snack
5 Bars.

6 56. WHAT: Defendant made material misrepresentations and omissions
7 of fact by using the terms “healthy,” “+” or “plus,” “good source of fiber,” and/or
8 “no trans fats” in the labeling, packaging, and marketing of the KIND Snack Bars.
9 Defendant made these claims with respect to the KIND Snack Bars even though
10 the KIND Snack Bars did not meet the requirements to make such claims.
11 Defendant’s misrepresentations and omissions were material because a reasonable
12 consumer would not have purchased or paid as much for the KIND Snack Bars if
13 he knew that they contained false representations.

14 57. WHEN: Defendant made the material misrepresentations and
15 omissions detailed herein continuously throughout the Classes Period.

16 58. WHERE: Defendant’s material misrepresentations and omissions
17 were made, inter alia, on the labeling and packaging of the KIND Snack Bars, on
18 Defendant’s website (www.kindsnacks.com), and through Defendant’s various
19 other advertisements.

20 59. HOW: Defendant made written misrepresentations and failed to
21 disclose material facts on the labeling and packaging of the KIND Snack Bars and
22 on its website and other advertising.

23 60. WHY: Defendant engaged in the material misrepresentations and
24 omissions detailed herein for the express purpose of inducing Plaintiff and other
25 reasonable consumers to purchase and/or pay a premium for Defendant’s KIND
26 Snack Bars based on the belief that they were “healthy,” “+” or “plus,” a “good
27 source of fiber,” and/or contained “no trans fats.” Defendant profited by selling
28 the KIND Snack Bars to millions of unsuspecting consumers nationwide.

CLASS ACTION ALLEGATIONS

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2 61. Plaintiffs bring this action individually and on behalf of the following
3 Class pursuant to Federal Rule of Procedure 23 (the “Nationwide Class”):

4 All individuals residing in the United States who purchased one or
5 more of the following snack bars: KIND Fruit & Nut Almond &
6 Apricot; KIND Fruit & Nut Almond & Coconut; KIND Plus Peanut
7 Butter Dark Chocolate + Protein; and KIND Plus Dark Chocolate
8 Cherry Cashew + Antioxidants for personal use and not for resale any
9 time between April 24, 2011 and the present (the “Class Period”).

10 62. Plaintiffs also bring this action individually and as a Class action
11 pursuant to Federal Rule of Civil Procedure 23 on behalf of all persons located
12 within the state of California (the “California Class”) and on behalf of all persons
13 located within states with similar consumer protection laws, breach of express
14 warranty laws, and breach of implied warranty laws (collectively with the
15 Nationwide and California Classes, the “Classes”).

16 63. Plaintiffs reserve the right to redefine the Classes prior to certification.

17 64. Excluded from the Classes are Defendant, any of its parent
18 companies, subsidiaries, and/or affiliates, its officers, directors, legal
19 representatives, and employees, any co-conspirators, all governmental entities, and
20 any judge, justice, or judicial officer presiding over this matter.

21 65. This action is brought and may properly be maintained as a Class
22 action pursuant to Federal Rule of Civil Procedure 23. This action satisfies the
23 numerosity, typicality, adequacy, predominance, and superiority requirements of
24 those provisions.

25 66. The Classes are so numerous that the individual joinder of all of its
26 members is impracticable. Due to the nature of the trade and commerce involved,
27 Plaintiffs believe that the total number of Class members is in the thousands and
28 that members of the Classes are geographically dispersed across the United States.

1 While the exact number and identities of the Class members are unknown at this
2 time, such information can be ascertained through appropriate investigation and
3 discovery.

4 67. Common questions of law and fact exist as to all members of the
5 Classes, and these common questions predominate over any questions affecting
6 only individual members of the Classes. These common legal and factual
7 questions, which do not vary from Class member to Class member, and which may
8 be determined without reference to the individual circumstances of any Class
9 member include, but are not limited to, the following:

10 a. whether Defendant violated provisions of the FDCA and
11 federal regulations through the labeling, packaging, and marketing of the
12 KIND Snack Bars;

13 b. whether the KIND Snack Bars are misbranded within the
14 meaning of the FDCA and/or the Sherman Law;

15 c. whether Defendant's labeling, packaging, and marketing of the
16 KIND Snack Bars was false and misleading;

17 d. whether Defendant's conduct constitutes negligent
18 misrepresentation;

19 e. whether Defendant's conduct constitutes a violation of the
20 Consumers Legal Remedies Act (Cal. Civ. Code §§1750, et seq.);

21 f. whether Defendant's conduct constitutes a violation of
22 California's false advertising law (Cal. Bus. & Prof. Code §§17500, et seq.);

23 g. whether Defendant's conduct constitutes an unfair, unlawful,
24 and/or fraudulent business practice in violation of California's unfair
25 competition law (Cal. Bus. & Prof. Code §§17200, et seq.);

26 h. whether Plaintiffs and the Classes are entitled to compensatory
27 damages, and if so, the nature of such damages;

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1 i. whether Plaintiffs and the Classes are entitled to restitutionary
2 relief; and

3 j. whether Plaintiffs and the Classes are entitled to injunctive
4 relief.

5 68. Plaintiffs' claims are typical of the claims of the members of the
6 Classes. Plaintiffs and all members of the Classes have been similarly affected by
7 Defendant's common course of conduct since they all relied on Defendant's
8 representations concerning the KIND Snack Bars and purchased one or more
9 KIND Snack Bars based on those representations.

10 69. Plaintiffs will fairly and adequately represent and protect the interests
11 of the Classes. Plaintiffs have retained counsel with substantial experience in
12 handling complex Class action litigation. Plaintiffs and their counsel are
13 committed to vigorously prosecuting this action on behalf of the Classes and have
14 the financial resources to do so.

15 70. A Class action is superior to other available methods for the fair and
16 efficient adjudication of the present controversy. Individual joinder of all members
17 of the Classes are impracticable. Even if individual members of the Classes had
18 the resources to pursue individual litigation, it would be unduly burdensome to the
19 courts in which the individual litigation would proceed. Individual litigation
20 magnifies the delay and expense to all parties in the court system of resolving the
21 controversies engendered by Defendant's common course of conduct. The class
22 action device allows a single court to provide the benefits of unitary adjudication,
23 judicial economy, and the fair and efficient handling of all Class members' claims
24 in a single forum. The conduct of this action as a class action conserves the
25 resources of the parties and of the judicial system and protects the rights of the
26 Classes. Furthermore, for many, if not most, a class action is the only feasible
27 mechanism that allows an opportunity for legal redress and justice.

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1 each state's law are two fundamental elements – the defendant received a benefit
2 from the plaintiff and it would be inequitable for the defendant to retain that
3 benefit without compensating the plaintiff. The focus of the inquiry is the same in
4 each state. Since there is no material conflict relating to the elements of unjust
5 enrichment between the different jurisdictions from which class members will be
6 drawn, California law applies to the claims of the Classes.

7 76. In the alternative, Plaintiffs bring this claim individually as well as on
8 behalf of the California Class.

9 77. At all times relevant hereto, Defendant deceptively labeled, marketed,
10 advertised, and sold KIND Snack Bars to Plaintiffs and the Classes.

11 78. Plaintiffs and members of the Classes conferred upon Defendant non-
12 gratuitous payments for KIND Snack Bars that they would not have if not for
13 Defendant's deceptive labeling, advertising, and marketing. Defendant accepted or
14 retained the non-gratuitous benefits conferred by Plaintiffs and members of the
15 Classes, with full knowledge and awareness that, as a result of Defendant's
16 deception, Plaintiffs and members of the Classes were not receiving a product of
17 the quality, nature, fitness, or value that had been represented by Defendant and
18 reasonable consumers would have expected.

19 79. Defendant has been unjustly enriched in retaining the revenues
20 derived from purchases of KIND Snack Bars by Plaintiffs and members of the
21 Classes, which retention under these circumstances is unjust and inequitable
22 because Defendant misrepresented, among other things, that KIND Snack Bars
23 were "healthy" and "plus" products, which caused injuries to Plaintiffs and
24 members of the Classes because they paid for, and/or paid a price premium due to
25 the mislabeling of KIND Snack Bars.

26 80. Retaining the non-gratuitous benefits conferred upon Defendant by
27 Plaintiffs and members of the Classes under these circumstances made Defendant's
28 retention of the non-gratuitous benefits unjust and inequitable. Thus, Defendant

1 must pay restitution to Plaintiffs and members of the Classes for unjust enrichment,
2 as ordered by the Court.

3 **SECOND CLAIM FOR RELIEF**

4 **(Breach of Express Warranty on Behalf of the California Class,**
5 **and Classes in the States with Similar Laws)**

6 81. Plaintiffs reallege each and every allegation contained above as if
7 fully set forth herein and, to the extent necessary, plead this cause of action in the
8 alternative.

9 82. Plaintiffs bring this Count individually under the laws of the state
10 where they purchased KIND Snack Bars and on behalf of: (a) all other persons
11 who purchased KIND Snack Bars in the same state; and (b) all other persons who
12 purchased KIND Snack Bars in states having similar laws regarding express
13 warranty.

14 83. Defendant's representations, as described herein, are affirmations by
15 Defendants that KIND Snack Bars are, among other things, "healthy" and/or
16 "plus" products. Defendant's representations regarding KIND Snack Bars are
17 made to Plaintiffs and the other members of the Classes at the point of purchase
18 and are part of the description of the goods. Those promises constituted express
19 warranties and became part of the basis of the bargain, between Defendant on the
20 one hand, and Plaintiffs and the Classes on the other.

21 84. In addition, or in the alternative, Defendant made each of the above-
22 described representations to induce Plaintiffs and the Classes to rely on such
23 representations, and they each did so rely on Defendant's representations as a
24 material factor in their decisions to purchase KIND Snack Bars. Plaintiffs and
25 other members of the Classes would not have purchased KIND Snack Bars but for
26 these representations and warranties.

27 85. KIND Snack Bars did not, in fact, meet the representations Defendant
28 made about them, as described herein.

1 86. At all times relevant to this action, Defendant falsely represented that
2 KIND Snack Bars were, among other things, “healthy” and/or “plus” products.

3 87. At all times relevant to this action, Defendant made false
4 representations in breach of the express warranties and in violation of state express
5 warranty laws, including:

- 6 a. Alaska St. §45.02.313;
- 7 b. Ariz. Rev. Stat. Ann. §47-2313;
- 8 c. Ark. Code Ann. §4-2-313;
- 9 d. Cal. Com. Code §2313;
- 10 e. Colo. Rev. Stat. §4-2-313;
- 11 f. Conn. Gen. Stat. Ann. §42a-2-313;
- 12 g. D.C. Code §28:2-313;
- 13 h. Fla. Stat. §672.313;
- 14 i. Haw. Rev. Stat. §490:2-313;
- 15 j. 810 Ill. Comp. Stat. 5/2-313;
- 16 k. Ind. Code §26-1-2-313;
- 17 l. Kan. Stat. Ann. §84-2-313;
- 18 m. La. Civ. Code. Ann. art. 2520;
- 19 n. Maine Rev. Stat. Ann. 11 §2-313;
- 20 o. Mass. Gen. Laws Ann. 106 §2-313;
- 21 p. Minn. Stat. Ann. §336.2-313;
- 22 q. Miss. Code Ann. §75-2-313;
- 23 r. Mo. Rev. Stat. §400.2-313;
- 24 s. Mont. Code Ann. §30-2-313;
- 25 t. Neb. Rev. Stat. §2-313;
- 26 u. Nev. Rev. Stat. §104.2313;
- 27 v. N.H. Rev. Stat. Ann. §382-A:2-313;
- 28 w. N.J. Stat. Ann. §12A:2-313;

- 1 x. N.M. Stat. Ann. §55-2-313;
- 2 y. N.Y. U.C.C. Law §2-313;
- 3 z. N.C. Gen. Stat. Ann. §25-2-313;
- 4 aa. Okla. Stat. Ann. tit. 12A, §2-313;
- 5 bb. Or. Rev. Stat. §72.3130;
- 6 cc. Pa. Stat. Ann. tit. 13, §2313;
- 7 dd. R.I. Gen. Laws §6A-2-313;
- 8 ee. S.C. Code Ann. §36-2-313;
- 9 ff. S.D. Codified Laws. §57A-2-313;
- 10 gg. Tenn. Code Ann. §47-2-313;
- 11 hh. Tex. Bus. & Com. Code Ann. §2.313;
- 12 ii. Utah Code Ann. §70A-2-313;
- 13 jj. Vt. Stat. Ann. tit. 9A§2-313;
- 14 kk. Wash. Rev. Code §62A.2-313;
- 15 ll. W. Va. Code §46-2-313;
- 16 mm. Wyo. Stat. Ann. §34.1-2-313;

17 88. The above statutes do not require privity of contract in order to
18 recover for breach of express warranty.

19 89. As a proximate result of this breach of warranty by Defendant,
20 Plaintiffs and other members of the Classes have been damaged in an amount to be
21 determined at trial because: (a) they paid a price premium due to the deceptive
22 labeling of KIND Snack Bars; and (b) KIND Snack Bars did not have the
23 composition, attributes, characteristics, nutritional value, health qualities, or value
24 promised.

25 90. Wherefore, Plaintiffs and the Classes demand judgment against
26 Defendant for compensatory damages, plus interest, costs, and such additional
27 relief as the Court may deem appropriate or to which Plaintiffs and the Classes
28 may be entitled.

1 **THIRD CLAIM FOR RELIEF**

2 **(Breach of Implied Warranty on Behalf of the California Class,**
3 **and Classes in the States with Similar Laws)**

4 91. Plaintiffs reallege each and every allegation contained above as if
5 fully set forth herein and, to the extent necessary, plead this cause of action in the
6 alternative.

7 92. Plaintiffs bring this Count individually under the laws of the state
8 where they purchased KIND Snack Bars and on behalf of: (a) all other persons
9 who purchased KIND Snack Bars in the same state; and (b) all other persons who
10 purchased KIND Snack Bars in states having similar laws regarding implied
11 warranties.

12 93. Uniform Commercial Code §2-314 provides that unless excluded or
13 modified, a warranty that the goods shall be merchantable is implied in a contract
14 for their sale if the seller is a merchant with respect to goods of that kind. This
15 implied warranty of merchantability acts as a guarantee by the seller that his goods
16 are fit for the ordinary purposes for which they are to be used.

17 94. Defendant developed, manufactured, advertised, marketed, sold,
18 and/or distributed the KIND Snack Bars and represented that they were fit for a
19 particular use, specifically that they were, among other things, “healthy” and/or
20 “plus” products. Contrary to such representations, Defendant failed to disclose that
21 the labeling and marketing of KIND Snack Bars violated federal and state laws and
22 regulations, as promised.

23 95. At all times, the following states listed below, including the District of
24 Columbia, have codified and adopted the provisions of the Uniform Commercial
25 Code governing the implied warranty of merchantability:

- 26 a. Ala. Code §7-2-314;
27 b. Alaska Stat. §45.02.314;
28 c. Ariz. Rev. Stat. Ann. §47-2314;

- 1 d. Ark. Code Ann. §4-2-314;
- 2 e. Cal. Com. Code §2314;
- 3 f. Colo. Rev. Stat. §4-2-314;
- 4 g. Conn. Gen. Stat. Ann. §42a-2-314;
- 5 h. Del. Code Ann. tit. 6 §2-314;
- 6 i. D.C. Code §28:2-314;
- 7 j. Fla. Stat. §672.314;
- 8 k. Ga. Code Ann. §11-2-314;
- 9 l. Haw. Rev. Stat. §490:2-314;
- 10 m. Idaho Code §28-2-314;
- 11 n. 810 Ill. Comp. Stat. Ann. 5/2-314;
- 12 o. Ind. Code Ann. §26-1-2-314;
- 13 p. Iowa Code Ann. §554.2314;
- 14 q. Kan. Stat. Ann. §84-2-314;
- 15 r. Ky. Rev. Stat. Ann. §355.2-314;
- 16 s. La. Civ. Code Ann. art. §2520;
- 17 t. Me. Rev. Stat. Ann. 11 §2-314;
- 18 u. Md. Code Ann. Com. Law §2-314;
- 19 v. Mass. Gen. Laws Ch. 106 §2-314;
- 20 w. Mich. Comp. Laws Ann. §440.2314;
- 21 x. Minn. Stat. Ann. §336.2-314;
- 22 y. Miss. Code Ann. §75-2-314;
- 23 z. Mo. Rev. Stat. §400.2-314;
- 24 aa. Mont. Code Ann. §30-2-314;
- 25 bb. Nev. Rev. Stat. §104.2314;
- 26 cc. N.H. Rev. Stat. Ann. §382-A:2-314;
- 27 dd. N.J. Stat. Ann. §12A:2-314;
- 28 ee. N.M. Stat. Ann. §55-2-314;

- 1 ff. N.Y. U.C.C. Law §2-314;
- 2 gg. N.C. Gen. Stat. Ann. §25-2-314;
- 3 hh. N.D. Cent. Code §41-02-314;
- 4 ii. Ohio Rev. Code Ann. §1302.27;
- 5 jj. Okla. Stat. Ann. tit. 12A §2-314;
- 6 kk. Or. Rev. Stat. §72.3140;
- 7 ll. Pa. Stat. Ann. tit. 13 §2314;
- 8 mm. R.I. Gen. Laws §6A-2-314;
- 9 nn. S.C. Code Ann. §36-2-314;
- 10 oo. S.D. Codified Laws §57A-2-314;
- 11 pp. Tenn. Code Ann. §47-2-314;
- 12 qq. Tex. Bus. & Com. Code Ann. §2-314;
- 13 rr. Utah Code Ann. §70A-2-314;
- 14 ss. Va. Code Ann. §8.2-314;
- 15 tt. Vt. Stat. Ann. tit. 9A §2-314;
- 16 uu. W. Va. Code §46-2-314;
- 17 vv. Wash. Rev. Code §62A 2-314;
- 18 ww. Wis. Stat. Ann. §402.314; and
- 19 xx. Wyo. Stat. Ann. §34.1-2-314.

20 96. As developer, manufacturer, producer, advertiser, marketer, seller
21 and/or distributor of snack products, Defendant is a “merchant” within the meaning
22 of the various states’ commercial codes governing the implied warranty of
23 merchantability.

24 97. Further, Defendant is a merchant with respect to KIND Snack Bars.
25 Defendant developed, manufactured, produced, advertised, marketed, sold, and/or
26 distributed KIND Snack Bars and represented to Plaintiffs and the Classes that
27 they developed them to be, among other things, “healthy” and “plus” products as
28 described herein. Further, Defendant, by selling KIND Snack Bars to Plaintiffs

1 and the Classes have held itself out as retailer of KIND Snack Bars and, in fact,
2 have derived a substantial amount of revenues from the sale of KIND Snack Bars.

3 98. KIND Snack Bars can be classified as “goods,” as defined in the
4 various states’ commercial codes governing the implied warranty of
5 merchantability.

6 99. As a merchant of KIND Snack Bars, Defendant knew that purchasers
7 relied upon them to develop, manufacture, produce, sell, and distribute products
8 that were, among other things, “healthy” and a “plus” product, as promised.

9 100. Defendant developed, manufactured, produced, sold, and distributed
10 KIND Snack Bars to consumers such as Plaintiffs and the Classes. Defendant
11 knew that the KIND Snack Bars would be used as, among other things, a “healthy”
12 and a “plus” product, as promised.

13 101. Defendant specifically represented in the labeling of KIND Snack
14 Bars that they are, among other things, “healthy” and a “plus” product, as
15 described herein.

16 102. At the time that Defendant developed, manufactured, sold, and/or
17 distributed KIND Snack Bars, Defendant knew the purpose for which KIND Snack
18 Bars were intended and impliedly warranted that KIND Snack Bars were of
19 merchantable quality and was fit for its ordinary purpose – among other things, a
20 “healthy” and a “plus” product.

21 103. Defendant breached its implied warranties in connection with the sale
22 of KIND Snack Bars to Plaintiffs and members of the Classes. KIND Snack Bars
23 were not fit for their ordinary purposes and intended use as, among other things, a
24 “healthy” and a “plus” product, because they were in violation of state and federal
25 laws and regulations.

26 104. Defendant had actual knowledge that KIND Snack Bars were not,
27 among other things, a “healthy” and a “plus” product as promised and thus were
28 not fit for their ordinary purpose and Plaintiffs therefore were not required to notify

1 Defendant of the breach. If notice is required, Plaintiffs and the Classes adequately
2 have provided Defendant of such notice through the filing of this lawsuit.

3 105. As a direct and proximate result of Defendant's breach of implied
4 warranties, Plaintiffs and other members of the Classes have been injured.
5 Plaintiffs and the other members of the Classes would not have purchased or paid a
6 premium for KIND Snack Bars but for Defendant's representations and warranties.
7 Defendant misrepresented the character of KIND Snack Bars, which caused
8 injuries to Plaintiffs and the other members of the Classes because either they paid
9 a price premium due to the deceptive labeling or they purchased products that were
10 not of a character and fitness as promised and therefore had no value to Plaintiffs
11 and the other members of the Classes.

12 **FOURTH CLAIM FOR RELIEF**
13 **(Violation of the Consumer Fraud Laws on Behalf**
14 **of Classes in the States with Similar Laws)**

15 106. Plaintiffs reallege each and every allegation contained above as if
16 fully set forth herein and, to the extent necessary, plead this cause of action in the
17 alternative.

18 107. Plaintiffs bring this Count individually under the laws of the state
19 where they purchased KIND Snack Bars and on behalf of all other persons who
20 purchased KIND Snack Bars in states having similar laws regarding consumer
21 fraud and deceptive trade practices.

22 108. Plaintiffs and each of the other members of the Classes are consumers,
23 purchasers, or other persons entitled to the protection of the consumer protection
24 laws of the state in which they purchased KIND Snack Bars.

25 109. The consumer protection laws of the state in which Plaintiffs and the
26 other members of the Classes purchased KIND Snack Bars declare that unfair or
27 deceptive acts or practices, in the conduct of trade or commerce, are unlawful.
28

1 110. Forty states and the District of Columbia have enacted statutes
2 designed to protect consumers against unfair, deceptive, fraudulent, and
3 unconscionable trade and business practices and false advertising and that allow
4 consumers to bring private and/or class actions. These statutes are found at:

5 a. Alabama Deceptive Trade Practices Act, Ala. Code §8-19-1 *et seq.*;

6 b. Alaska Unfair Trade Practices and Consumer Protection Act, Alaska
7 Code §45.50.471 *et seq.*;

8 c. Arkansas Deceptive Trade Practices Act, Ark. Code Ann. §4-88-101 *et*
9 *seq.*;

10 d. California Consumers Legal Remedies Act, Cal. Civ. Code §1750 *et*
11 *seq.*, and California's Unfair Competition Law, Cal. Bus. & Prof. Code §17200 *et*
12 *seq.*;

13 e. Colorado Consumer Protection Act, Colo. Rev. Stat. §6-1-101 *et seq.*;

14 f. Connecticut Unfair Trade Practices Act, Conn. Gen. Stat. §42-110a *et*
15 *seq.*;

16 g. Delaware Deceptive Trade Practices Act, Del. Code tit. 6§2511 *et seq.*;

17 h. District of Columbia Consumer Protection Procedures Act, D.C. Code
18 §28 3901 *et seq.*;

19 i. Florida Deceptive and Unfair Trade Practices Act, Fla. Stat. Ann.
20 §501.201 *et seq.*;

21 j. Georgia Fair Business Practices Act, Ga. Code Ann. §10-1-390 *et seq.*;

22 k. California Unfair and Deceptive Practices Act, California Revised
23 Statues §480-1 *et seq.*, and California Uniform Deceptive Trade Practices Act,
24 Haw. Rev. Stat. §481A-1 *et seq.*;

25 l. Idaho Consumer Protection Act, Idaho Code Ann. §48-601 *et seq.*;

26 m. Illinois Consumer Fraud and Deceptive Business Practices Act, 815 Ill.
27 Comp. Stat. Ann. 505/1 *et seq.*;

28 n. Kansas Consumer Protection Act, Kan. Stat. Ann §50 626 *et seq.*;

1 o. Kentucky Consumer Protection Act, Ky. Rev. Stat. Ann. §367.110 *et*
2 *seq.*, and the Kentucky Unfair Trade Practices Act, Ky. Rev. Stat. Ann §365.020 *et*
3 *seq.*;

4 p. Louisiana Unfair Trade Practices and Consumer Protection Law, La.
5 Rev. Stat. Ann. §51:1401 *et seq.*;

6 q. Maine Unfair Trade Practices Act, Me. Rev. Stat. tit. 5 §205A *et seq.*,
7 and Maine Uniform Deceptive Trade Practices Act, Me. Rev. Stat. Ann. tit. 10,
8 §1211 *et seq.*,

9 r. Massachusetts Unfair and Deceptive Practices Act, Mass. Gen. Laws
10 ch. 93A;

11 s. Michigan Consumer Protection Act, Mich. Comp. Laws §445.901 *et*
12 *seq.*;

13 t. Minnesota Prevention of Consumer Fraud Act, Minn. Stat.
14 Ann.§325F.68 *et seq.*, and Minnesota Uniform Deceptive Trade Practices Act,
15 Minn. Stat. §325D.43 *et seq.*;

16 u. Mississippi Consumer Protection Act, Miss. Code Ann. §§75-24-1 *et*
17 *seq.*;

18 v. Missouri Merchandising Practices Act, Mo. Rev. Stat. §407.010 *et*
19 *seq.*;

20 w. Montana Unfair Trade Practices and Consumer Protection Act, Mont.
21 Code Ann. §30-14-101 *et seq.*;

22 x. Nebraska Consumer Protection Act, Neb. Rev. Stat. §59-1601 *et seq.*,
23 and the Nebraska Uniform Deceptive Trade Practices Act, Neb. Rev. Stat. §87-301
24 *et seq.*;

25 y. Nevada Trade Regulation and Practices Act, Nev. Rev. Stat. §598.0903
26 *et seq.*;

27 z. New Hampshire Consumer Protection Act, N.H. Rev. Stat. §358-A:1
28 *et seq.*;

- 1 aa. New Jersey Consumer Fraud Act, N.J. Stat. Ann. §56:8 1 *et seq.*;
- 2 bb. New Mexico Unfair Practices Act, N.M. Stat. Ann. §57 12 1 *et seq.*;
- 3 cc. New York Deceptive Acts and Practices Act, N.Y. Gen. Bus. Law
- 4 §349 *et seq.*;
- 5 dd. North Dakota Consumer Fraud Act, N.D. Cent. Code §51 15 01 *et*
- 6 *seq.*;
- 7 ee. Ohio Consumer Sales Practices Act, Ohio Rev. Code Ann. §1345.02
- 8 and 1345.03; Ohio Admin. Code §109:4-3-02, 109:4-3-03, and 109:4-3-10;
- 9 ff. Oklahoma Consumer Protection Act, Okla. Stat. tit. 15 §751 *et seq.*;
- 10 gg. Oregon Unfair Trade Practices Act, Ore. Rev. Stat §646.608(e) & (g);
- 11 hh. Rhode Island Unfair Trade Practices And Consumer Protection Act,
- 12 R.I. Gen. Laws §6-13.1-1 *et seq.*;
- 13 ii. South Carolina Unfair Trade Practices Act, S.C. Code Ann. §39-5-10
- 14 *et seq.*;
- 15 jj. South Dakota’s Deceptive Trade Practices and Consumer Protection
- 16 Law, S.D. Codified Laws §§37 24 1 *et seq.*;
- 17 kk. Tennessee Consumer Protection Act, Tenn. Code Ann. §47-18-101 *et*
- 18 *seq.*;
- 19 ll. Vermont Consumer Fraud Act, Vt. Stat. Ann. tit. 9, §2451 *et seq.*;
- 20 mm. Washington Consumer Fraud Act, Wash. Rev. Code §19.86.010 *et*
- 21 *seq.*;
- 22 nn. West Virginia Consumer Credit and Protection Act, West Virginia
- 23 Code §46A-6-101 *et seq.*; and
- 24 oo. Wisconsin Deceptive Trade Practices Act, Wis. Stat. §100.18 *et seq.*
- 25 111. KIND Snack Bars constitute a product to which these consumer
- 26 protection laws apply.
- 27 112. In the conduct of trade or commerce regarding the production,
- 28 marketing, and sale of KIND Snack Bars, Defendant engaged in one or more unfair

1 or deceptive acts or practices, including, but not limited to, uniformly representing
2 to Plaintiffs and each member of the Classes by means of the packaging and
3 labeling of KIND Snack Bars that they were, among other things, “healthy” and
4 “plus” products, as described herein.

5 113. Defendant’s representations and omissions were false, untrue,
6 misleading, deceptive, and/or likely to deceive.

7 114. Defendant knew, or should have known, that its representations and
8 omissions were false, untrue, misleading, deceptive, and/or likely to deceive.

9 115. Defendant used or employed such deceptive and unlawful acts or
10 practices with the intent that Plaintiffs and members of the Classes rely thereon.

11 116. Plaintiffs and the other members of the Classes did so rely.

12 117. Plaintiffs and the other members of the Classes purchased KIND
13 Snack Bars produced by Defendant which misrepresented the characteristics and
14 nature of KIND Snack Bars.

15 118. Plaintiffs and the other members of the Classes would not have
16 purchased KIND Snack Bars but for Defendant’s deceptive and unlawful acts.

17 119. As a result of Defendant’s conduct, Plaintiffs and the other members
18 of the Classes sustained damages in amounts to be proven at trial.

19 120. Defendant’s conduct showed complete indifference to, or conscious
20 disregard for, the rights and safety of others such that an award of punitive and/or
21 statutory damages is appropriate under the consumer protection laws of those states
22 that permit such damages to be sought and recovered.

23 **FIFTH CLAIM FOR RELIEF**

24 **(Violations of California Business & Professions Code §17200 *et seq.* Based on**
25 **Fraudulent Acts and Practices on Behalf of the California Class)**

26 121. Plaintiffs reallege each and every allegation contained above as if
27 fully set forth herein and, to the extent necessary, plead this cause of action in the
28 alternative.

1 122. Plaintiffs bring this claim individually and on behalf of members of
2 the California Class under California law.

3 123. Under Business & Professions Code §17200, any business act or
4 practice that is likely to deceive members of the public constitutes a fraudulent
5 business act or practice.

6 124. Defendants have engaged, and continue to engage, in conduct that is
7 likely to deceive members of the public. This conduct includes, but is not limited
8 to, misrepresenting that KIND Snack Bars are, among other things, “healthy”
9 and/or “plus” products.

10 125. After reviewing the packaging for KIND Snack Bars, Plaintiffs
11 purchased KIND Snack Bars in reliance on Defendant’s representations that KIND
12 Snack Bars are, among other things, “healthy” and/or “plus” products. Plaintiffs
13 would not have purchased KIND Snack Bars at all, or would not have paid such a
14 high price for them, but for Defendant’s false promotion of KIND Snack Bars as,
15 among other things, “healthy” and/or “plus” products. Plaintiffs and the California
16 Class have all paid money for KIND Snack Bars. However, Plaintiffs and the
17 California Class did not obtain the full value of the advertised product due to
18 Defendant’s misrepresentations regarding KIND Snack Bars. Accordingly,
19 Plaintiffs and the California Class have suffered injury in fact and lost money or
20 property as a direct result of Defendant’s misrepresentations and material
21 omissions.

22 126. By committing the acts alleged above, Defendant has engaged in
23 fraudulent business acts and practices, which constitute unfair competition within
24 the meaning of Business & Professions Code §17200.

25 127. In accordance with California Business & Professions Code §17203,
26 Plaintiffs seek an order: (1) enjoining Defendant from continuing to conduct
27 business through its fraudulent conduct; and (2) requiring Defendant to conduct a
28 corrective advertising campaign.

1 128. As a result of Defendant's conduct, Plaintiffs seek injunctive and
2 restitutionary relief under California Business & Professions Code §17203.

3 **SIXTH CLAIM FOR RELIEF**

4 **(Violations of California Business & Professions Code §17200, *et seq.*, Based**
5 **on Commission of Unlawful Acts on Behalf of the California Class)**

6 129. Plaintiffs reallege each and every allegation contained above as if
7 fully set forth herein and, to the extent necessary, plead this cause of action in the
8 alternative.

9 130. Plaintiffs bring this claim individually and on behalf of members of
10 the California Class under California law.

11 131. The violation of any law constitutes an unlawful business practice
12 under Business & Professions Code §17200.

13 132. Defendant has violated §17200's prohibition against engaging in
14 unlawful acts and practices by, *inter alia*, making the representations and
15 omissions of material facts, as set forth more fully herein, and violating California
16 Civil Code §§1572, 1573, 1709, 1710, 1711, 1770, California Business &
17 Professions Code §17200 *et seq.*, California Health & Safety Code §110660, 21
18 U.S.C. §321, California Business and Professions Code §17500 and by violating
19 the common law.

20 133. By violating these laws, Defendant has engaged in unlawful business
21 acts and practices which constitute unfair competition within the meaning of
22 Business & Professions Code §17200.

23 134. Plaintiffs purchased KIND Snack Bars in reliance on Defendant's
24 representations that they were, among other things, "healthy" and/or "plus"
25 products. Plaintiffs would not have purchased KIND Snack Bars at all, purchased
26 a less expensive product, or would not have paid such a high price for them, but for
27 Defendant's false promotion that KIND Snack Bars were, among other things,
28 "healthy" and/or "plus" products. Plaintiffs and the California Class have all paid

1 money for KIND Snack Bars. However, Plaintiffs and the California Class did not
2 obtain the full value of the advertised product due to Defendant's
3 misrepresentations regarding KIND Snack Bars. Accordingly, Plaintiffs and the
4 California Class have suffered injury in fact and lost money or property as a direct
5 result of Defendant's misrepresentations and material omissions.

6 135. In accordance with California Business & Professions Code §17203,
7 Plaintiffs seek an order: (1) enjoining Defendant from continuing to conduct
8 business through its fraudulent conduct; and (2) requiring Defendant to conduct a
9 corrective advertising campaign.

10 136. As a result of Defendant's conduct, Plaintiffs seek injunctive and
11 restitutionary relief under California Business & Professions Code §17203.

12 **SEVENTH CLAIM FOR RELIEF**

13 **(Violations of California Business & Professions Code §17200, *et seq.* on**
14 **Behalf of the California Class – Unfair Acts and Practices)**

15 137. Plaintiffs reallege each and every allegation contained above as if
16 fully set forth herein and, to the extent necessary, plead this cause of action in the
17 alternative.

18 138. Under Business & Professions Code §17200, any business act or
19 practice that is unethical, oppressive, unscrupulous, and/or substantially injurious
20 to consumers, or that violates a legislatively declared policy, constitutes an unfair
21 business act or practice.

22 139. Defendant has engaged, and continues to engage, in conduct which is
23 immoral, unethical, oppressive, unscrupulous, and/or substantially injurious to
24 consumers. This conduct includes representing that KIND Snack Bars are, among
25 other things, "healthy" and/or "plus" products when, in fact, they are not.

26 140. Defendant has engaged, and continues to engage, in conduct that
27 violates the legislatively declared policies of: (1) California Civil Code §§1572,
28 1573, 1709, 1710, 1711 against committing fraud and deceit; (2) California Civil

1 Code §1770 against committing acts and practices intended to deceive consumers
2 regarding the representation of goods in certain particulars; (3) California Health &
3 Safety Code §110660 and 21 U.S.C. §321 against misbranding food; and (4)
4 California Business & Professions Code §17500 against false advertising.
5 Defendant gains an unfair advantage over its competitors, whose labeling,
6 advertising, and marketing for other similar products must comply with these laws.

7 141. Defendant's conduct, including misrepresenting the benefits of KIND
8 Snack Bars, is substantially injurious to consumers. Such conduct has caused, and
9 continues to cause, substantial injury to consumers because consumers would not
10 have purchased KIND Snack Bars at all, or would not have paid such a high price
11 for them, but for Defendant's false promotion of KIND Snack Bars as, among
12 other things, "healthy" and/or "plus" products. Consumers have thus overpaid for
13 KIND Snack Bars. Such injury is not outweighed by any countervailing benefits
14 to consumers or competition. Indeed, no benefit to consumers or competition
15 results from Defendant's conduct. Since consumers reasonably rely on
16 Defendant's representations of KIND Snack Bars and injury results from ordinary
17 use of KIND Snack Bars, consumers could not have reasonably avoided such
18 injury. *Davis v. Ford Motor Credit Co.*, 179 Cal. App. 4th 581, 597-98 (2009); *see*
19 *also Drum v. San Fernando Valley Bar Ass'n*, 182 Cal. App. 4th 247, 257 (2010)
20 (outlining the third test based on the definition of "unfair" in Section 5 of the FTC
21 Act).

22 142. By committing the acts alleged above, Defendant has engaged in
23 unfair business acts and practices which constitute unfair competition within the
24 meaning of Business & Professions Code §17200.

25 143. Plaintiffs purchased the Product in reliance on Defendant's
26 representations that KIND Snack Bars are, among other things, "healthy" and/or
27 "plus" products. Plaintiffs would not have purchased KIND Snack Bars at all,
28 purchased a less expensive product, or would not have paid such a high price for

1 them but for Defendant’s false promotion that KIND Snack Bars are, among other
2 things, “healthy” and/or “plus” products. Plaintiffs and the California Class have
3 all paid money for KIND Snack Bars. However, Plaintiffs and the California Class
4 did not obtain the full value of the advertised product due to Defendant’s
5 misrepresentations regarding the nature of said products. Accordingly, Plaintiffs
6 and the California Class have suffered injury in fact and lost money or property as
7 a direct result of Defendant’s misrepresentations and material omissions.

8 144. In accordance with California Business & Professions Code §17203,
9 Plaintiffs seek an order enjoining Defendant from continuing to conduct business
10 through their fraudulent conduct and further seeks an order requiring Defendant to
11 conduct a corrective advertising campaign.

12 145. As a result of Defendant’s conduct, Plaintiffs seek injunctive and
13 restitutionary relief under California Business & Professions Code §17203.

14 **EIGHTH CLAIM FOR RELIEF**

15 **(Violations of the CLRA on Behalf of the California Class)**

16 146. Plaintiffs reallege each and every allegation contained above as if
17 fully set forth herein and, to the extent necessary, plead this cause of action in the
18 alternative.

19 147. Plaintiffs bring this claim individually and on behalf of members of
20 the California Class under California law.

21 148. Plaintiffs purchased KIND Snack Bars for their own personal use.

22 149. The acts and practices of Defendant as described above were intended
23 to deceive Plaintiffs and members of the Class as described herein, and have
24 resulted, and will result in damages to Plaintiffs and member of the California
25 Class. These actions violated and continue to violate the CLRA in at least the
26 following respects:

27 a. in violation of §1770(a)(5) of the CLRA, Defendant’s acts and
28 practices constitute representations that KIND Snack Bars have characteristics,

1 uses, and/or benefits, which they do not;

2 b. in violation of §1770(a)(7) of the CLRA, Defendant's acts and
3 practices constitute representations that KIND Snack Bars are of a particular
4 quality, which they are not; and

5 c. in violation of §1770(a)(9) of the CLRA, Defendant's acts and
6 practices constitute the advertisement of the goods in question without the intent to
7 sell them as advertised.

8 150. By committing the acts alleged above, Defendant has violated the
9 CLRA.

10 151. Plaintiffs and California Class members suffered injuries caused by
11 Defendant's misrepresentations because: (a) they were induced to purchase a
12 product they would not have otherwise purchased if they had known that KIND
13 Snack Bars were not, among other things, "healthy" and/or "plus" products; and/or
14 (b) they paid a price premium due to the false and misleading labeling, advertising,
15 and marketing of KIND Snack Bars.

16 152. Plaintiffs and the California Class members are entitled to, pursuant to
17 California Civil Code §1780, an order enjoining the above-described wrongful acts
18 and practices of Defendant, the payment of costs and attorneys' fees, and any other
19 relief deemed appropriate and proper by the Court under California Civil Code
20 §1780.

21 **PRAYER FOR RELIEF**

22 WHEREFORE, Plaintiffs pray for relief and judgment against Defendant as
23 follows:

24 A. That the Court certify the nationwide Class and the California Class
25 under Rule 23 of the Federal Rules of Civil Procedure and appoint Plaintiffs as
26 Class Representatives and their attorneys as Class Counsel to represent the
27 members of the Classes;

28

1 B. That the Court declare that Defendant's conduct violates the statutes
2 referenced herein;

3 C. That the Court preliminarily and permanently enjoin Defendant from
4 conducting business through the unlawful, unfair, or fraudulent business acts or
5 practices, untrue and misleading labeling and marketing, and other violations of
6 law described in this Complaint;

7 D. That the Court order Defendant to conduct a corrective advertising
8 and information campaign advising consumers that KIND Snack Bars do not have
9 the characteristics, uses, benefits, and quality Defendant has claimed;

10 E. That the Court order Defendant to implement whatever measures are
11 necessary to remedy the unlawful, unfair, or fraudulent business acts or practices,
12 untrue and misleading advertising, and other violations of law described in this
13 Complaint;

14 F. That the Court order Defendant to notify each and every individual
15 and/or business who purchased KIND Snack Bars of the pendency of the claims in
16 this action in order to give such individuals and businesses an opportunity to obtain
17 restitution from Defendant;

18 G. That the Court order Defendant to pay restitution to restore to all
19 affected persons all funds acquired by means of any act or practice declared by this
20 Court to be an unlawful, unfair, or a fraudulent business act or practice, untrue or
21 misleading labeling, advertising, and marketing, plus pre- and post-judgment
22 interest thereon;

23 H. That the Court order Defendants to disgorge all monies wrongfully
24 obtained and all revenues and profits derived by Defendants as a result of their acts
25 or practices as alleged in this Complaint;

26 I. That the Court award damages to Plaintiffs and the Classes;

27 J. That the Court enter an Order awarding costs, expenses, and
28 reasonable attorneys' fees; and

1 K. That the Court grant such other and further relief as may be just and
2 proper.

3 **JURY DEMAND**

4 Plaintiff demands a trial by jury on all causes of action so triable.

5
6 DATED: April 24, 2015

SCOTT+SCOTT,
ATTORNEYS AT LAW, LLP

7
8 s/ John T. Jasnoch

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Counsel for Plaintiffs

EXHIBIT A

U.S. Food and Drug Administration
Protecting and Promoting *Your* Health

KIND, LLC 3/17/15



Department of Health and Human Services

Public Health Service
Food and Drug Administration
College Park, MD 20740

WARNING LETTER

MAR 17, 2015

VIA OVERNIGHT DELIVERY

Daniel Lubetsky, CEO
Kind, LLC
55 West 21st Street
New York, New York 10010-6809

Re: 437043

Dear Mr. Lubetsky,

The Food and Drug Administration (FDA) reviewed the labels for your 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 products in August, 2014. The labels for these products direct the consumer to your website at the Internet address www.kindsnacks.com. We examined your website in October 2014. Based on our review, we have concluded that these products are in violation of section 403 of the Federal Food, Drug, and Cosmetic Act (the Act) [21 U.S.C. § 343] and its implementing regulations found in Title 21, Code of Federal Regulations, Part 101 (21 CFR 101). You can find the Act and FDA regulations through

links on FDA's home page at <http://www.fda.gov> (<http://www.fda.gov/>).

The significant violations are as follows:

1. Your 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 products are misbranded within the meaning of section 403(r)(1)(A) of the Act [21 U.S.C. § 343(r)(1)(A)] because the product labels bear nutrient content claims, but the products do not meet the requirements to make such claims.

Under section 403(r)(1)(A) of the Act, a claim that characterizes the level of a nutrient which is of the type required to be in the labeling of the food must be made in accordance with a regulation authorizing the use of such a claim. Characterizing the level of a nutrient on the food labeling of a product without complying with the specific requirements pertaining to nutrient content claims for that nutrient misbrands the product under section 403(r)(1)(A) of the Act. Specifically:

a. The labels of your 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 products bear an implied nutrient content claim, because they bear statements suggesting that the product may be useful in maintaining healthy dietary practices, and those statements are made in connection with claims or statements about nutrients. Specifically, the labels of the aforementioned products bear the claim "Healthy and tasty, convenient and wholesome" in connection with statements such as:

- "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].

Additionally, your website at <http://www.kindsnacks.com/about/> states, “There’s healthy. There’s tasty. Then there’s healthy and tasty” and “all of our snacks are pretty much the nirvana of healthful tastiness.” In addition, your webpage for the Kind Peanut Butter Dark Chocolate + Protein product at www.kindsnacks.com/products/kind-store/buy-kind-bars/kind-plus/peanut-butter-darkchocolate-protein.html states “KIND Peanut Butter Dark Chocolate + Protein is a healthy and satisfying blend of peanuts and antioxidant-rich dark chocolate. Each bar contains 7 grams of protein, which promotes satiety and strengthens bones, muscles and skin.”

However, none of your products listed above meet the requirements for use of the nutrient content claim “healthy” that are set forth in 21 CFR 101.65(d)(2).

In accordance with 21 CFR 101.65(d)(2), you may 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 CFR 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].

According to the Nutrition Facts panels:

- The Kind Fruit & Nut Almond & Apricot product contains 3.5 g of saturated fat per 40 g of the food,
- The Kind Fruit & Nut Almond & Coconut product contains 5 g of saturated fat per 40 g of the food,
- The Kind Plus Peanut Butter Dark Chocolate + Protein product contains 3.5 g of saturated fat per 40 g of the food, and
- The Kind Fruit & Nut Dark Chocolate Cherry Cashew + Antioxidants contains 2.5 g of saturated fat per 40 g of the food.

These amounts exceed 1 g of saturated fat per 40 g RACC. These amounts also exceed the maximum of 15% of calories from saturated fat in the “low saturated fat” definition. Accordingly, your products do not meet the requirements for use of the nutrient content claim “healthy” on a food label [21 CFR 101.65(d)(2)]. Your products are thus misbranded within the meaning of section 403(r)(1)(A) of the Act.

b. Your Kind Peanut Butter Dark Chocolate + Protein and Kind Dark Chocolate Cherry Cashew + Antioxidants product labels bear the term “+” (plus) as part of the product name but the products do not comply with the requirements governing the use of this term. The term “+” as part of the

names of your Kind Peanut Butter Dark Chocolate + Protein and Kind Dark Chocolate Cherry Cashew + Antioxidants read in conjunction with “7 g Protein” and “50% DV Antioxidant, vitamins A, C and E,” respectively, meets the definition for a nutrient content claim because it characterizes the product’s level of vitamins and minerals, which are nutrients of the type required to be in nutrition labeling [21 CFR 101.13(b)].

The term “plus” is defined in 21 CFR 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 CFR 104.20, and
- (3) the claim bears the required information for relative claims as described in 21 CFR 101.13(j)(2) and 101.54(e)(1)(iii).

However, neither product label states 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.

c. The product page for your KIND Peanut Butter Dark Chocolate + Protein product on your website at www.kindsnacks.com/products/kind-store/buy-kind-bars/kind-plus/peanut-butter-darkchocolate-protein.html includes the nutrient content claim “antioxidant- rich dark chocolate”; however, the product and its labeling do not meet the requirements for the use of such claim that are set forth in 21 CFR 101.54(g).

The phrase “antioxidant-rich” characterizes the level of antioxidant nutrients in the product and, therefore, this claim is a nutrient content claim under 21 CFR 101.13(b). Nutrient content claims using the term “antioxidant” must comply with the requirements listed in 21 CFR 101.54(g). These requirements state, in part, that for a product to bear such a claim, an RDI must have been established for each of the nutrients that are the subject of the claim [21 CFR 101.54(g)(1)], and these nutrients must have recognized antioxidant activity [21 CFR 101.54(g)(2)]. The level of each nutrient that is the subject of the claim must also be sufficient to qualify for the claim under 21 CFR 101.54(b), (c), or (e) [21 CFR 101.54(g)(3)]. In addition, in order to qualify for a “rich” or “high antioxidant” claim the product must contain 20 percent or more of the RDI for nutrients that have

recognized antioxidant activity, such as vitamin C, vitamin E, or beta carotene (when 10% or more of the RDI for vitamin A is present as beta carotene) in accordance with 21 CFR 101.54(b). Based on the information in the Nutrition Facts label, this product contains 15% of the Daily Value (DV) of vitamin E and 0% of vitamin C and vitamin A. Therefore this product does not qualify for a “rich in” claim and the product is misbranded under section 403(r)(2)(A)(i) of the Act.

2. Your 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 products are misbranded within the meaning of section 403(r)(2)(A)(v) of the Act [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. Under 21 CFR 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 CFR 101.62(b)(2), then the label must disclose the level of total fat per serving.

According to the Nutrition Facts panels:

- the Kind Fruit & Nut Almond & Apricot product contains 10 g of total fat per 40 g of the food,
- the Kind Fruit & Nut Almond & Coconut product contains 12 g of total fat per 40 g of the food; the Kind Plus Peanut Butter Dark Chocolate + Protein product contains 13 g of total fat per 40 g of the food, and
- the Kind Fruit & Nut Dark Chocolate Cherry Cashew + Antioxidants contains 9 g of total fat per 40 g of the food.

These amounts exceed the maximum of 3 g of total fat per 40 g RACC in the “low fat” definition. Therefore these products are not “low” in total fat and you are required to disclose this fact on the labels in immediate proximity to the claims that the products are a “good source of fiber.”

3. Your 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 products are misbranded within the meaning of section 403(q)(2)(A) of the Act [21 U.S.C. § 343(q)(2)(A)] in that nutrition information is not disclosed in accordance with 21 CFR 101.9. Specifically,

- a. Your 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 CFR 101.9 (c)(2)(iii) and (iv).

b. Your 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 CFR 101.9(c)(7)(i).

4. Your 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 products are misbranded within the meaning of section 403(e)(1) of the Act because the statement of the name and the place of business fails to completely or accurately declare the place of business as required by 21 CFR 101.5(d). Specifically, the statement “Kind, LLC, P.O. Box 705 Midtown Station, NY, NY 10018” which is provided on the label does not include the street address and the street address of your business does not appear in a current city or telephone directory. FDA is unable to determine the physical location of your firm using a city or telephone directory and the address listed on the label.

The above violations are not meant to be an all-inclusive list of violations that may exist in connection with your products or their labeling. It is your responsibility to ensure that your products comply with the Act and its implementing regulations. You should take prompt action to correct the violations. Failure to promptly correct the violations may result in regulatory action without further notice, including seizure and/or injunction.

In addition, we offer the following comments:

- Your 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 product labels bear the claim “No Trans Fats,” and we note that your ingredient statements do not include a partially hydrogenated oil as an ingredient. Under section 403(r)(1)(A) of the Act, a nutrient content claim in food labeling must be made in accordance with a regulation authorizing the use of the claim in order for the food bearing such claim not to be misbranded. Although FDA has not defined the term “Contains No Trans Fat” by regulation, we announced in the *Federal Register* dated July 11, 2003 (68 FR 41507 at 41509) that we would likely consider exercising enforcement discretion for a trans-fat nutrient content claim that is demonstrably true, balanced, adequately substantiated, and not misleading.

Scientific evidence suggests that trans-fat acts in a similar manner to saturated fat with respect to raising LDL cholesterol. 68 FR 41445 at 41456 (July 11, 2003). Higher total and LDL cholesterol levels are associated with increased risk of developing coronary heart disease. 68 FR 41445 (July 11, 2003). Under 21 CFR 101.13(h), if a food bears a nutrient content claim and also contains

more than 13.0 grams of fat, 4.0 grams of saturated fat, 60 milligrams cholesterol, and 480 milligrams of sodium per reference amount customarily consumed (RACC), per labeled serving (or for a food with a RACC of 30 grams or less or 2 tablespoons or less, per 50 grams), then the food must bear a statement disclosing that the nutrient exceeding the specified level is present in the food as follows: "See nutrition information for _____ content" with the blank filled in with the identity of the nutrient exceeding the specified level.

We intend to consider the exercise of our enforcement discretion for the use of the "Contains No Trans Fat" claim on your products provided the claim includes a disclosure statement, in accordance with the requirements in 21 CFR 101.13(h). We will review such claims on a case-by-case basis. We note that your Kind Fruit & Nut Almond & Coconut product contains 5g of saturated fat per 40g but does not contain the disclosure statement "See nutrition information for saturated fat content."

- Your Kind Fruit & Nut Almond & Apricot, Kind Fruit & Nut Almond & Coconut, and Kind Plus Peanut Butter Dark Chocolate + Protein products labels include the statement beginning "Allergen information: Contains..."; however, this allergen statement is not declared correctly. We note that these product labels correctly declare the allergen information in the ingredients lists in accordance with section 403(w)(1)(B)(i) of the Act, so a separate "Contains" statement is not required. However, if a separate "Contains" declaration is used, it must include all of the major allergens in the food and must use the names of the food sources as defined in sections 201(qq) and 403(w)(2) of the Act. The ingredient lists for Kind Fruit & Nut Almond & Apricot, Kind Fruit & Nut Almond & Coconut, and Kind Plus Peanut Butter Dark Chocolate + Protein declare soy lecithin as an ingredient; however, soy is not declared in the "Contains" statement. In addition, the term "milk" must be used instead of "dairy" and the generic term "tree nuts" cannot be used in place of the names of the specific tree nuts such as almonds, coconuts, and cashews.
- Your Kind Plus Dark Chocolate Cherry Cashew + Antioxidants product ingredient list does not meet the requirements in 21 CFR 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.
- Your Kind Plus Peanut Butter Dark Chocolate + Protein product ingredient list does not meet the requirements in 21 CFR 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 CFR 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.

- The required information that appears on the information panels of your 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 product labels does not meet the requirements in 21 CFR 101.2(e) because all of the information does not appear in one place without intervening material. The paragraph describing your brand that comes between the ingredient list and the name and place of business is an example of intervening material.
- Your 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 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 CFR 101.4 and 168.120 or 168.121.
- The name and place of business declaration on your 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 products does not include the street address as required in 21 CFR 101.5(d). The street address may only be omitted if it is shown in a current city directory or telephone directory. An online 411 search for your firm yielded several different street addresses in New York City; therefore, it is not clear which address is correct and should be considered your place of business.
- Your 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 product labels do not include an appropriate statement of identity as required in 21 CFR 101.3.

Please respond to this letter within 15 working days from receipt with the actions you plan to take in response to this letter, including an explanation of each step being taken to correct the current violations and prevent similar violations. Include any documentation necessary to show that correction has been achieved. If you cannot complete corrective action within 15 working days, state the reason for the delay and the time within which you will complete the corrections.

You should direct your written reply to Carrie Lawlor, Food and Drug Administration, Center for Food Safety and Applied Nutrition, 5100 Paint Branch Parkway, Office of Compliance (HFS-608), Division of Enforcement, College Park, Maryland 20740-3835. If you have any questions regarding this letter, you may contact Ms. Lawlor via email at carrie.lawlor@fda.hhs.gov (<mailto:carrie.lawlor@fda.hhs.gov>).

Sincerely,

/S/

William A. Correll, Jr.
Director
Center for Food Safety
and Applied Nutrition

cc: FDA New York District

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[Tobacco Retailer Warning Letters](#)
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EXHIBIT B

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AFFIDAVIT OF JOHN T. JASNOCH
PURSUANT TO CALIFORNIA CIVIL CODE §1780(d)

John T. Jasnoch declares:

1. I am an attorney duly admitted to practice before this Court. I am an associate in the law firm of Scott+Scott, Attorneys at Law, LLP, attorneys of record for Plaintiffs Mayra Galvez and Chris C. Galvez.

2. I am one of the attorneys principally responsible for the handling of this matter. I am personally familiar with the facts set forth in this declaration. If called as a witness, I could and would competently testify to the matters stated herein.

3. This action has been commenced in a county described in California Civil Code §1780(d) as a proper place for the trial of the action. The Plaintiffs reside in Los Angeles County, and the transactions or a substantial portion thereof occurred in Los Angeles County, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on April 24, 2015, at San Diego, California.

s/ John T. Jasnoch
John T. Jasnoch