

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

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

Plaintiff,)

v.)

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

Defendant.)

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

DEMAND FOR JURY TRIAL

CLASS ACTION COMPLAINT

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

NATURE OF THE CASE

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

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

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

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

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

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

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

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

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

PARTIES

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

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

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

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

13. Until recently, Defendant was actually called “KIND Healthy Snacks.” Multiple references to the company in articles and on the Internet are to KIND Healthy Snacks² and the company’s logo—recently removed from its website contained the name KIND Healthy Snacks.



14. Using its “brAND” philosophy to market its purportedly healthy snack products, Defendant sold 458 million units in the United States in 2014.³

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

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

JURISDICTION AND VENUE

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

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

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

SUBSTANTIVE ALLEGATIONS

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

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

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

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

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

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

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