

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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IN RE;	:	
	:	15md2645
	:	15mc2645
KIND LLC “HEALTHY AND ALL NATURAL” LITIGATION	:	
	:	<u>OPINION & ORDER</u>
	:	
<i>This Document Relates to All Actions.</i>	:	
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WILLIAM H. PAULEY III, Senior District Judge:

Plaintiffs bring this putative class action against KIND, LLC, alleging consumer protection and false advertising claims. They move for class certification. (ECF No. 168.) In addition to opposing Plaintiffs’ motion, KIND counters with a Daubert motion seeking to exclude one of Plaintiffs’ experts, (ECF No. 190), and separately objects to two expert reports submitted on reply, (ECF No. 211). For the reasons that follow, Plaintiffs’ motion for class certification is granted in part and denied in part, KIND’s Daubert motion is denied, and KIND’s objections are granted in part and denied in part.

BACKGROUND

I. This Action

This Court assumes familiarity with the facts of this case and addresses only those necessary to decide this motion. See In re KIND LLC “Healthy & All Natural” Litig., 209 F. Supp. 3d 689, 691 (S.D.N.Y. 2016). KIND markets and distributes the ubiquitous KIND bar that has become a staple of American checkout counters. In addition to these bars, KIND also sells bags of granola, dubbed “Healthy Grain Clusters.” (See Amended Class Action Complaint, ECF No. 84 (“ACC”), ¶ 1.) These snack foods display a label that includes the words “All Natural”

and “Non-GMO.”¹ (ACC ¶ 1.) Plaintiffs allege that KIND uses these descriptors to capitalize on the highly profitable and fast-growing health food market. (ACC ¶¶ 19–22.) But despite KIND’s reliance on this advertising, Plaintiffs allege that the products do not live up to their labels. (ACC ¶ 2–3.) Instead, Plaintiffs allege that KIND products contain a conglomeration of chemically-synthesized and highly-processed ingredients. (ACC ¶ 2–3.) According to Plaintiffs, these ingredients render KIND’s labeling false and misleading based on the New Oxford American Dictionary’s definition of “natural” as “existing in or caused by nature; not made or caused by humankind.” (ACC ¶ 40.) Additionally, Plaintiffs allege that “[t]esting . . . detected the presence of GMOs in at least some of the products,” (ACC ¶ 33), and that “approximately 90% of canola, 89% of corn, and 94% of soybeans grown in the United States are genetically modified,” (ACC ¶ 48).

Plaintiffs seek damages under New York’s General Business Law (“GBL”) § 349; California’s Consumers Legal Remedies Act (“CLRA”), Cal. Civ. Code § 1750, et seq., Unfair Competition Law (“UCL”), Cal. Bus. & Prof. Code § 17200, et seq., and False Advertising Law (“FAL”), Cal. Bus. & Prof. Code § 17500, et seq.; and Florida’s Deceptive and Unfair Trade Practices Act (“FDUTPA”) Fla. Sta. § 501.201, et seq. Additionally, Plaintiffs seek to enjoin KIND from continuing to use this allegedly deceptive advertising.

II. The Product Labels

Plaintiffs take issue with the labels on 39 KIND products. Each of these labels displays a litany of health-related characteristics. These include—in addition to some variation of the “All Natural / Non-GMO,” “Non-GMO,” and “No Genetically Engineered Ingredients”—advertisements that the products are gluten free, low glycemic, very low sodium, and contain no

¹ “Non-GMO” is defined as “organisms in which the genetic material (DNA) has been altered in a way that does not occur naturally.” (ACC ¶ 2 (citing the World Health Organization).)

trans-fat. (See generally Decl. of Elle Lanning in Opp’n to Class Certification, ECF No. 184 (“Lanning Decl.”), Ex C.) Additionally, the KIND packaging features a window, so that potential consumers can see the bar itself. Because a picture is worth a thousand words, three representative labels are depicted as follows:

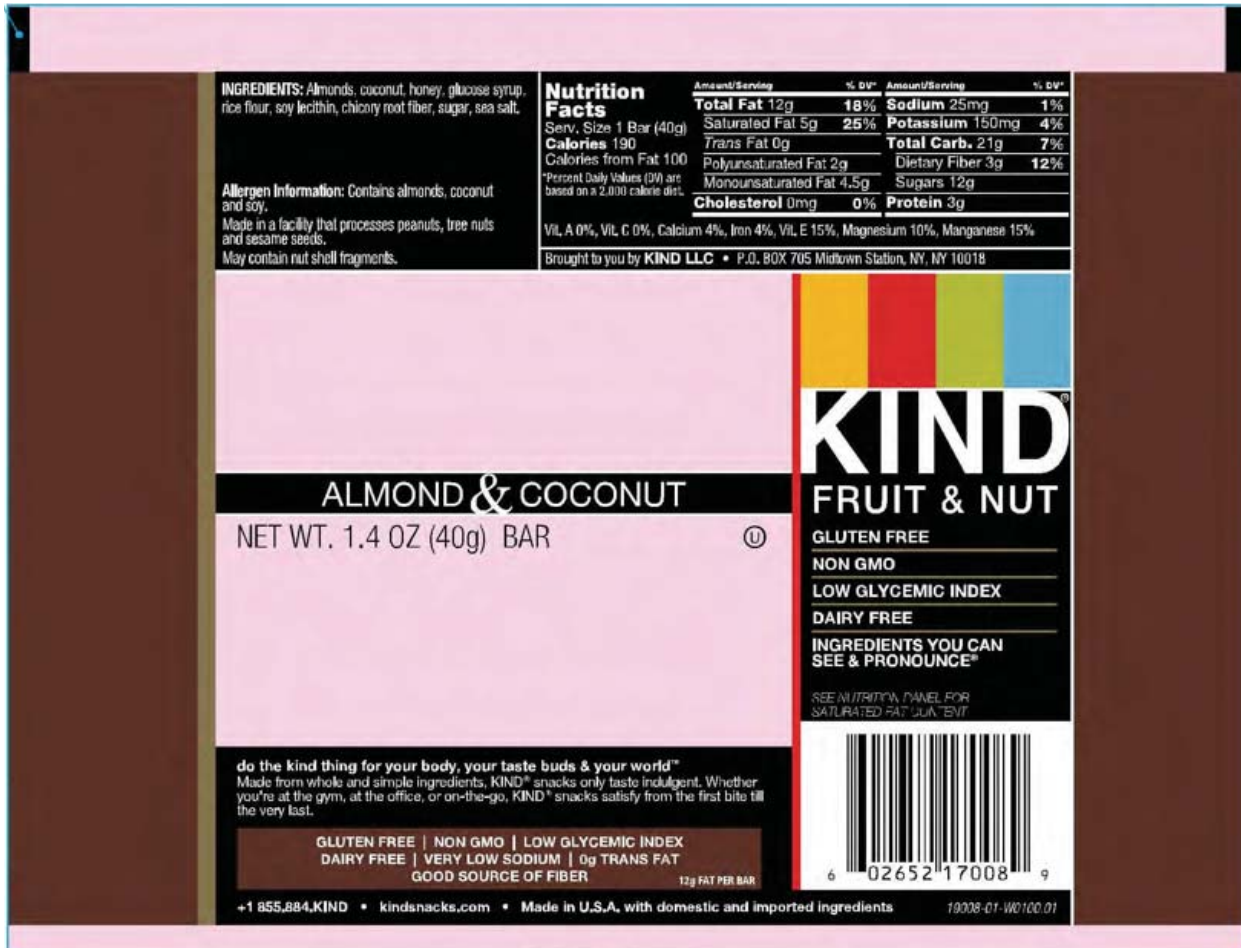
All Natural / Non-GMO



(Lanning Decl. Ex. C, at 1.)²

² These packaging labels are for KIND Core bars. (See Lanning Decl. ¶ 19.) The pink rectangles on the labels denote clear plastic so that consumers can see the bar.

Non-GMO



(Lanning Decl. Ex. C, at 2.)

No Genetically Engineered Ingredients

(Lanning Decl. Ex. C, at 3.) As demonstrated by these labels, KIND cycled through three different variations during the putative class period: “All Natural / Non-GMO,” “Non-GMO,” and “No Genetically Engineered Ingredients.”

While KIND started with “All Natural / Non-GMO” on most of its products, KIND began removing the “All Natural” advertisement through a staggered change from 2014 to 2017. The majority of products at issue had the “All Natural” label removed by June 2015, though several displayed the label until 2017. Notably, while the “All Natural” label was present on the packaging, it was on the same line as “Non-GMO” and read as “All Natural / Non-GMO.” (See, e.g., Lanning Decl. Ex. D, at 1.) On a rolling basis across the products from October 2015

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