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19 UNITED STATES DISTRICT COURT
20 SOUTHERN DISTRICT OF CALIFORNIA

21 HARLAN ZABACK, individually and on
22 behalf of all others similarly situated,

23 Plaintiff,

24 v.

25 KELLOGG SALES COMPANY and
26 DOES 1 through 10, inclusive,

27 Defendants.

28 Case No. '20CV0268 BEN MSB

**DEFENDANT KELLOGG SALES
COMPANY'S NOTICE OF REMOVAL**

1 Defendant Kellogg Sales Company (“Kellogg”) hereby effects the removal of this
2 action from the Superior Court of California, County of San Diego to the United States
3 District Court for the Southern District of California. Removal is proper under the Class
4 Action Fairness Act of 2005 (“CAFA”), 28 U.S.C. § 1332(d), because this case is a class
5 action in which the putative class exceeds 100 members, at least one plaintiff is diverse
6 from at least one defendant, and the amount in controversy exceeds \$5 million. Venue is
7 proper in this Court because it is the “district and division embracing the place where [the]
8 action is pending.” 28 U.S.C. § 1441(a); *see also* 28 U.S.C. § 84(d) (providing that San
9 Diego County is part of the Southern District of California).

10 **FACTUAL BACKGROUND AND STATE COURT PROCEEDINGS**

11 1. Plaintiff filed this lawsuit in San Diego County Superior Court on December
12 20, 2019. Kellogg was served with the Summons and Complaint on January 17, 2020. *See*
13 Ex. 1 (“Compl.”).

14 2. Pursuant to 28 U.S.C. § 1446(a), a true and correct copy of the state court case
15 file is attached to this Notice of Removal and is incorporated by reference herein. The file
16 includes all process, pleadings, motions, and orders filed in this case, including the
17 Summons and Complaint (Exhibit 1) and all other documents in the state court case file
18 (Exhibit 2).

19 3. Plaintiff alleges that Bear Naked Granola Fit V’Nilla Almond, which is
20 manufactured and sold by Kellogg, is mislabeled because it purports to be “made with
21 vanilla flavoring derived exclusively from vanilla beans when the ingredient list reveals
22 otherwise.” Compl. ¶¶ 1-2. Plaintiff alleges that the labeling of this product is misleading
23 and that it violates various FDA regulations governing the labeling of vanilla and other
24 flavoring agents. *See id.* ¶¶ 15-47.

25 4. Based on those allegations, Plaintiff asserts claims for violations of the
26 Consumers Legal Remedies Act, Cal. Civ. Code §§ 1750 *et seq.*, the Unfair Competition
27 Law, Cal. Bus. & Prof. Code §§ 17200 *et seq.*, and the False Advertising Law, Cal. Bus. &
28 Prof. Code §§ 17500 *et seq.* *See* Compl. ¶¶ 60-93. Plaintiff also asserts a claim for “Quasi-

1 Contract/Unjust Enrichment/Restitution.” *See id.* ¶¶ 94-101. Plaintiff purports to assert
2 these claims on behalf of a class consisting of all California consumers who purchased Bear
3 Naked Granola Fit V’nilla Almond within the relevant statute of limitations periods. *See*
4 *id.* ¶ 49.

5 5. Plaintiff seeks a variety of remedies on behalf of the class, including
6 restitution, disgorgement, actual damages, punitive damages, injunctive relief, and
7 attorneys’ fees. *See* Compl. at 21-22 (Prayer).

8 **REMOVAL IS PROPER UNDER CAFA (28 U.S.C. § 1332(D))**

9 6. CAFA provides that federal courts have original jurisdiction over class actions
10 in which (a) any plaintiff is diverse from any defendant, (b) there are at least 100 members
11 in the putative class, and (c) the amount in controversy exceeds \$5 million, exclusive of
12 interest and costs. 28 U.S.C. § 1332(d). Under 28 U.S.C. § 1441(a), any such action may
13 be removed to the district court for the district and division embracing the place where the
14 action is pending.

15 **THE PARTIES ARE SUFFICIENTLY NUMEROUS TO SATISFY CAFA**

16 7. Plaintiff purports to bring this action on behalf of “[a]ll persons, who are
17 California residents who purchased ‘Bear Naked Granola Fit V’Nilla Almond,’ or who
18 purchased ‘Bear Naked Granola Fit V’Nilla Almond’ within the State of California, for
19 personal, family, or household purposes during the relevant statute of limitations periods.”
20 Compl. ¶ 49. Plaintiff alleges that “members of the Class number in at least the thousands.”
21 *Id.* ¶ 53. This is sufficiently numerous to satisfy CAFA.

22 **THE PARTIES ARE MINIMALLY DIVERSE**

23 8. Plaintiff resides in San Diego County and is a citizen of California. *Id.* ¶ 11.

24 9. Kellogg is a Delaware corporation with its principal place of business in Battle
25 Creek, Michigan. *Id.* ¶ 13. Thus, Kellogg is a citizen of Delaware and Michigan. *See* 28
26 U.S.C. § 1332(c)(1) (providing that a corporation is a “citizen of every State . . . by which
27 it has been incorporated and of the State . . . where it has its principal place of business”);
28 *see also Hertz Corp. v. Friend*, 559 U.S. 77, 92-93 (2010) (noting that a corporation’s

1 principal place of business is the place where “a corporation’s officers direct, control, and
2 coordinate the corporation’s activities,” which is typically “the place where the corporation
3 maintains its headquarters”).

4 10. Accordingly, the minimal diversity requirement is satisfied because at least
5 one plaintiff is diverse from at least one defendant. *See* 28 U.S.C. § 1332(d)(2)(A);
6 *Bridgewell-Sledge v. Blue Cross of Cal.*, 798 F.3d 923, 928 (9th Cir. 2015) (“[U]nder
7 CAFA, complete diversity is not required; ‘minimal diversity’ suffices.”) (citation omitted).

8 11. Because Kellogg is not a citizen of California, neither the “local controversy”
9 nor the “home state” exception to CAFA applies. *See* 28 U.S.C. § 1332(d)(3)-(4).

10 **THERE IS AT LEAST \$5,000,000 IN CONTROVERSY**

11 12. “In measuring the amount in controversy, a court must assume that the
12 allegations of the complaint are true and that a jury will return a verdict for the plaintiff on
13 all claims made in the complaint.” *Korn v. Polo Ralph Lauren Corp.*, 536 F. Supp. 2d 1199,
14 1205 (E.D. Cal. 2008). It must then “add[] up the value of the claim of each person who
15 falls within the definition of [the] proposed class.” *Std. Fire Ins. Co. v. Knowles*, 568 U.S.
16 588, 592 (2013). In other words, “[t]he ultimate inquiry is what amount is put ‘in
17 controversy’ by the plaintiff’s complaint, not what a defendant will actually owe.” *Korn*,
18 536 F. Supp. 2d at 1205; *see also Rippee v. Boston Mkt. Corp.*, 408 F. Supp. 2d 982, 986
19 (S.D. Cal. 2005) (“It’s not a question as to what you would owe. It’s a question as to what
20 is in controversy.”) (citation omitted). And under CAFA, there is no presumption against
21 removal to federal court. *See Dart Cherokee Basin Operating Co. v. Owens*, 574 U.S. 81,
22 89 (2014).

23 13. “A defendant seeking removal of a putative class action must demonstrate, by
24 a preponderance of the evidence, that the aggregate amount in controversy exceeds the
25 jurisdictional minimum.” *Rodriguez v. AT & T Mobility Servs. LLC*, 728 F.3d 975, 981
26 (9th Cir. 2013). The preponderance of the evidence standard is satisfied where “the
27 potential damages could exceed the jurisdictional amount.” *Rea v. Michaels Stores Inc.*,
28

1 742 F.3d 1234, 1239 (9th Cir. 2014) (quoting *Lewis v. Verizon Commc'ns, Inc.*, 627 F.3d
2 395, 397 (9th Cir. 2010)).

3 14. Plaintiff's complaint seeks, among other things, damages consisting of the
4 alleged "[m]oney spent" on Bear Naked Granola Fit V'Nilla Almond, restitution of the
5 "unlawfully, unfairly, and fraudulently obtained money" Kellogg allegedly obtained from
6 Plaintiff and other class members, and "restitution, disgorgement, and/or the imposition of
7 a constructive trust upon all profits, benefits, and other compensation obtained by
8 Defendant" due to its alleged deceptive conduct. Compl. ¶¶ 74(b), 86, 101. Because
9 Plaintiff's claims are subject to either a three-year or four-year statute of limitations, his
10 demand places into controversy all sales of the product in California since December 20,
11 2015.¹

12 15. Kellogg has access to retail sales data for Bear Naked Granola Fit V'Nilla
13 Almond through Nielsen, including data reflecting sales of this product in California. The
14

15 ¹ Kellogg believes that California law precludes Plaintiff from seeking disgorgement and
16 restitution of all profits received by Kellogg from the sale of Bear Naked Granola Fit
17 V'Nilla Almond because Plaintiff derived significant value from that product, and full
18 restitution would therefore amount to an unjustified windfall. *See Brazil v. Dole Packaged*
19 *Foods, LLC*, 660 F. App'x 531, 534 (9th Cir. 2016) (explaining that damages in false
20 advertising case were limited to "the difference between the prices customers paid and the
21 value of the [product] they bought—in other words, the 'price premium' attributable to [the
22 challenged] labels"). For the purposes of removal, however, the "inquiry is what amount is
23 put 'in controversy' by the plaintiff's complaint, not what a defendant will actually owe."
24 *Korn*, 536 F. Supp. 2d at 1205; *see also Deutsche Bank Nat'l Trust v. Heredia*, No. 12-
25 04405, 2012 WL 4714539, at *2 (N.D. Cal. Sept. 14, 2012), *report & recommendation*
26 *adopted*, No. 12-4405, 2012 WL 4747157 (N.D. Cal. Oct. 3, 2012) (citation omitted) ("[I]n
27 determining whether a challenged jurisdictional amount has been met, district courts are
28 permitted only to assess the allegations in a complaint and not the validity of any asserted
defenses . . ."). Accordingly, the full amount of Kellogg's sales during Plaintiff's
proposed class period is properly included in the amount-in-controversy calculation. *See*
Waller v. Hewlett-Packard Co., No. 11-454, 2011 WL 8601207, at *2 n.3 (S.D. Cal. May
10, 2011) (calculating amount in controversy based on the full purchase price even though
plaintiff argued it would be "unrealistic" to expect the putative class members to receive a
"100% reimbursement," since the inquiry is based on "the relief a plaintiff *seeks*, not what
the plaintiff may reasonably or ultimately *obtain*").

1 Nielsen retail sales data reflect that, since January 1, 2016, total sales of Bear Naked
2 Granola Fit V’Nilla Almond exceed \$5 million.² See Ex. 3 (“Eastwood Decl.”) ¶¶ 3-4.

3 16. Plaintiff also seeks punitive damages, which are included in calculating the
4 amount in controversy. See Compl. ¶ 73; Prayer ¶ 6; *Fritsch v. Swift Transp. Co.*, 899 F.3d
5 785, 793 (9th Cir. 2018) (noting that punitive damages are included in the amount in
6 controversy).³ Punitive damages awards “can be substantial.” *Hurd*, 2013 WL 5575073,
7 at *6-7. Even “applying the ‘conservative’ estimate of a 1:1 ratio between compensatory
8 damages and punitive damages,” Plaintiff’s request for punitive damages adds more than
9 \$5 million to the amount in controversy. *Tompkins v. Basic Research LLC*, No. 08-244,
10 2008 WL 1808316, at *4 (E.D. Cal. Apr. 22, 2008) (including potential punitive damages
11 in analyzing amount in controversy).

12 17. Plaintiff also seeks attorneys’ fees. See Compl. ¶ 72; Prayer ¶ 7. For purposes
13 of assessing the amount in controversy, the Court is not limited to considering fees incurred
14 at the time of removal; rather, “a court must include future attorneys’ fees recoverable by
15 statute or contract when assessing whether the amount-in-controversy requirement is met.”
16 *Fritsch*, 899 F.3d at 794 (holding that the amount in controversy includes fees likely to be
17 incurred after removal); see also *Bayol v. Zipcar, Inc.*, No. 14-2483, 2015 WL 4931756, at
18 *7 (N.D. Cal. Aug. 18, 2015) (“The amount in controversy can include . . . attorneys’
19 fees[.]” Fee requests in consumer class actions, such as this case, are typically significant.
20 See, e.g., *Wilson v. Airborne, Inc.*, No. 07-770, 2008 WL 3854963, at *12 (C.D. Cal. Aug.
21 13, 2008) (awarding \$3,459,946 in attorneys’ fees in deceptive advertising class action);
22

23 ² The precise sales figures are set forth in the unredacted Declaration of Winnie Eastwood,
24 which Kellogg will submit under seal concurrently with the filing of this Notice of Removal.

25 ³ See also, e.g., *Bell-Sparrow v. Wiltz*, No. 12-2782, 2014 WL 2927354, at *4-5 (N.D. Cal.
26 June 27, 2014) (including punitive damages award with 5.5 multiplier in amount-in-
27 controversy in light of plaintiff’s request for punitive damages in connection with claim for
28 intentional misrepresentation); *Lee v. Equifax Info. Servs., LLC*, No. 13-4302, 2013 WL
6627755, at *4 (N.D. Cal. Dec. 16, 2013) (similar); *Hurd v. Am. Income Life Ins.*, No. 13-
5205, 2013 WL 5575073, at *6-7 (C.D. Cal. Oct. 10, 2013) (similar); *Simmons v. PCR
Tech.*, 209 F. Supp. 2d 1029, 1033 (N.D. Cal. 2002) (similar).

1 *Chavez v. Netflix, Inc.*, 162 Cal. App. 4th 43, 46 (2008) (awarding attorneys’ fees of \$2.04
2 million as part of the settlement of consumer class action); *In re Sony SXRDRear Projection*
3 *Television Class Action Litig.*, No. 06-5173, 2008 WL 1956267, at *16 (S.D.N.Y. May 1,
4 2008) (awarding class counsel \$1.6 million in attorneys’ fees and expenses in breach-of-
5 warranty class action).

6 18. Furthermore, Plaintiff seeks injunctive relief. *See* Compl. at 21-22 (seeking to
7 enjoin Kellogg from “engaging in the unlawful act” alleged in the Complaint). “In actions
8 seeking declaratory or injunctive relief, it is well established that the amount in controversy
9 is measured by the value of the object of the litigation.” *Cohn v. Petsmart, Inc.*, 281 F.3d
10 837, 840 (9th Cir. 2002) (quoting *Hunt v. Wash. State Apple Advert. Comm’n*, 432 U.S.
11 333, 347 (1977)); *see also* *Rose v. J.P. Morgan Chase, N.A.*, No. 12-225, 2012 WL 892282,
12 at *2-3 (E.D. Cal. Mar. 14, 2012) (denying motion to remand where value of injunctive
13 relief sought exceeded the amount in controversy). The amount in controversy therefore
14 includes “the cost [to Kellogg] of complying with [Plaintiff’s] requested injunctive relief.”
15 *Gen. Dentistry for Kids, LLC v. Kool Smiles, P.C.*, 379 F. App’x 634, 635 (9th Cir. 2010).

16 19. Here, the injunctive relief Plaintiff seeks would likely require Kellogg to
17 immediately cease selling Bear Naked Granola Fit V’nilla Almond in its current packaging
18 in California. The costs of compliance would be significant, as they would include the cost
19 of removing Bear Naked Granola Fit V’Nilla Almond from all stores in California and re-
20 designing the product packaging, as well as the loss of sales Kellogg would likely incur
21 between the time it removed current products from store shelves and when it distributed
22 updated products with re-designed packaging. *See* Eastwood Decl. ¶ 5.

23 20. When aggregated, the actual damages, restitution and disgorgement, punitive
24 damages demanded by Plaintiff, the amount of attorneys’ fees that class counsel may
25 recover, and the cost of complying with Plaintiff’s requested injunctive relief easily exceed
26 CAFA’s \$5 million threshold.

1 **VENUE IS PROPER**

2 21. Venue is proper in this Court because Plaintiff filed his complaint in San Diego
3 County Superior Court, which is located in this District. *See* 28 U.S.C. § 1441(a) (“Except
4 as otherwise expressly provided by Act of Congress, any civil action brought in a State
5 court of which the district courts of the United States have original jurisdiction, may be
6 removed by the defendant or the defendants, to the district court of the United States for the
7 district and division embracing the place where such action is pending.”); 28 U.S.C. § 84(d)
8 (providing that San Diego County is part of the Southern District of California).

9 **REMOVAL IS TIMELY**

10 22. Under 28 U.S.C. § 1446(b), a notice of removal of a civil action must be filed
11 within thirty days of the defendant’s receipt of service of the Summons and the Complaint.
12 Kellogg was served on January 17, 2020. *See* Ex. 1. This Notice of Removal is accordingly
13 timely.

14 **OTHER REQUIREMENTS FOR REMOVAL ARE MET**

15 23. Kellogg has not had any attorneys enter an appearance, file any responsive
16 pleadings, or file any papers responding to the Complaint in the Superior Court.

17 24. Pursuant to 28 U.S.C. § 1446(d), Kellogg will promptly give written notice of
18 the filing of this Notice of Removal to all parties and will promptly file a written notice,
19 along with a copy of this Notice of Removal, with the Clerk of the San Diego County
20 Superior Court. *See* Ex. 4 (Notice to State Court of Removal to Federal Court).

21
22 DATED: February 13, 2020

JENNER & BLOCK LLP

23
24 By: s/ Kate T. Spelman
25 Attorney for Kellogg Sales Company
26 E-mail: kspelman@jenner.com
27
28

EXHIBIT 1

11/11/20 [Signature]

SUM-100

**SUMMONS
(CITACION JUDICIAL)**

FOR COURT USE ONLY
(SOLO PARA USO DE LA CORTE)

ELECTRONICALLY FILED

Superior Court of California,
County of San Diego

12/20/2019 at 01:20:31 PM

Clerk of the Superior Court
By Gen Dieu, Deputy Clerk

**NOTICE TO DEFENDANT:
(AVISO AL DEMANDADO):**

KELLOGG SALES COMPANY; and DOES 1 through 10, inclusive

**YOU ARE BEING SUED BY PLAINTIFF:
(LO ESTÁ DEMANDANDO EL DEMANDANTE):**

Harlan Zaback, individually and on behalf of all others similarly situated

NOTICE! You have been sued. The court may decide against you without your being heard unless you respond within 30 days. Read the information below.

You have 30 CALENDAR DAYS after this summons and legal papers are served on you to file a written response at this court and have a copy served on the plaintiff. A letter or phone call will not protect you. Your written response must be in proper legal form if you want the court to hear your case. There may be a court form that you can use for your response. You can find these court forms and more information at the California Courts Online Self-Help Center (www.courtinfo.ca.gov/selfhelp), your county law library, or the courthouse nearest you. If you cannot pay the filing fee, ask the court clerk for a fee waiver form. If you do not file your response on time, you may lose the case by default, and your wages, money, and property may be taken without further warning from the court.

There are other legal requirements. You may want to call an attorney right away. If you do not know an attorney, you may want to call an attorney referral service. If you cannot afford an attorney, you may be eligible for free legal services from a nonprofit legal services program. You can locate these nonprofit groups at the California Legal Services Web site (www.lawhelpcalifornia.org), the California Courts Online Self-Help Center (www.courtinfo.ca.gov/selfhelp), or by contacting your local court or county bar association. NOTE: The court has a statutory lien for waived fees and costs on any settlement or arbitration award of \$10,000 or more in a civil case. The court's lien must be paid before the court will dismiss the case. **[AVISO! Lo han demandado. Si no responde dentro de 30 días, la corte puede decidir en su contra sin escuchar su versión. Lea la información a continuación.]**

Tiene 30 DÍAS DE CALENDARIO después de que le entreguen esta citación y papeles legales para presentar una respuesta por escrito en esta corte y hacer que se entregue una copia al demandante. Una carta o una llamada telefónica no lo protegen. Su respuesta por escrito tiene que estar en formato legal correcto si desea que procesen su caso en la corte. Es posible que haya un formulario que usted pueda usar para su respuesta. Puede encontrar estos formularios de la corte y más información en el Centro de Ayuda de las Cortes de California (www.sucorte.ca.gov), en la biblioteca de leyes de su condado o en la corte que le quede más cerca. Si no puede pagar la cuota de presentación, pida al secretario de la corte que le dé un formulario de exención de pago de cuotas. Si no presenta su respuesta a tiempo, puede perder el caso por incumplimiento y la corte le podrá quitar su sueldo, dinero y bienes sin más advertencia.

Hay otros requisitos legales. Es recomendable que llame a un abogado inmediatamente. Si no conoce a un abogado, puede llamar a un servicio de remisión a abogados. Si no puede pagar a un abogado, es posible que cumpla con los requisitos para obtener servicios legales gratuitos de un programa de servicios legales sin fines de lucro. Puede encontrar estos grupos sin fines de lucro en el sitio web de California Legal Services, (www.lawhelpcalifornia.org), en el Centro de Ayuda de las Cortes de California, (www.sucorte.ca.gov) o poniéndose en contacto con la corte o el colegio de abogados locales. AVISO: Por ley, la corte tiene derecho a reclamar las cuotas y los costos exentos por imponer un gravamen sobre cualquier recuperación de \$10,000 ó más de valor recibida mediante un acuerdo o una concesión de arbitraje en un caso de derecho civil. Tiene que pagar el gravamen de la corte antes de que la corte pueda desechar el caso.

The name and address of the court is:
(El nombre y dirección de la corte es): **San Diego Hall of Justice**
330 West Broadway
San Diego, CA 92101

CASE NUMBER:
(Número del Caso): **37-2019-00067808-CU-BT-CTL**

The name, address, and telephone number of plaintiff's attorney, or plaintiff without an attorney, is:
(El nombre, la dirección y el número de teléfono del abogado del demandante, o del demandante que no tiene abogado, es):
Eric A. LaGuardia, LaGuardia Law, 402 West Broadway, Suite 800, San Diego, CA, 92101

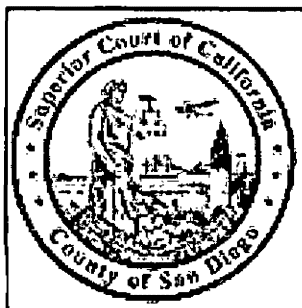
DATE: **12/23/2019**
(Fecha)

Clerk, by
(Secretario)

[Signature]
G. Dieu

Deputy
(Adjunto)

(For proof of service of this summons, use Proof of Service of Summons (form POS-010).)
(Para prueba de entrega de esta citación use el formulario Proof of Service of Summons, (POS-010)).



- NOTICE TO THE PERSON SERVED:** You are served
- as an individual defendant.
 - as the person sued under the fictitious name of (specify):
 - on behalf of (specify):
under: CCP 416.10 (corporation) CCP 416.60 (minor)
 CCP 416.20 (defunct corporation) CCP 416.70 (conservatee)
 CCP 416.40 (association or partnership) CCP 416.90 (authorized person)
 other (specify):
 - by personal delivery on (date):

1 DEVON K. ROEPCKE (SBN 265708)
2 LAW OFFICES OF DEVON K. ROEPCKE
3 170 Laurel Street
4 San Diego, CA 92101
5 Telephone: (619) 940-5357
6 Fax: (619)354-4157
7 droepcke@lawdkr.com

ELECTRONICALLY FILED
Superior Court of California,
County of San Diego
12/20/2019 at 01:20:31 PM
Clerk of the Superior Court
By Gen Dieu, Deputy Clerk

8 ERIC A. LAGUARDIA (SBN 272791)
9 LAGUARDIA LAW, APC
10 402 West Broadway, Suite 800
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12 Telephone No: (619) 655-4322
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15 Attorneys for Plaintiff HARLAN ZABACK

16 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
17 **COUNTY OF SAN DIEGO**

18 Harlan Zaback, individually and on behalf of
19 all others similarly situated,

20 Plaintiff,

21 vs.

22 KELLOGG SALES COMPANY; and DOES
23 1 through 10, inclusive,

24 Defendants.

Case No.: 37-2019-00067808-CU-BT-CTL

CLASS ACTION COMPLAINT FOR:

- (1) **Violations of the California Consumers Legal Remedies Act, Civil Code § 1750, et seq.;**
- (2) **Unfair Business Practices, California Business & Professions Code §§ 17200, et seq.;**
- (3) **Violation of the California False Advertising Law, California Business & Professions Code §§ 17500, et seq.;**
- (4) **Quasi Contract (Unjust Enrichment) Seeking Restitution**

DEMAND FOR JURY TRIAL

1 Plaintiff Harlan Zaback (“Plaintiff”) brings this action on behalf of himself and all others
2 similarly-situated against Kellogg Sales Company (“Kellogg”) and alleges, on information and
3 belief, except for information based on personal knowledge, as follows:

4 **INTRODUCTION**

5 1. Through false and deceptive packaging and advertising, Defendant intentionally
6 misleads consumers into believing that its product “Bear Naked Granola Fit V’nilla Almond” is
7 made with vanilla flavoring derived exclusively from vanilla beans when the ingredient list reveals
8 otherwise.

9 2. At all relevant times, Defendant has packaged, advertised, marketed, distributed,
10 and sold “Bear Naked Granola Fit V’nilla Almond” to consumers via retail stores and online retail
11 platforms throughout the state of California with the misrepresentation that “Bear Naked Granola
12 Fit V’nilla Almond” is made with vanilla flavoring derived exclusively from vanilla beans when
13 the ingredient list reveals otherwise.

14 3. Plaintiff and other consumers purchased “Bear Naked Granola Fit V’nilla Almond”
15 because they reasonably believed, based on Defendant’s packaging and advertising that “Bear
16 Naked Granola Fit V’nilla Almond” is made with vanilla flavoring derived exclusively from
17 vanilla beans. Had Plaintiff and other consumers known that “Bear Naked Granola Fit V’nilla
18 Almond” is not flavored with flavoring derived exclusively from vanilla beans, they would not
19 have purchased the “Bear Naked Granola Fit V’nilla Almond” or would have paid significantly
20 less for it. As a result, Plaintiff and other consumers have been deceived and have suffered
21 economic injury.

22 4. Plaintiff seeks relief in this action individually, and on behalf of all other similarly
23 situated individuals who purchased “Bear Naked Granola Fit V’nilla Almond” during the relevant
24 statute of limitations period, for violations of California’s Consumer Legal Remedies Act
25 (“CLRA”), California Civil Code section 1750, *et seq.*, California’s Unfair Competition Law
26 (“UCL”), California Business & Professions Code section 17200, *et seq.*, California’s False
27 Advertising Law (“FAL”), California Business & Professions Code section 17500, *et seq.*, and for
28 common law fraud, intentional misrepresentation, negligent misrepresentation, and unjust

1 enrichment.

2 5. Plaintiff seeks to represent a Class (defined *infra* in paragraph 49) (hereinafter,
3 referred to as the “Class”).

4 6. As a result of the unlawful scheme alleged herein, Defendant has been able to
5 overcharge Plaintiff and other consumers for its product, induce purchases that would otherwise
6 not have occurred, and/or obtain wrongful profits. Defendant’s misconduct has caused Plaintiff
7 and other consumers to suffer monetary damages. Plaintiff, on behalf himself and other similarly
8 situated consumers, seek damages, restitution, declaratory and injunctive relief, and all other
9 remedies provided by applicable law or this Court deems appropriate.

10 **JURISDICTION AND VENUE**

11 7. The amount in controversy is sufficient to implicate the general jurisdiction of the
12 Superior Court of San Diego.

13 8. This Court has subject matter jurisdiction pursuant to California Business and
14 Professions Code, Sections 17203, 17204 and Civil Code, Section 1750.

15 9. This Court has personal jurisdiction over Defendant because it has continuous and
16 systematic contacts with the state of California, County of San Diego. Plaintiff’s claims arise out
17 of Defendant’s forum related activities.

18 10. Venue is proper in this Court pursuant to California Code of Civil Procedure,
19 Sections 395 and 395.5, Business and Professions Code, Sections 17203, 17204, and Civil Code
20 Section 1750 because Defendant conducts substantial business in this County. Venue is also
21 proper because a substantial portion of the misconduct alleged herein occurred in the County of
22 San Diego.

23 **THE PARTIES**

24 11. Plaintiff Harlan Zaback is an individual that resides in the County of San Diego,
25 California. Mr. Zaback purchased “Bear Naked Granola Fit V’nilla Almond” and in doing so saw
26 and relied upon the representations on the packaging. Specifically, Mr. Zaback saw and relied on
27 the following illustrations and representations on the packaging: use of the word “V’nilla” in the
28 product’s name on the front and back of the package; the words “naturally flavored” on front of

1 package immediately below the words “V’nilla Almond”; a vignette of vanilla beans with only the
2 word “Vanilla” below it on the back of package; and the words “natural flavors” in package’s
3 ingredient list. Based on these representations, Mr. Zaback believed he was purchasing granola
4 with vanilla flavoring derived exclusively from vanilla beans.

5 12. Mr. Zaback would not have purchased “Bear Naked Granola Fit V’nilla Almond”
6 or would have paid significantly less for it had he known that it was not flavored with vanilla
7 flavoring derived exclusively from vanilla beans. Therefore, Mr. Zaback suffered injury in fact
8 and lost money as a result of Defendant’s misleading, false, unfair, and fraudulent practices, as
9 described herein. Despite being misled by Defendant, Mr. Zaback wishes to and is likely to
10 continue purchasing “Bear Naked Granola Fit V’nilla Almond” in the future if it is flavored with
11 vanilla flavoring derived exclusively from vanilla beans. To this day, Mr. Zaback regularly shops
12 at stores where “Bear Naked Granola Fit V’nilla Almond” is sold. On some of these occasions,
13 Mr. Zaback would like to buy the “Bear Naked Granola Fit V’nilla Almond,” but has refrained
14 from doing so because he cannot rely with any confidence on Defendant’s representations
15 regarding the vanilla flavor of the granola, especially since he was deceived in the past by
16 Defendant. While Mr. Zaback currently believes that “Bear Naked Granola Fit V’nilla Almond,”
17 is not flavored with vanilla flavoring derived exclusively from vanilla beans, he lacks personal
18 knowledge as to Defendant’s food production practices, which may change over time, leaving
19 room for doubt in his mind as to whether “Bear Naked Granola Fit V’nilla Almond” is flavored
20 with vanilla flavoring derived exclusively from vanilla beans. This uncertainty, coupled with his
21 desire to purchase “Bear Naked Granola Fit V’nilla Almond,” is an ongoing injury that can and
22 would be rectified by an injunction enjoining Defendant from making the false and/or misleading
23 representations alleged herein.

24 13. Defendant Kellogg Sales Company is a Delaware corporation with its principal
25 place of business at One Kellogg Square, Battle Creek, Michigan 49016. Defendant is responsible
26 for the production, marketing, and sales of “Bear Naked Granola Fit V’nilla Almond.” Kellogg
27 was founded in 1906 and is headquartered in Battle Creek, Michigan. Kellogg is a multi-billion-
28 dollar food company that manufactures, markets, and sells a wide variety of cereals and snack

1 bars, among other foods. Among these food products, Kellogg distributes, markets, labels, and
2 sells a variety of granola products in various flavors under its “Bare Naked” brand, including
3 “Bear Naked Granola Fit V’nilla Almond” purchased by Plaintiff.

4 14. Plaintiff is unaware of the names of, and capacities of the defendants sued herein as
5 DOES 1 through 10, inclusive. Plaintiff is informed and believes and upon that basis alleges that
6 each of the defendants sued herein as DOES 1 through 10, inclusive, is responsible in some
7 manner for the wrongs alleged herein and is legally liable to the Plaintiff. Plaintiff will amend this
8 complaint to allege their true names and capacities when such information is ascertained.

9 **FACTUAL ALLEGATIONS**

10 **A. Background**

11 15. Vanilla is one of the most popular and common ingredients in the world – whether
12 as a primary flavor, a component of another flavor, or for its aroma.¹

13 16. Vanilla is also the second most expensive flavoring ingredient after saffron.²

14 17. Because of its versatility, high demand, high value, and the relatively limited
15 supply of vanilla bean crops, vanilla is constantly subject to adulteration, extension, and imitation
16 efforts. For the same reasons, there is strong incentive for bad actors to pass off less expensive and
17 lower quality components as natural *vanillin*³ derived from the vanilla bean.

18 18. Tactics used to make consumers believe they are getting a product with only real
19 vanilla include: adding synthetically produced *vanillin* derived from wood pulp, tree bark, coal tar,
20
21
22

23 ¹ In 1908, E. M. Chace, Assistant Chief of the Foods Division of the U.S. Department of
24 Agriculture’s Bureau of Chemistry, noted “There is at least three times as much vanilla consumed
25 [in the United States] as all other flavors together. See “The Manufacture of Flavoring Extracts,”
26 Yearbook of the United States Department of Agriculture 1908 (Washington, DC: Government
27 Printing Office, 1909) pp.333–42, 333; see also “Vanilla: The Cultural History of the World’s
28 Most Popular Flavor and Fragrance” Rain, Patricia (2004).

² “Chemistry of Spices” Parthasarathy, V. A.; Chempakam, Bhageerathy; Zachariah, T.
John (2008), p. 2.

³ “Vanillin” is the primary component of the extract of the vanilla bean but does not have
quite the same taste as the much more complex mixture of compounds found in natural vanilla
extract.

1 or anal secretions from beaver castor sacs⁴; “extending” vanilla with various flavoring substances
2 with no connection or resemblance to real vanilla beans; and utilizing Tonka bean extract which is
3 a source of coumarin, a substance banned for use in food in the US since 1954 based on possible
4 safety concerns⁵, among others.

5 19. Section 341 of the Federal Food, Drug, and Cosmetic Act (FFDCA) directs the
6 Food and Drug Administration (FDA) to establish standards for food where necessary to promote
7 honesty and fair dealing in the interest of consumers.⁶

8 20. The federal food standards, as FDA explains, are intended to “protect consumers
9 from contaminated products and economic fraud” and have served as “a trusted barrier against
10 substandard and fraudulently packaged food since their enactment in the 1938
11 FFDCA.” Additionally, the federal food standards help create a “level playing field” environment
12 where competitors cannot cut prices by selling inferior products.⁷

13 21. Federal food standards allow consumers to trust that a standardized food is actually
14 what it purports to be by establishing explicit specifications for the standardized food. Another
15 important part of a food standard is its assigned common or usual name under which only
16 conforming products may be sold. Once a food has a promulgated standard, only products that
17 comply with the compositional and applicable production requirements of the standard may be
18 marketed under the food standard name. Put differently, a food labeled with the name of the food
19 that is subject to the standard must be composed of the ingredients specified in the applicable
20 standard.

21 22. FDA established a series of standards of identity specifically for vanilla products
22 promulgated at 21 CFR 169.175 – 169.182 intended to alleviate potential consumer fraud by
23 establishing specific requirements for vanilla extract and other standardized vanilla products. The
24

25 ⁴ Mollie Bloudoff-Indelicato “Beaver Butts Emit Goo Used for Vanilla Flavoring”,
26 October 1, 2013, <https://www.nationalgeographic.com/news/2013/10/beaver-butt-goo-vanilla-flavoring/#close>

27 ⁵ FDA, 2008. Mexican “vanilla” with coumarin: no bargain. FDA Consumer Health
28 Information at www.fda.gov/consumer.

⁶ 21 U.S.C.A. § 341.

⁷ FDA, 2007. FDA Consumer Update, “FDA’s Standards for High Quality Foods.”

1 need for consumers to be protected from fraudulent vanilla flavoring representations is reflected in
2 the fact that vanilla flavorings are the only flavoring materials subject to a federal standard of
3 identity.

4 23. FDA defines vanilla beans at 21 CFR 169.3(a): “The term vanilla beans means the
5 properly cured and dried fruit pods of *Vanilla planifolia Andrews* and of *Vanilla tahitensis*
6 *Moore*.”

7 24. The standards of identity set out by 21 CFR 169 for identifying vanilla extract and
8 the other standardized vanilla products require standardized vanilla products be derived from
9 “vanilla beans” as defined above under 21 CFR 169.3(a).

10 25. In addition to Section 341, Section 343 of the FFDCFA dictates that a food shall be
11 deemed to be misbranded “[i]f it purports to be or is represented as a food for which a definition
12 and standard of identity has been prescribed by regulations as provided by section 341 of this title,
13 unless (1) it conforms to such definition and standard, and (2) its label bears the name of the food
14 specified in the definition and standard, and, insofar as may be required by such regulations, the
15 common names of optional ingredients (other than spices, flavoring, and coloring) present in such
16 food.”⁸

17 26. Taken together, Sections 341 and 343 dictate where a flavor is represented as
18 “vanilla” and/or tastes like vanilla it is subject to the standards of identity for vanilla flavorings set
19 out by 21 CFR 169.175 – 169.182 and must comply with the labeling requirements for the
20 standards. FDA’s implementing regulations follow the legal principle that standards of identity
21 supersede the general flavor labeling regulations because where there “is a flavor for which a
22 standard of identity has been promulgated,” then “it shall be labeled as provided in the standard.”⁹

23 27. If a food contains any artificial flavor which resembles or reinforces the characte-
24 rizing flavor, the name of the food on the label should be accompanied by the common or usual
25 name of the characterizing flavor and the word(s) ‘artificial’ or ‘artificially flavored’ e.g. ‘artificial
26 vanilla,’ ‘artificially flavored vanilla’ or ‘vanilla artificially flavored.’

27
28 ⁸ 21 U.S.C.A. § 343.

⁹ 21 C.F.R. § 101.22(g)

1 28. Even if, for example, Defendant’s “Bear Naked Granola Fit V’nilla Almond”
2 (where vanilla is a characterizing flavor) is flavored with a combination that is part vanilla flavor
3 derived exclusively from vanilla beans (like vanilla-extract) along with *vanillin* derived from some
4 other “natural” but non-vanilla bean *vanillin* source (like tree bark), the proper labeling would be
5 the general flavor and food labeling regulations at 21 CFR Section 101.22. In this example,
6 though, the *vanillin* derived from tree bark is characterizing for vanilla and even though it qualifies
7 as “natural flavor” under 21 CFR Section 101.22(a)(3) the labeling for the “Bear Naked Granola
8 Fit V’nilla Almond” on the principal display panel must indicate that its granola contains an
9 “artificial” flavor – the *vanillin* not from vanilla beans; and in such an example the ingredient
10 statement could contain a statement of “natural and artificial flavors.”¹⁰ But even if this *is* the case
11 with the vanilla flavor in “Bear Naked Granola Fit V’nilla Almond,” Defendant’s packaging for
12 “Bear Naked Granola Fit V’nilla Almond” does neither.

13 **B. Defendant’s Packaging and Marketing Are Misleading**

14 29. Defendant’s “Bear Naked Granola Fit V’nilla Almond,” along with the other Bare
15 Naked granola products, is available to consumers nationwide from third-party retailers, including
16 brick and mortar and online stores.

17 30. Defendant’s packaging and marketing of “Bear Naked Granola Fit V’nilla
18 Almond” is misleading to reasonable consumers, including Plaintiff and other Class members.

19 31. Plaintiff purchased “Bear Naked Granola Fit V’nilla Almond” with the belief,
20 based on Defendant’s misleading packaging, that it is flavored with vanilla flavoring derived
21 exclusively from vanilla beans when close inspection of the ingredient list reveals otherwise.

22 32. A reasonable consumer is misled to believe “Bear Naked Granola Fit V’nilla
23 Almond” is flavored with vanilla flavoring derived exclusively from vanilla beans based on the

24 _____
25 ¹⁰ The FDA has weighed in on this point, specifically, stating that a food containing *vanillin* even
26 produced consistent with the FDA definition of natural flavor “can bear the term ‘vanillin,’
27 ‘natural flavor,’ or ‘contains natural flavor’ but the term natural flavor must not be used in such a
28 way to imply that it is ‘natural vanilla flavor’ because it is not derived from vanilla beans.” See:
“Labeling Vanilla Flavorings and Vanilla-Flavored Foods in the U.S.,” John B. Hallagan and
Joanna Drake, The Flavor and Extract Manufacturers Association of the United States, April 25,
2018 article quoting May 6, 2009 Letter from FDA to a flavor industry member regarding “natural
vanillin.” (Emphasis added).

1 following illustrations and representations on Defendant's relevant packaging and advertising:

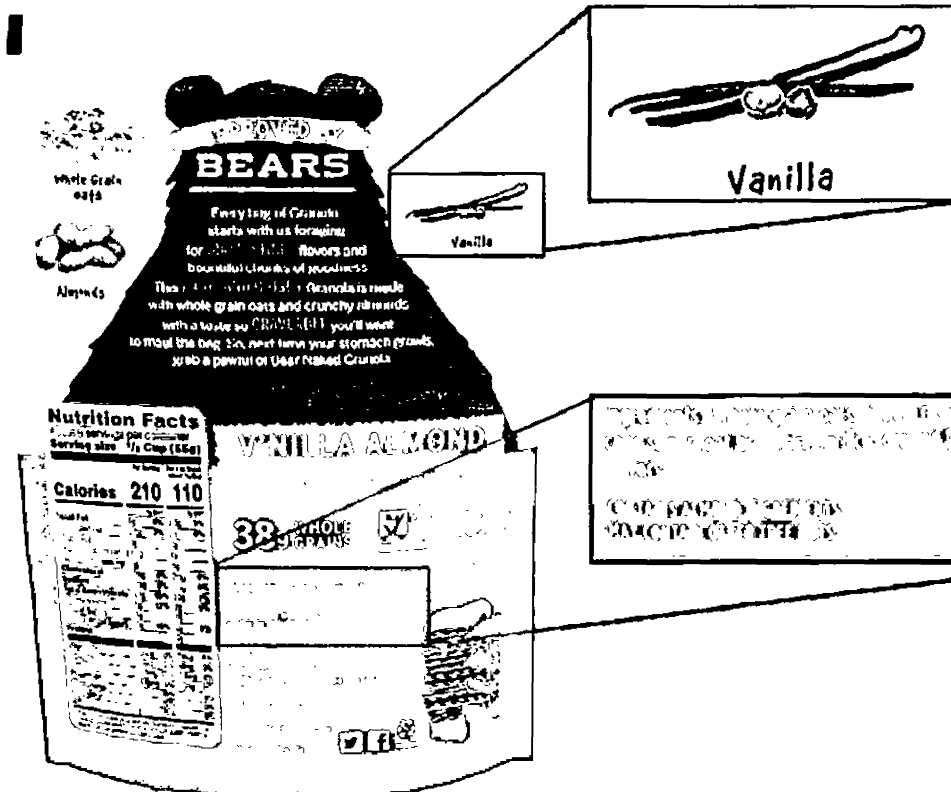
2 (1) use of the word "V'nilla" in the product's name;

3 (2) the words "naturally flavored" on front of package immediately below the words
4 "V'nilla Almond";



14 (3) a vignette of vanilla beans with only the word "Vanilla" below it on the back of
15 package;

16 (4) the words "natural flavors" in package's ingredient list;



(5) the words "natural vanilla flavor" in the narrative next to the product on the Bear Naked website;



V'NILLA ALMOND

Bear Naked Granola Fit Vnilla Almond. Not all bears hibernate for the winter. Some like to keep active all year round. These are the fit-minded bears behind V'nilla Almond Fit Granola, with Non-GMO project verified whole grain oats, almonds, and natural vanilla flavor. Perfect for the bear on the go.

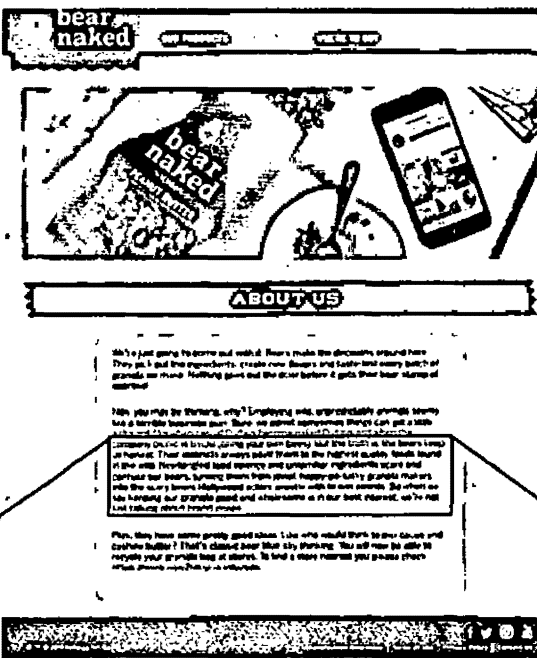
Product Information:

Allergen Notes: CONTAINS ALMOND INGREDIENTS. MAY CONTAIN OTHER TREE NUTS.

Ingredients: Whole grain oats, brown rice syrup, almonds, cane sugar, oat bran, brown rice, ground flax seeds, natural flavors.



(6) and the narrative under "About Us" on the Bear Naked website, suggesting that their products are made from the "highest quality foods" without "unfamiliar ingredients," and that they keep their granola "good and wholesome."



company picnic is BYOB (bring your own bees). But the truth is, the bears keep us honest. Their instincts always point them to the highest quality foods found in the wild. Newfangled food science and unfamiliar ingredients scare and confuse our bears, turning them from jovial, happy-go-lucky granola makers into the scary bears Hollywood actors wrestle with to win awards. So when we say keeping our granola good and wholesome is in our best interest, we're not just talking about brand image.

1 33. Ingredients: Whole grain oats, brown rice syrup, almonds, dried cane syrup, oat
2 bran, brown rice, natural flavors, ground flax seeds. (Emphasis added).

3 34. “Bear Naked Granola Fit V’nilla Almond” does not identify vanilla extract or
4 vanilla flavoring as the flavoring source for its vanilla flavor, despite vanilla constituting a
5 “characterizing flavor” based on its packaging, along with “almond.”

6 35. As explained above, when faced with general and specific regulations, the general
7 rule is to use the specific ones, in this case the specific regulations for vanilla as opposed to
8 general flavoring.

9 36. Defendant’s listing of “natural flavors” as opposed to vanilla flavor or vanilla
10 extract is tacit acknowledgement that the “natural flavors” is not a synonym for the required
11 vanilla ingredients. *Compare* 21 C.F.R. § 101.22 (natural flavor) *with* 21 C.F.R. § 169.175
12 (Vanilla extract.) and § 169.177 (Vanilla flavoring.).

13 37. Additionally, it would make no sense to use a more expensive and higher quality
14 ingredient (vanilla extract or vanilla flavor) but designate it with a general term that could be
15 perceived by some consumers to cost less money and appearing on most foods in existence
16 (“natural flavors”).

17 38. In short, the vanilla flavor in “Bear Naked Granola Fit V’nilla Almond” derived
18 from any source other than the vanilla bean must be labeled as an artificial flavor, but it is not.

19 39. Nowhere on the packaging does it disclose that the “Bear Naked Granola Fit
20 V’nilla Almond” is flavored with anything other than vanilla flavoring derived exclusively from
21 vanilla beans. Rather, as described above, the packaging uses words and even a picture of vanilla
22 beans to misrepresent to Plaintiff and reasonable consumers that it *is* flavored with vanilla
23 flavoring derived exclusively from vanilla beans.

24 40. Through Defendant’s packaging and advertising as described herein, Defendant has
25 acknowledged its intent to create the impression that its “Bear Naked Granola Fit V’nilla Almond”
26 is flavored with vanilla flavoring derived exclusively from vanilla beans.

27 41. “Bear Naked Granola Fit V’nilla Almond” is misleading because it is marketed as
28 if it is flavored with vanilla flavoring derived exclusively from vanilla beans (when it is not) next

1 to other granola products marketed similarly but that actually are flavored with vanilla flavoring
2 derived exclusively from vanilla beans.

3 42. Where two similarly labeled products are situated in the same category or section
4 of a store and their representations as to quality are identical, yet one is lacking the quantity of the
5 characterizing ingredient (vanilla) or qualities, the reasonable consumer will be deceived.

6 43. Accordingly, a reasonable consumer will and does pay more money for the
7 misleading labeled product under the false impression that it contains the equivalent amount
8 and/or type of the characterizing ingredients and possesses such qualities.

9 44. The proportion of this characterizing component, vanilla, has a material bearing on
10 price or consumer acceptance of the product because it is more expensive and desired by
11 consumers.

12 45. Had Plaintiff and Class members known the truth about “Bear Naked Granola Fit
13 V’nilla Almond,” they would not have purchased it or would have paid less for it.

14 46. As a result of its misleading business practice, and the harm caused to Plaintiff and
15 other consumers, Defendant should be enjoined from deceptively representing that “Bear Naked
16 Granola Fit V’nilla Almond” is made with vanilla flavoring derived exclusively from vanilla
17 beans. Furthermore, Defendant should be required to pay for all damages caused to misled
18 consumers, including Plaintiff.

19 47. Despite being misled by Defendant, Plaintiff wishes to and is likely to continue
20 purchasing “Bear Naked Granola Fit V’nilla Almond” in the future if it is made with vanilla
21 flavoring derived exclusively from vanilla beans. To this day, Plaintiff regularly shops at stores
22 where “Bear Naked Granola Fit V’nilla Almond” is sold. On some of these occasions, Plaintiff
23 would like to buy the “Bear Naked Granola Fit V’nilla Almond,” but refrains from doing so
24 because he cannot rely with any confidence on Defendant’s representations regarding the
25 ingredients, especially since he was deceived by Defendant in the past. While Mr. Zaback
26 currently believes that “Bear Naked Granola Fit V’nilla Almond,” is not flavored with vanilla
27 flavoring derived exclusively from vanilla beans, he lacks personal knowledge as to Defendant’s
28 food production practices, which may change over time, leaving room for doubt in his mind as to

1 whether “Bear Naked Granola Fit V’nilla Almond” is flavored with vanilla flavoring derived
2 exclusively from vanilla beans. This uncertainty, coupled with his desire to purchase “Bear Naked
3 Granola Fit V’nilla Almond,” is an ongoing injury that can and would be rectified by an injunction
4 enjoining Defendant from making the false and/or misleading representations alleged herein.

5 **CLASS ACTION ALLEGATIONS**

6 48. Plaintiff re-alleges and incorporates by reference all preceding paragraphs.

7 49. Plaintiff brings this action on behalf of himself and the following ascertainable
8 class of similarly situated persons pursuant to California Civil Code of Procedure section 382:

9 All persons, who are California residents who purchased “Bear Naked Granola Fit V’nilla
10 Almond,” or who purchased “Bear Naked Granola Fit V’nilla Almond” within the State of
11 California, for personal, family, or household purposes during the relevant statute of
12 limitations periods.

13 50. Excluded from the Class is the following individuals and/or entities: Defendant and
14 its parents, subsidiaries, affiliates, officers and directors, current or former employees, and any
15 entity in which Defendant has a controlling interest; all individuals who make a timely election to
16 be excluded from this proceeding using the correct protocol for opting out; and all judges assigned
17 to hear any aspect of this litigation, as well as their staff.

18 51. Plaintiff reserves the right to amend the above class and to add additional classes
19 and subclasses as appropriate based on investigation, discovery, and the specific theories of
20 liability.

21 52. Plaintiff is a member of the Class.

22 53. Members of the Class are so numerous that their individual joinder herein is
23 impracticable. On information and belief, members of the Class number in at least the thousands.
24 The precise number of Class members and their identities is unknown to Plaintiff at this time but
25 will be determined through discovery. Class members may be notified of the pendency of this
26 action by mail and/or publication through the distribution records of Defendant and third party
27 retailers and vendors.

28 54. Defendant’s conduct has imposed a common injury on the members of the Class.
Defendant has acted, and refused to act, on ground generally applicable to the Class, which makes

1 final injunctive relief with respect to each claim as a whole appropriate.

2 55. The representative Plaintiff will faithfully represent the class and the claims of
3 Plaintiff is typical of the claims of the Class, because Plaintiff and all members of the Class
4 sustained damages that arise out of the same pattern and practice of wrongful conduct by the
5 Defendant, in violation of law as alleged herein.

6 56. Plaintiffs will fairly and adequately protect the interests of the Class. Plaintiff has
7 retained counsel highly experienced in handling class action litigation, including that which
8 involves consumer protection from unfair business practices, and Plaintiff intends to prosecute this
9 action vigorously. Plaintiff has no adverse or antagonistic interests to those of the Class.

10 57. The class mechanism is superior to other available means for the fair and efficient
11 adjudication of the claims of Plaintiff and Class members. Each individual Class member may
12 lack the resources to undergo the burden and expense of individual prosecution of the complex
13 and extensive litigation necessary to establish Defendant's liability. Individualized litigation
14 increases the delay and expense to all parties and multiplies the burden on the judicial system
15 presented by the complex legal and factual issues of this case. Individualized litigation also
16 presents a potential for inconsistent or contradictory judgments. In contrast, the class action device
17 presents far fewer management difficulties and provides the benefits of single adjudication,
18 economy of scale, and comprehensive supervision by a single court on the issue of Defendant's
19 liability. Class treatment of the liability issues will ensure that all claims and claimants are before
20 this Court for consistent adjudication of the liability issues.

21 58. There is a well-defined community of interest in the questions and answers of law
22 and fact involved affecting the members of the Class. The questions and answers of law and fact
23 common to the Class predominate over questions and answers affecting only individual class
24 members, and include, but are not limited to, the following:

- 25 a. Whether Defendant misrepresented material facts and/or failed to disclose material
26 facts in connection with the packaging, marketing, distribution, and sale of "Bear
27 Naked Granola Fit V'nilla Almond";
28 b. Whether Defendant's use of false or deceptive packaging and advertising

- 1 constituted false or deceptive advertising;
- 2 c. Whether Defendant engaged in unfair, unlawful and/or fraudulent business
- 3 practices;
- 4 d. Whether Defendant’s unlawful conduct, as alleged herein, was intentional and
- 5 knowing;
- 6 e. Whether Plaintiff and the Class are entitled to damages and/or restitution, and in
- 7 what amount;
- 8 f. Whether Defendant is likely to continue using false, misleading or unlawful
- 9 conduct such that an injunction is necessary; and
- 10 g. Whether Plaintiff and the Class are entitled to an award of reasonable attorneys’
- 11 fees, interest, and costs of suit.

12 59. Plaintiff knows of no difficulty likely to be encountered in the management of this
 13 litigation that would preclude its maintenance as a class action. Because the action is brought as a
 14 California class action, the court need only apply a single set of California laws as they relate to
 15 Defendant’s contract, practices, and conduct.

16 **CAUSES OF ACTION**

17 **FIRST CAUSE OF ACTION**

18 Violation of California’s Consumers Legal Remedies Act (“CLRA”),
 19 California Civil Code §§ 1750, *et seq.*

20 60. Plaintiff re-alleges and incorporates by reference all preceding paragraphs.

21 61. Plaintiff brings this claim individually and on behalf of the members of the
 22 proposed Class against Defendant.

23 62. “Bear Naked Granola Fit V’nilla Almond” is a “good” within the meaning of
 24 California Civil Code section 1761(a), and the purchases of such “Bear Naked Granola Fit V’nilla
 25 Almond” by Plaintiff and members of the Class constitute “transactions” within the meaning of
 26 California Civil Code section 1761(e).

27 63. California Civil Code section 1770(a)(5) prohibits “[r]epresenting that goods or
 28 services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities

1 which they do not have” By marketing “Bear Naked Granola Fit V’nilla Almond” with its
2 current packaging and advertisements, Defendant has represented and continues to represent that
3 the granola has characteristics (that it is flavored with vanilla flavoring derived exclusively from
4 vanilla beans) which it is not. Therefore, Defendant has violated section 1770(a)(5) of the CLRA.

5 64. California Civil Code section 1770(a)(7) prohibits “[r]espresenting that goods or
6 services are of a particular standard, quality, or grade, or that goods are of a particular style or
7 model, if they are of another.” By marketing “Bear Naked Granola Fit V’nilla Almond” with its
8 current packaging and advertisements, Defendant has represented and continues to represent that
9 the granola is of a particular standard, quality, or grade (that it is flavored with vanilla flavoring
10 derived exclusively from vanilla beans) when it is of another (flavored with vanilla flavoring that
11 is not derived exclusively from vanilla beans). Therefore, Defendant has violated section
12 1770(a)(7) of the CLRA.

13 65. California Civil Code section 1770(a)(9) prohibits “[a]dvertising goods or services
14 with intent not to sell them as advertised.” By packaging and marketing “Bear Naked Granola Fit
15 V’nilla Almond” with words, statements, and pictures so that a reasonable consumer would
16 believe that the granola is flavored with vanilla flavoring derived exclusively from vanilla beans,
17 and then intentionally not selling the granola as granola flavored with something other than vanilla
18 flavoring derived exclusively from vanilla beans, Defendant has violated section 1770(a)(9) of the
19 CLRA.

20 66. At all relevant times, Defendant has known or reasonably should have known that
21 “Bear Naked Granola Fit V’nilla Almond” was not flavored with vanilla flavoring derived
22 exclusively from vanilla beans, but instead flavored with something other than vanilla flavoring
23 derived exclusively from vanilla beans, and that Plaintiff and other members of the Class would
24 reasonably and justifiably rely on the packaging and other advertisements in purchasing the
25 granola.

26 67. Plaintiff and members of the Class have reasonably and justifiably relied on
27 Defendant’s misleading, and fraudulent conduct when purchasing “Bear Naked Granola Fit
28 V’nilla Almond.” Moreover, based on the materiality of Defendant’s fraudulent and misleading

1 conduct, reliance on such conduct as a material reason for the decision to purchase the granola
2 may be presumed or inferred for Plaintiff and members of the Class.

3 68. Plaintiff and members of the Class have suffered and continue to suffer injuries
4 caused by Defendant because they would not have purchased “Bear Naked Granola Fit V’nilla
5 Almond” or would have paid significantly less for “Bear Naked Granola Fit V’nilla Almond” had
6 they known that Defendant’s conduct was misleading and fraudulent.

7 69. Under California Civil Code section 1780(a), Plaintiff and members of the Class
8 are seeking injunctive relief pursuant to the CLRA, preventing Defendant from further wrongful
9 acts and unfair and unlawful business practices, as well as restitution, disgorgement of profits, and
10 any other relief this Court deems proper.

11 70. Pursuant to California Civil Code section 1782, on December 5, 2019 Plaintiff
12 notified Defendant in writing by certified mail of the violations of Section 1770 of the Act and
13 demanded that Defendant rectify the problems associated with the actions detailed above and to
14 give notice to all affected consumers of its intent to so act. Plaintiff sent this notice by certified
15 mail, return receipt requested, to Defendant’s principal place of business.

16 71. Pursuant to California Civil Code section 1782(d), Plaintiff and the Class seek a
17 Court order enjoining the above-described wrongful acts and practices.

18 72. Plaintiff has incurred attorneys’ fees and costs in connection with the investigation
19 and filing of this complaint and anticipates incurring additional attorneys’ fees and costs in
20 connection with the prosecution of this action. An award of attorneys’ fees is, therefore,
21 appropriate pursuant to, among other grounds, California Civil Code section 1780(d):

22 73. Plaintiff has suffered and will continue to suffer damages because of the violations
23 discussed herein. The time for Defendant to respond to the letter referred to in the preceding
24 paragraphs has not yet passed. When it does, Plaintiff will amend this complaint to seek, on behalf
25 of himself and the Class, compensatory, punitive, and all other available damages.

26 74. In all, the injuries suffered by Plaintiff and/or members of the Class as a direct
27 result of Defendant’s acts include:

28 a. Purchases made in reliance on the false representations made by Defendant; and

1 “Bear Naked Granola Fit V’nilla Almond” was flavored with vanilla flavoring derived exclusively
2 from vanilla beans. Defendant’s representations are misleading because “Bear Naked Granola Fit
3 V’nilla Almond” was not flavored with vanilla flavoring derived exclusively from vanilla beans.
4 Because Defendant has disseminated misleading information regarding “Bear Naked Granola Fit
5 V’nilla Almond,” and Defendant knows, knew, or should have known through the exercise of
6 reasonable care that the representation was and continues to be misleading, Defendant has violated
7 the FAL.

8 91. Moreover, Defendant knows, knew or should have known through the exercise of
9 reasonable care that such representation was and continues to be unauthorized and misleading.

10 92. As a result of Defendant’s false advertising, Defendant has and continues to
11 fraudulently obtain money from Plaintiff and members of the Class.

12 93. Plaintiff requests that this Court cause Defendant to restore this fraudulently
13 obtained money to Plaintiff and members of the Class, to disgorge the profits Defendant made on
14 these transactions, and to enjoin Defendant from violating the FAL or violating it in the same
15 fashion in the future as discussed herein. Otherwise, Plaintiff and members of the Class may be
16 irreparably harmed and/or denied an effective and complete remedy if such an order is not granted.

17
18 **FOURTH CAUSE OF ACTION**
19 **Quasi Contract/Unjust Enrichment/Restitution**

20 94. Plaintiff re-alleges and incorporates by reference all preceding paragraphs.

21 95. Plaintiff brings this claim individually and on behalf of the members of the Class
22 against Defendant.

23 96. Where a defendant has been unjustly conferred a benefit “through mistake, fraud,
24 coercion, or request” the return of that benefit is a remedy sought in “a quasi-contract cause of
25 action.” *Astiana v. Hain Celestial Grp., Inc.*, 783 F.3d 753, 762 (9th Cir. 2015). When a plaintiff
26 alleges “unjust enrichment, a court may ‘construe the cause of action as a quasi-contract claim
27 seeking restitution.’” *Id.*

28 97. As alleged herein, Defendant has intentionally and recklessly made misleading
representations to Plaintiff and members of the Class to induce them to purchase “Bear Naked

1 Granola Fit V'nilla Almond." Plaintiff and members of the Class have reasonably relied on the
2 misleading representations and have not received all of the benefits promised by Defendant.
3 Plaintiff and members of the Class therefore have been induced by Defendant's misleading and
4 false representations about "Bear Naked Granola Fit V'nilla Almond," and paid for it when they
5 would and/or should not have or paid more money to Defendant for it than they otherwise would
6 and/or should have paid.

7 98. Plaintiff and members of the Class have conferred a benefit upon Defendant as
8 Defendant has retained monies paid to them by Plaintiff and members of the Class.

9 99. The monies received were obtained under circumstances that were at the expense of
10 Plaintiff and members of the Class – i.e., Plaintiff and members of the Class did not receive the
11 full value of the benefit conferred upon Defendant.

12 100. Accordingly, it is inequitable and unjust for Defendant to retain the profit, benefit,
13 or compensation conferred upon them without paying Plaintiff and the members of the Class back
14 for the difference of the full value of the benefits compared to the value actually received.

15 101. As a direct and proximate result of Defendant's unjust enrichment, Plaintiff and
16 members of the Class are entitled to restitution, disgorgement, and/or the imposition of a
17 constructive trust upon all profits, benefits, and other compensation obtained by Defendant from
18 its deceptive, misleading, and unlawful conduct as alleged herein.

19 **PRAYER**

20 **WHEREFORE**, Plaintiff, individually and on behalf of the Class, respectfully pray for
21 following relief:

22 1. Certification of this case as a class action on behalf of the Class defined above,
23 appointment of Plaintiff as Class representative, and appointment of Plaintiff's counsel as Class
24 counsel;

25 2. A declaration that Defendant's actions, as described herein, constitute violations as
26 described herein;

27 3. An award of injunctive and other equitable relief as is necessary to protect the
28 interests of Plaintiff and the Class, including, *inter alia*, an order prohibiting Defendant from

1 engaging in the unlawful act described above;

2 4. An award to Plaintiff and the proposed class of restitution and/or other equitable
3 relief, including, without limitation, restitutionary disgorgement of all profits and unjust
4 enrichment that Defendant obtained from Plaintiff and the proposed class as a result of its
5 unlawful, unfair and fraudulent business practices described herein;

6 5. An award of all economic, monetary, actual, consequential, and compensatory
7 damages caused by Defendant's conduct;

8 6. An award of punitive damages;

9 7. An award to Plaintiff and his counsel of their reasonable expenses and attorneys'
10 fees;

11 8. An award to Plaintiff and the Class of pre and post-judgment interest, to the extent
12 allowable; and

13 9. For such further relief that the Court may deem just and proper.

14 **JURY DEMAND**

15 Plaintiff requests a jury on all triable issues.

16 DATED: December 20, 2019

17 **LAGUARDIA LAW, APC**

18 By: _____

Eric A. LaGuardia

19 **LAW OFFICES OF DEVON K.
20 ROEPCKE, PC**

21 Attorneys for Plaintiff
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Affidavit of Eric A. LaGuardia for CLRA Count

I, Eric A. LaGuardia, am an attorney admitted to practice before this Court and I am counsel of record for Plaintiff in the above-captioned matter. I make this affidavit pursuant to California Civil Code §1780(d). Venue is proper in this District because it is within the county where Plaintiff's transaction at issued in this Complaint occurred. I declare under penalty of perjury under the laws of the United States of America the above is true and correct and of my own personal knowledge.

Dated: December 20, 2019


Eric A. LaGuardia

EXHIBIT 2

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO	
STREET ADDRESS:	330 W Broadway
MAILING ADDRESS:	330 W Broadway
CITY AND ZIP CODE:	San Diego, CA 92101-3827
BRANCH NAME:	Central
TELEPHONE NUMBER:	(619) 450-7070
PLAINTIFF(S) / PETITIONER(S):	Harlan Zaback
DEFENDANT(S) / RESPONDENT(S):	KELLOGG SALES COMPANY
ZABACK VS KELLOGG SALES COMPANY [EFILE]	
NOTICE OF CASE ASSIGNMENT AND CASE MANAGEMENT CONFERENCE on MANDATORY eFILE CASE	CASE NUMBER: 37-2019-00067808-CU-BT-CTL

CASE ASSIGNED FOR ALL PURPOSES TO:

Judge: Randa Trapp

Department: C-70

COMPLAINT/PETITION FILED: 12/20/2019

TYPE OF HEARING SCHEDULED	DATE	TIME	DEPT	JUDGE
Civil Case Management Conference	06/12/2020	09:50 am	C-70	Randa Trapp

A case management statement must be completed by counsel for all parties or self-represented litigants and timely filed with the court at least 15 days prior to the initial case management conference. (San Diego Local Rules, Division II, CRC Rule 3.725).

All counsel of record or parties in pro per shall appear at the Case Management Conference, be familiar with the case, and be fully prepared to participate effectively in the hearing, including discussions of ADR* options.

IT IS THE DUTY OF EACH PLAINTIFF (AND CROSS-COMPLAINANT) TO SERVE A COPY OF THIS NOTICE WITH THE COMPLAINT (AND CROSS-COMPLAINT), THE ALTERNATIVE DISPUTE RESOLUTION (ADR) INFORMATION FORM (SDSC FORM #CIV-730), A STIPULATION TO USE ALTERNATIVE DISPUTE RESOLUTION (ADR) (SDSC FORM #CIV-359), AND OTHER DOCUMENTS AS SET OUT IN SDSC LOCAL RULE 2.1.5.

ALL COUNSEL WILL BE EXPECTED TO BE FAMILIAR WITH SUPERIOR COURT RULES WHICH HAVE BEEN PUBLISHED AS DIVISION II, AND WILL BE STRICTLY ENFORCED.

TIME STANDARDS: The following timeframes apply to general civil cases and must be adhered to unless you have requested and been granted an extension of time. General civil cases consist of all civil cases except: small claims proceedings, civil petitions, unlawful detainer proceedings, probate, guardianship, conservatorship, juvenile, parking citation appeals, and family law proceedings.

COMPLAINTS: Complaints and all other documents listed in SDSC Local Rule 2.1.5 must be served on all named defendants.

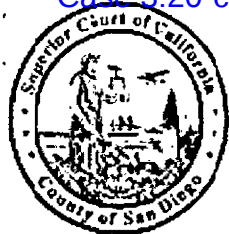
DEFENDANT'S APPEARANCE: Defendant must generally appear within 30 days of service of the complaint. (Plaintiff may stipulate to no more than 15 day extension which must be in writing and filed with the Court.) (SDSC Local Rule 2.1.6)

JURY FEES: In order to preserve the right to a jury trial, one party for each side demanding a jury trial shall pay an advance jury fee in the amount of one hundred fifty dollars (\$150) on or before the date scheduled for the initial case management conference in the action.

MANDATORY eFILE: Case assigned to mandatory eFile program per CRC 3.400-3.403 and SDSC Rule 2.4.11. All documents must be eFiled at www.onelegal.com. Refer to General Order in re procedures regarding electronically imaged court records, electronic filing, and access to electronic court records in civil and probate cases or guidelines and procedures.

COURT REPORTERS: Court reporters are not provided by the Court in Civil cases. See policy regarding normal availability and unavailability of official court reporters at www.sdcourt.ca.gov.

*ALTERNATIVE DISPUTE RESOLUTION (ADR): THE COURT ENCOURAGES YOU TO CONSIDER UTILIZING VARIOUS ALTERNATIVES TO TRIAL, INCLUDING MEDIATION AND ARBITRATION, PRIOR TO THE CASE MANAGEMENT CONFERENCE. PARTIES MAY FILE THE ATTACHED STIPULATION TO USE ALTERNATIVE DISPUTE RESOLUTION (SDSC FORM #CIV-359).



SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO

ALTERNATIVE DISPUTE RESOLUTION (ADR) INFORMATION

CASE NUMBER: 37-2019-00067808-CU-BT-CTL

CASE TITLE: Zaback vs Kellogg Sales Company [EFILE]

NOTICE: All plaintiffs/cross-complainants in a general civil case are required to serve a copy of the following three forms on each defendant/cross-defendant, together with the complaint/cross-complaint:

- (1) this Alternative Dispute Resolution (ADR) Information form (SDSC form #CIV-730),
- (2) the Stipulation to Use Alternative Dispute Resolution (ADR) form (SDSC form #CIV-359), *and*
- (3) the Notice of Case Assignment form (SDSC form #CIV-721).

Most civil disputes are resolved without filing a lawsuit, and most civil lawsuits are resolved without a trial. The courts, community organizations, and private providers offer a variety of Alternative Dispute Resolution (ADR) processes to help people resolve disputes without a trial. The San Diego Superior Court expects that litigants will utilize some form of ADR as a mechanism for case settlement before trial, and it may be beneficial to do this early in the case.

Below is some information about the potential advantages and disadvantages of ADR, the most common types of ADR, and how to find a local ADR program or neutral. A form for agreeing to use ADR is attached (SDSC form #CIV-359).

Potential Advantages and Disadvantages of ADR

ADR may have a variety of advantages or disadvantages over a trial, depending on the type of ADR process used and the particular case:

Potential Advantages

- Saves time
- Saves money
- Gives parties more control over the dispute resolution process and outcome
- Preserves or improves relationships

Potential Disadvantages

- May take more time and money if ADR does not resolve the dispute
- Procedures to learn about the other side's case (discovery), jury trial, appeal, and other court protections may be limited or unavailable

Most Common Types of ADR

You can read more information about these ADR processes and watch videos that demonstrate them on the court's ADR webpage at <http://www.sdcourt.ca.gov/adr>.

Mediation: A neutral person called a "mediator" helps the parties communicate in an effective and constructive manner so they can try to settle their dispute. The mediator does not decide the outcome, but helps the parties to do so. Mediation is usually confidential, and may be particularly useful when parties want or need to have an ongoing relationship, such as in disputes between family members, neighbors, co-workers, or business partners, or when parties want to discuss non-legal concerns or creative resolutions that could not be ordered at a trial.

Settlement Conference: A judge or another neutral person called a "settlement officer" helps the parties to understand the strengths and weaknesses of their case and to discuss settlement. The judge or settlement officer does not make a decision in the case but helps the parties to negotiate a settlement. Settlement conferences may be particularly helpful when the parties have very different ideas about the likely outcome of a trial and would like an experienced neutral to help guide them toward a resolution.

Arbitration: A neutral person called an "arbitrator" considers arguments and evidence presented by each side and then decides the outcome of the dispute. Arbitration is less formal than a trial, and the rules of evidence are usually relaxed. If the parties agree to binding arbitration, they waive their right to a trial and agree to accept the arbitrator's decision as final. With nonbinding arbitration, any party may reject the arbitrator's decision and request a trial. Arbitration may be appropriate when the parties want another person to decide the outcome of their dispute but would like to avoid the formality, time, and expense of a trial.

Other ADR Processes: There are several other types of ADR which are not offered through the court but which may be obtained privately, including neutral evaluation, conciliation, fact finding, mini-trials, and summary jury trials. Sometimes parties will try a combination of ADR processes. The important thing is to try to find the type or types of ADR that are most likely to resolve your dispute. Be sure to learn about the rules of any ADR program and the qualifications of any neutral you are considering, and about their fees.

Local ADR Programs for Civil Cases

Mediation: The San Diego Superior Court maintains a Civil Mediation Panel of approved mediators who have met certain minimum qualifications and have agreed to charge \$150 per hour for each of the first two (2) hours of mediation and their regular hourly rate thereafter in court-referred mediations.

On-line mediator search and selection: Go to the court's ADR webpage at www.sdcourt.ca.gov/adr and click on the "Mediator Search" to review individual mediator profiles containing detailed information about each mediator including their dispute resolution training, relevant experience, ADR specialty, education and employment history, mediation style, and fees and to submit an on-line Mediator Selection Form (SDSC form #CIV-005). The Civil Mediation Panel List, the Available Mediator List, individual Mediator Profiles, and Mediator Selection Form (CIV-005) can also be printed from the court's ADR webpage and are available at the Mediation Program Office or Civil Business Office at each court location.

Settlement Conference: The judge may order your case to a mandatory settlement conference, or voluntary settlement conferences may be requested from the court if the parties certify that: (1) settlement negotiations between the parties have been pursued, demands and offers have been tendered in good faith, and resolution has failed; (2) a judicially supervised settlement conference presents a substantial opportunity for settlement; and (3) the case has developed to a point where all parties are legally and factually prepared to present the issues for settlement consideration and further discovery for settlement purposes is not required. Refer to SDSC Local Rule 2.2.1 for more information. To schedule a settlement conference, contact the department to which your case is assigned.

Arbitration: The San Diego Superior Court maintains a panel of approved judicial arbitrators who have practiced law for a minimum of five years and who have a certain amount of trial and/or arbitration experience. Refer to SDSC Local Rules Division II, Chapter III and Code Civ. Proc. § 1141.10 et seq or contact the Arbitration Program Office at (619) 450-7300 for more information.

More information about court-connected ADR: Visit the court's ADR webpage at www.sdcourt.ca.gov/adr or contact the court's Mediation/Arbitration Office at (619) 450-7300.

Dispute Resolution Programs Act (DRPA) funded ADR Programs: The following community dispute resolution programs are funded under DRPA (Bus. and Prof. Code §§ 465 et seq.):

- In Central, East, and South San Diego County, contact the National Conflict Resolution Center (NCRC) at www.ncrconline.com or (619) 238-2400.
- In North San Diego County, contact North County Lifeline, Inc. at www.nclifeline.org or (760) 726-4900.

Private ADR: To find a private ADR program or neutral, search the Internet, your local telephone or business directory, or legal newspaper for dispute resolution, mediation, settlement, or arbitration services.

Legal Representation and Advice

To participate effectively in ADR, it is generally important to understand your legal rights and responsibilities and the likely outcomes if you went to trial. ADR neutrals are not allowed to represent or to give legal advice to the participants in the ADR process. If you do not already have an attorney, the California State Bar or your local County Bar Association can assist you in finding an attorney. Information about obtaining free and low cost legal assistance is also available on the California courts website at www.courtinfo.ca.gov/selfhelp/lowcost.

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO STREET ADDRESS: 330 West Broadway MAILING ADDRESS: 330 West Broadway CITY, STATE, & ZIP CODE: San Diego, CA 92101-3827 BRANCH NAME: Central	<i>FOR COURT USE ONLY</i>
PLAINTIFF(S): Harlan Zaback	
DEFENDANT(S): KELLOGG SALES COMPANY	
SHORT TITLE: ZABACK VS KELLOGG SALES COMPANY [EFILE]	
STIPULATION TO USE ALTERNATIVE DISPUTE RESOLUTION (ADR)	CASE NUMBER: 37-2019-00067808-CU-BT-CTL

Judge: Randa Trapp

Department: C-70

The parties and their attorneys stipulate that the matter is at issue and the claims in this action shall be submitted to the following alternative dispute resolution (ADR) process. Selection of any of these options will not delay any case management timelines.

- | | |
|--|--|
| <input type="checkbox"/> Mediation (court-connected)
<input type="checkbox"/> Mediation (private)
<input type="checkbox"/> Voluntary settlement conference (private)
<input type="checkbox"/> Neutral evaluation (private)
<input type="checkbox"/> Other (specify e.g., private mini-trial, private judge, etc.): _____ | <input type="checkbox"/> Non-binding private arbitration
<input type="checkbox"/> Binding private arbitration
<input type="checkbox"/> Non-binding judicial arbitration (discovery until 15 days before trial)
<input type="checkbox"/> Non-binding judicial arbitration (discovery until 30 days before trial) |
|--|--|

It is also stipulated that the following shall serve as arbitrator, mediator or other neutral: (Name) _____

Alternate neutral (for court Civil Mediation Program and arbitration only): _____

Date: _____

Date: _____

Name of Plaintiff

Name of Defendant

Signature

Signature

Name of Plaintiff's Attorney

Name of Defendant's Attorney

Signature

Signature

If there are more parties and/or attorneys, please attach additional completed and fully executed sheets.

It is the duty of the parties to notify the court of any settlement pursuant to Cal. Rules of Court, rule 3.1385. Upon notification of the settlement, the court will place this matter on a 45-day dismissal calendar.

No new parties may be added without leave of court.

IT IS SO ORDERED.

Dated: 12/23/2019

JUDGE OF THE SUPERIOR COURT

CM-010

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address): Eric A. LaGuardia, SBN: 272791 402 West Broadway, Suite 800 San Diego, CA 92101 TELEPHONE NO.: 619-655-4322 FAX NO.: 619-655-4344 ATTORNEY FOR (Name): Harlan Zaback	FOR COURT USE ONLY ELECTRONICALLY FILED Superior Court of California, County of San Diego 12/20/2019 at 01:20:31 PM Clerk of the Superior Court By Gen Dieu, Deputy Clerk
SUPERIOR COURT OF CALIFORNIA, COUNTY OF San Diego STREET ADDRESS: 330 West Broadway MAILING ADDRESS: 330 West Broadway CITY AND ZIP CODE: San Diego, 92101 BRANCH NAME: Hall of Justice	CASE NUMBER: 37-2019-00067808-CU-BT-CTL JUDGE: Judge Randa Trapp DEPT:
CASE NAME: Zaback v. Kellogg Sales Company	CIVIL CASE COVER SHEET <input checked="" type="checkbox"/> Unlimited (Amount demanded exceeds \$25,000) <input type="checkbox"/> Limited (Amount demanded is \$25,000 or less) <input type="checkbox"/> Counter <input type="checkbox"/> Joinder Filed with first appearance by defendant (Cal. Rules of Court, rule 3.402)

Items 1-6 below must be completed (see instructions on page 2).

1. Check one box below for the case type that best describes this case:

Auto Tort <input type="checkbox"/> Auto (22) <input type="checkbox"/> Uninsured motorist (46) Other PI/PD/WD (Personal Injury/Property Damage/Wrongful Death) Tort <input type="checkbox"/> Asbestos (04) <input type="checkbox"/> Product liability (24) <input type="checkbox"/> Medical malpractice (45) <input type="checkbox"/> Other PI/PD/WD (23) Non-PI/PD/WD (Other) Tort <input checked="" type="checkbox"/> Business tort/unfair business practice (07) <input type="checkbox"/> Civil rights (08) <input type="checkbox"/> Defamation (13) <input type="checkbox"/> Fraud (16) <input type="checkbox"/> Intellectual property (19) <input type="checkbox"/> Professional negligence (25) <input type="checkbox"/> Other non-PI/PD/WD tort (35) Employment <input type="checkbox"/> Wrongful termination (36) <input type="checkbox"/> Other employment (15)	Contract <input type="checkbox"/> Breach of contract/warranty (06) <input type="checkbox"/> Rule 3.740 collections (09) <input type="checkbox"/> Other collections (09) <input type="checkbox"/> Insurance coverage (18) <input type="checkbox"/> Other contract (37) Real Property <input type="checkbox"/> Eminent domain/Inverse condemnation (14) <input type="checkbox"/> Wrongful eviction (33) <input type="checkbox"/> Other real property (26) Unlawful Detainer <input type="checkbox"/> Commercial (31) <input type="checkbox"/> Residential (32) <input type="checkbox"/> Drugs (38) Judicial Review <input type="checkbox"/> Asset forfeiture (05) <input type="checkbox"/> Petition re: arbitration award (11) <input type="checkbox"/> Writ of mandate (02) <input type="checkbox"/> Other judicial review (39)	Provisionally Complex Civil Litigation (Cal. Rules of Court, rules 3.400-3.403) <input type="checkbox"/> Antitrust/Trade regulation (03) <input type="checkbox"/> Construction defect (10) <input type="checkbox"/> Mass tort (40) <input type="checkbox"/> Securities litigation (28) <input type="checkbox"/> Environmental/Toxic tort (30) <input type="checkbox"/> Insurance coverage claims arising from the above listed provisionally complex case types (41) Enforcement of Judgment <input type="checkbox"/> Enforcement of judgment (20) Miscellaneous Civil Complaint <input type="checkbox"/> RICO (27) <input type="checkbox"/> Other complaint (not specified above) (42) Miscellaneous Civil Petition <input type="checkbox"/> Partnership and corporate governance (21) <input type="checkbox"/> Other petition (not specified above) (43)
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2. This case is is not complex under rule 3.400 of the California Rules of Court. If the case is complex, mark the factors requiring exceptional judicial management:

a. <input type="checkbox"/> Large number of separately represented parties b. <input type="checkbox"/> Extensive motion practice raising difficult or novel issues that will be time-consuming to resolve c. <input type="checkbox"/> Substantial amount of documentary evidence	d. <input type="checkbox"/> Large number of witnesses e. <input type="checkbox"/> Coordination with related actions pending in one or more courts in other counties, states, or countries, or in a federal court f. <input type="checkbox"/> Substantial postjudgment judicial supervision
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3. Remedies sought (check all that apply): a. monetary b. nonmonetary; declaratory or injunctive relief c. punitive

4. Number of causes of action (specify): 1) CLRA; 2) UCL; 3) FAL; 4) Quasi Contract

5. This case is is not a class action suit.

6. If there are any known related cases, file and serve a notice of related case. (You may use form CM-015.)

Date: **December 20, 2019**
Eric A. LaGuardia
(TYPE OR PRINT NAME)

(SIGNATURE OF PARTY OR ATTORNEY FOR PARTY)

NOTICE

- Plaintiff must file this cover sheet with the first paper filed in the action or proceeding (except small claims cases or cases filed under the Probate Code, Family Code, or Welfare and Institutions Code). (Cal. Rules of Court, rule 3.220.) Failure to file may result in sanctions.
- File this cover sheet in addition to any cover sheet required by local court rule.
- If this case is complex under rule 3.400 et seq. of the California Rules of Court, you must serve a copy of this cover sheet on all other parties to the action or proceeding.
- Unless this is a collections case under rule 3.740 or a complex case, this cover sheet will be used for statistical purposes only.

INSTRUCTIONS ON HOW TO COMPLETE THE COVER SHEET

To Plaintiffs and Others Filing First Papers. If you are filing a first paper (for example, a complaint) in a civil case, you **must** complete and file, along with your first paper, the *Civil Case Cover Sheet* contained on page 1. This information will be used to compile statistics about the types and numbers of cases filed. You must complete items 1 through 6 on the sheet. In item 1, you must check **one** box for the case type that best describes the case. If the case fits both a general and a more specific type of case listed in item 1, check the more specific one. If the case has multiple causes of action, check the box that best indicates the **primary** cause of action. To assist you in completing the sheet, examples of the cases that belong under each case type in item 1 are provided below. A cover sheet must be filed only with your initial paper. Failure to file a cover sheet with the first paper filed in a civil case may subject a party, its counsel, or both to sanctions under rules 2.30 and 3.220 of the California Rules of Court.

To Parties in Rule 3.740 Collections Cases. A "collections case" under rule 3.740 is defined as an action for recovery of money owed in a sum stated to be certain that is not more than \$25,000, exclusive of interest and attorney's fees, arising from a transaction in which property, services, or money was acquired on credit. A collections case does not include an action seeking the following: (1) tort damages, (2) punitive damages, (3) recovery of real property, (4) recovery of personal property, or (5) a prejudgment writ of attachment. The identification of a case as a rule 3.740 collections case on this form means that it will be exempt from the general time-for-service requirements and case management rules, unless a defendant files a responsive pleading. A rule 3.740 collections case will be subject to the requirements for service and obtaining a judgment in rule 3.740.

To Parties in Complex Cases. In complex cases only, parties must also use the *Civil Case Cover Sheet* to designate whether the case is complex. If a plaintiff believes the case is complex under rule 3.400 of the California Rules of Court, this must be indicated by completing the appropriate boxes in items 1 and 2. If a plaintiff designates a case as complex, the cover sheet must be served with the complaint on all parties to the action. A defendant may file and serve no later than the time of its first appearance a joinder in the plaintiff's designation, a counter-designation that the case is not complex, or, if the plaintiff has made no designation, a designation that the case is complex.

CASE TYPES AND EXAMPLES

Auto Tort

Auto (22)—Personal Injury/Property Damage/Wrongful Death
Uninsured Motorist (46) (*if the case involves an uninsured motorist claim subject to arbitration, check this item instead of Auto*)

Other P/PI/PD/WD (Personal Injury/Property Damage/Wrongful Death) Tort

Asbestos (04)
Asbestos Property Damage
Asbestos Personal Injury/Wrongful Death
Product Liability (*not asbestos or toxic/environmental*) (24)
Medical Malpractice (45)
Medical Malpractice—Physicians & Surgeons
Other Professional Health Care Malpractice
Other P/PI/PD/WD (23)
Premises Liability (e.g., slip and fall)
Intentional Bodily Injury/PD/WD (e.g., assault, vandalism)
Intentional Infliction of Emotional Distress
Negligent Infliction of Emotional Distress
Other P/PI/PD/WD

Non-P/PI/PD/WD (Other) Tort

Business Tort/Unfair Business Practice (07)
Civil Rights (e.g., discrimination, false arrest) (*not civil harassment*) (08)
Defamation (e.g., slander, libel) (13)
Fraud (16)
Intellectual Property (19)
Professional Negligence (25)
Legal Malpractice
Other Professional Malpractice (*not medical or legal*)
Other Non-P/PI/PD/WD Tort (35)

Employment

Wrongful Termination (36)
Other Employment (15)

Contract

Breach of Contract/Warranty (06)
Breach of Rental/Lease
Contract (*not unlawful detainer or wrongful eviction*)
Contract/Warranty Breach—Seller Plaintiff (*not fraud or negligence*)
Negligent Breach of Contract/Warranty
Other Breach of Contract/Warranty
Collections (e.g., money owed, open book accounts) (09)
Collection Case—Seller Plaintiff
Other Promissory Note/Collections Case
Insurance Coverage (*not provisionally complex*) (18)
Auto Subrogation
Other Coverage
Other Contract (37)
Contractual Fraud
Other Contract Dispute

Real Property

Eminent Domain/Inverse Condemnation (14)
Wrongful Eviction (33)
Other Real Property (e.g., quiet title) (26)
Writ of Possession of Real Property
Mortgage Foreclosure
Quiet Title
Other Real Property (*not eminent domain, landlord/tenant, or foreclosure*)

Unlawful Detainer

Commercial (31)
Residential (32)
Drugs (38) (*if the case involves illegal drugs, check this item; otherwise, report as Commercial or Residential*)

Judicial Review

Asset Forfeiture (05)
Petition Re: Arbitration Award (11)
Writ of Mandate (02)
Writ—Administrative Mandamus
Writ—Mandamus on Limited Court Case Matter
Writ—Other Limited Court Case Review
Other Judicial Review (39)
Review of Health Officer Order
Notice of Appeal—Labor
Commissioner Appeals

Provisionally Complex Civil Litigation (Cal. Rules of Court Rules 3.400–3.403)

Antitrust/Trade Regulation (03)
Construction Defect (10)
Claims Involving Mass Tort (40)
Securities Litigation (28)
Environmental/Toxic Tort (30)
Insurance Coverage Claims (*arising from provisionally complex case type listed above*) (41)

Enforcement of Judgment

Enforcement of Judgment (20)
Abstract of Judgment (Out of County)
Confession of Judgment (*non-domestic relations*)
Sister State Judgment
Administrative Agency Award (*not unpaid taxes*)
Petition/Certification of Entry of Judgment on Unpaid Taxes
Other Enforcement of Judgment Case

Miscellaneous Civil Complaint

RICO (27)
Other Complaint (*not specified above*) (42)
Declaratory Relief Only
Injunctive Relief Only (*non-harassment*)
Mechanics Lien
Other Commercial Complaint Case (*non-tort/non-complex*)
Other Civil Complaint (*non-tort/non-complex*)

Miscellaneous Civil Petition

Partnership and Corporate Governance (21)
Other Petition (*not specified above*) (43)
Civil Harassment
Workplace Violence
Elder/Dependent Adult Abuse
Election Contest
Petition for Name Change
Petition for Relief From Late Claim
Other Civil Petition

EXHIBIT 3

1 **JENNER & BLOCK LLP**

2 Kate T. Spelman (Cal. Bar No. 269109)
3 kspelman@jenner.com
4 Alexander M. Smith (Cal. Bar No. 295187)
5 asmith@jenner.com
6 633 West 5th Street, Suite 3600
7 Los Angeles, CA 90071-2054
8 Telephone: (213) 239-5100
9 Facsimile: (213) 239-5199

7 **JENNER & BLOCK LLP**

8 Dean N. Panos (to apply *pro hac vice*)
9 dpanos@jenner.com
10 353 North Clark Street
11 Chicago, IL 60654-3456
12 Telephone: (312) 222-9350
13 Facsimile: (312) 527-0484

11 Attorneys for Defendant
12 Kellogg Sales Company

14 UNITED STATES DISTRICT COURT
15 SOUTHERN DISTRICT OF CALIFORNIA

17 HARLAN ZABACK, individually and on
18 behalf of all others similarly situated,

19 Plaintiff,

20 v.

21 KELLOGG SALES COMPANY and
22 DOES 1 through 10, inclusive,

23 Defendants.

Case No. _____

**DECLARATION OF WINNIE
EASTWOOD IN SUPPORT OF
KELLOGG SALES COMPANY'S
NOTICE OF REMOVAL**

1 I, Winnie Eastwood, declare and state as follows pursuant to 28 U.S.C. § 1746:

2 1. I am a Manager, Brand Marketing for the Kellogg Company, which is the
3 parent of Defendant Kellogg Sales Company. I have personal knowledge of the facts set
4 forth in this declaration, and I could and would testify competently thereto if called on to
5 do so.

6 2. I understand that this lawsuit involves Bear Naked Granola Fit V'nilla
7 Almond, which is manufactured by Kellogg.

8 3. Kellogg is not able to track retail sales of their food products, including the
9 granola at issue in this case, because it sells its products to retailers and distributors, who in
10 turn sell those products to retail consumers. However, Kellogg obtains retail data from
11 Nielsen, which tracks retail sales of Kellogg products through certain retail channels.

12 4. Nielsen tracks both nationwide and California retail sales of the challenged
13 Bear Naked Granola Fit V'Nilla Almond. Nielsen's retail sales data reflect that, since
14 January 1, 2016, California sales of Bear Naked Granola Fit V'Nilla Almond amount to
15 approximately [REDACTED] million through the retail channels tracked by Nielsen.

16 5. I understand that the Plaintiff in this case also seeks to enjoin sales of Bear
17 Naked Granola Fit V'nilla Almond in its current packaging. To comply with such an
18 injunction, Kellogg would need to incur significant costs—including, among other things,
19 the cost of removing the product from retail stores in California, the cost of re-designing
20 the packaging, and the lost sales during the period in which Kellogg was removing the
21 product from the shelves and re-designing the packaging.

22
23 I declare under penalty of perjury under the laws of the United States and the State
24 of California that the foregoing is true and correct to the best of my knowledge.

25 Executed this ___ day of February, 2020 in Solana Beach, CA.

26
27 DATED: February 12, 2020

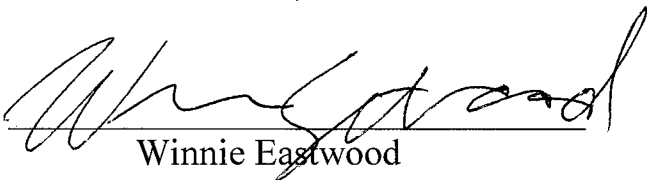
28 By: 
Winnie Eastwood

EXHIBIT 4

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7 Attorneys for Defendant
 Kellogg Sales Company

8
 9 SUPERIOR COURT OF CALIFORNIA
 10 COUNTY OF SAN DIEGO

11
 12 HARLAN ZABACK, individually and on behalf
 13 of all others similarly situated,

14 Plaintiff,

15 v.

16 KELLOGG SALES COMPANY and DOES 1
 17 through 10, inclusive,

18 Defendants.

Case No. 37-2019-00067808-CU-BT-CTL

**NOTICE TO STATE COURT OF REMOVAL
 TO FEDERAL COURT**

1 TO THE COURT, ALL PARTIES, AND THEIR COUNSEL OF RECORD:

2 PLEASE TAKE NOTICE that Defendant Kellogg Sales Company has removed this action to the
3 United States District Court for the Southern District of California pursuant to 28 U.S.C. § 1441 *et seq.* A
4 file-stamped copy of the Notice of Removal is attached as Exhibit 1.

5

6 Dated: February 13, 2020

JENNER & BLOCK LLP

7

8

By: /s/ Kate T. Spelman
Kate T. Spelman

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Attorneys for Defendant
Kellogg Sales Company

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ClassAction.org

This complaint is part of ClassAction.org's searchable class action lawsuit database and can be found in this post: [Kellogg Sales Co.'s 'Bear Naked Granola Fit V'nilla Almond' Not Exclusively Flavored by Vanilla Beans, Class Action Claims](#)
