

1 ANTHONY J. ORSHANSKY, Cal. Bar No. 199364
anthony@counselonegroup.com
2 JUSTIN KACHADOORIAN, Cal. Bar No. 260356
justin@counselonegroup.com
3 COUNSELONE, P.C.
9301 Wilshire Boulevard, Suite 650
4 Beverly Hills, California 90210
Telephone: (310) 277-9945
5 Facsimile: (424) 277-3727

6 Attorneys for Plaintiff
RICHARD HALL, on behalf of himself and others similarly
7 situated

8
9 UNITED STATES DISTRICT COURT
10 FOR THE NORTHERN DISTRICT OF CALIFORNIA
11

12 RICHARD HALL, on behalf of himself and
13 others similarly situated,

14 Plaintiff,

15 v.

16 DIAMOND FOODS, INC., a Delaware
corporation, dba KETTLE FOODS, and
17 DOES 1 through 50, inclusive,

18 Defendants.
19
20
21
22
23
24
25
26
27
28

Case No. 3:14-CV-02148-MMC

**FIRST AMENDED CLASS ACTION
COMPLAINT FOR:**

- (1) **Unlawful Business Practices (Cal. Bus. & Prof. Code § 17200 et seq.)**
- (2) **Unfair Business Practices (Cal. Bus. & Prof. Code § 17200 et seq.)**
- (3) **Fraudulent Business Practices (Cal. Bus. & Prof. Code § 17200 et seq.)**
- (4) **Misleading Advertising (Cal. Bus. & Prof. Code § 17500 et seq.)**
- (5) **Untrue Advertising (Cal. Bus. & Prof. Code § 17500 et seq.)**
- (6) **Violation of the Consumer Legal Remedies Act, Cal. Civ. Code §§ 1750 et seq.**
- (7) **Restitution Based on Quasi-Contract / Unjust Enrichment**

DEMAND FOR JURY TRIAL

1 Plaintiff RICHARD HALL (hereinafter “Plaintiff”), on behalf of himself and all others
2 similarly situated, complains of DIAMOND FOODS, INC., a California corporation, dba KETTLE
3 FOODS, and DOES 1 through 50, inclusive, as follows:

4 **INTRODUCTION**

5 1. Plaintiff brings this action against Defendants Diamond Foods, Inc. dba Kettle Foods
6 (“Diamond Foods”), and Does 1 through 50, inclusive (“Defendants”), on behalf of all consumers
7 in the United States or, alternatively, California within four years of the filing of this lawsuit who
8 have purchased Defendants’ Kettle Brand Chips and/or Tias! tortilla chips (“Misbranded
9 Products”).¹

10 2. Throughout the class period Defendants have prominently made claims on their
11 product labels that their chip products are “natural or “all natural” or statements of similar import,
12 cultivating a wholesome and healthful image in an effort to promote the sale of these products.
13 Defendants have further promoted this image through their line of “reduced fat” chips. As a result
14 of these false and misleading statements Defendants were able to sell their chip products to
15 thousands of unsuspecting consumers in California and throughout the United States and to profit
16 handsomely from these transactions.

17 3. Defendants’ representations are false. Defendants’ chip products actually contain
18 synthetic ingredients such as citric acid as well as color additives which a reasonably prudent
19 consumer would not expect natural food products to contain. Moreover, some of Defendants’
20 “reduced fat” chips are deceptively labeled and marketed because they compare their products to
21 inappropriate reference foods, which is not identified proximate to the principal reduced-fat claim,
22 and are not reduced in fat by the stated amount.

23 4. Plaintiff alleges that Defendants’ conduct violates California’s Business and
24 Professions Code sections 17200, et seq. (the Unfair Competition Law, or “UCL”), California’s

25 ¹ The Misbranded Products include the products Plaintiff purchased (“Purchased Products”), identified in
26 paragraph 48 below, as well as “Substantially Similar Products,” identified in Addendum 1, which is attached
27 hereto. The Substantially Similar Products are identically misbranded products manufactured by Defendants
28 during the class period which (i) make the same label representations, as described herein, as the Purchased
Products, (ii) contain the same or similar ingredients as the Purchased Products, and/or (iii) violate the same
regulations of the Sherman Food, Drug, & Cosmetic Law, California Health & Safety Code § 109875
(the “Sherman Law”) as the Purchased Products herein identified.

1 their identities become known. (As used herein, “Defendants” refers to Diamond Foods and Does
2 1 to 50, inclusive.)

3 8. Plaintiff is informed and believes and thereon alleges that each defendant acted in all
4 respects pertinent to this action as the agent of the other Defendants, that Defendants carried out a
5 joint scheme, business plan, or policy in all respects pertinent hereto, and that the acts of each
6 defendant are legally attributable to the other Defendants.

7 **JURISDICTION**

8 9. This Court has jurisdiction pursuant to 28 U.S.C. § 1441(a) based on 18 U.S.C. §
9 1332(d). This is a putative class action whereby: (i) the proposed nationwide class consists of more
10 than 100 members; (ii) at least some class members have a different citizenship from Defendants;
11 and (iii) the claims of the proposed class exceed \$5,000,000.00 in the aggregate. [*See* Dkt. 1.]

12 **BACKGROUND**

13 10. Defendants produce a brand of kettle chips, or “batch-cooked” chips, which are
14 distinct from regular potato chips in the manner of their production and end result. Kettle chips are
15 cooked in batches. When each new batch of potatoes is added to oil, the temperature of the oil
16 drops, so the potatoes take longer to cook, giving the starch in the potatoes time to absorb and
17 dissolve before the potato finishes frying. The result is a thicker, sturdier chip with a caramelized
18 flavor. Regular potato chips are cooked through continuous processing whereby the oil is kept very
19 hot, so the water in the potato evaporates immediately, making the chip light, crispy, and finely
20 textured. Because of the manner in which they are produced, kettle chips are viewed by the
21 consuming public as a throw-back to chips before the advent of mass-processing and thus in some
22 respect more authentic and natural.

23 11. Defendants have labeled and marketed their chips to appeal to these consumers
24 owing to the recurring representations on the product labels that Kettle Brand chips are “natural”
25 and “all natural” (herein referred to as “Misbranded All-Natural Products”). The front label of each
26 of Defendants’ chip products bear the prominent trademarked slogan “great taste...naturally” or
27 state “absolutely nothing artificial” or “all natural potato chips.” The back labels assert under the
28 heading “OUR NATURAL PROMISE” that the products contain “No preservatives,” “Only all natural

1 colors and flavors,” “Non-GMO ingredients,” and “Real food ingredients,” and are “Made with All
2 Natural Ingredients.” (See photos attached in Addendum 2 hereto.)

3 12. The back panel contains explanatory text to the same effect. For example,
4 Defendants’ Backyard Barbeque kettle chips state, “The Backyard Barbeque chips have bold flavor
5 and hearty crunch. [¶] They taste so great because they are made from all natural, real food
6 ingredients, the finest potatoes, natural oils and craft cooking methods. [Graphic of wild flowers]
7 [¶] They are backed by a commitment to sustainability like wind power, solar power, green building
8 and biodiversity. [¶] Kettle Brand Potato Chips: simply great tasting, all natural potato chips made
9 by a company that cares.”

10 13. Furthermore, Defendants market and sell chip products that are labeled “reduced
11 fat” (herein referred to as “Misbranded Reduced Fat Products”). For example, Kettle Brand
12 Reduced Fat Sea Salt Chips features the words “40% reduced fat potato chips” prominently in a
13 green band across the front center of the brown bag. (See photo attached in Addendum 3 hereto.)

14 **Defendants’ Labeling of the Misbranded Products As “Natural” or “All Natural” (or Words**
15 **of Similar Import) Is False and/or Deceptive.**

16 14. Defendants’ representations that their products are “natural” or “all natural” (or
17 words of similar import) are false or, at best, deceptive and misleading. Webster’s New World
18 Dictionary defines “natural” as “produced or existing in nature; not artificial or manufactured.”²
19 Moreover, “all” is defined as “the whole extent or quantity of[.]” (*Id.*, “all,” definition no. 1 at p.
20 36.) Thus the combined use of “all natural” on the labels of the Mislabeled Products indicates to
21 the average reasonable person that “the whole extent or quantity of” the ingredients contained in the
22 food products are “produced or existing in nature; not artificial or manufactured.”

23 15. Although the Food and Drug Administration (“FDA”) does not directly regulate the
24 term “natural,” the FDA has established a policy defining the outer boundaries of the use of that
25 term by clarifying that a product is not natural if it contains color additives, artificial flavors, or
26 synthetic substances.³ Specifically, the FDA states: “[T]he agency will maintain its policy (Ref.

27 ² *Webster’s New World Dictionary of the American Language*, 2nd College Ed. (Simon & Schuster, 1984),
“natural,” definition no. 2 at p.947.

28 ³ See <http://www.fda.gov/ForConsumers/ConsumerUpdates/ucm094536.htm> and
<http://www.fda.gov/AboutFDA/Transparency/Basics/ucm214868.htm>

1 32) regarding the use of ‘natural,’ as meaning that nothing artificial or synthetic (including all color
2 additives regardless of source) has been included in, or has been added to, a food that would not
3 normally be expected to be in the food.” 58 Fed. Reg. 2302, 2407 (Jan. 6, 2003).

4 16. This policy is consistent with consumers’ understanding of the word “natural.”
5 Consumers understand “natural” to exclude synthetic ingredients, food additives, or chemical
6 preservatives. In a 2007 survey conducted by the Natural Marketing Institute the majority of
7 respondents believed that the term “natural” in a product label meant that the product contained 100
8 percent natural ingredients, no artificial flavors, no artificial colors, no preservatives, no chemicals,
9 and a substantial percentage thought that it meant that the product was not highly processed.
10 Moreover, 81 percent of respondents found products claiming to be “natural” very/somewhat
11 important when purchasing food or beverage products. And large majorities also found that
12 products containing no preservatives, no artificial ingredients, no artificial flavors, and no artificial
13 colors to be very/somewhat important when purchasing food and beverage products. These
14 percentages are even larger among the health-conscious segments of the US population, which are
15 large—approximately 40 percent. What is more, the survey found that these trends have increased
16 from previous years, and consequently the subject labeling statements are probably far more
17 important to consumers today. Significantly, the survey also found that package labeling was by far
18 the most important source of information influencing consumers’ purchasing decisions, especially
19 among the health-conscious segment of the population.

20 17. The labeling of products as “natural” or “all natural” (or words of similar import)
21 carries implicit health benefits important to consumers—benefits that consumers are willing to pay
22 a premium for over comparable products that are not so labeled and marketed. Defendants have
23 cultivated and reinforced a corporate image based on this theme, which they have emblazoned on
24 each and every one of their chip products, despite the fact Defendants use synthetic ingredients. The
25 presence of synthetic ingredients in Defendants’ chip products renders their product label
26 advertising false and misleading.

27 18. Moreover, like the FDA, the United States Department of Agriculture (“USDA”),
28 which regulates the labeling of meat and poultry, has also set limits on the use of the term “natural.”

1 The USDA's Food Safety and Inspection Service states that the term "natural" may be used on
2 labeling of meat and poultry products so long as "(1) the product does not contain any artificial
3 flavor or flavorings, color ingredient, or chemical preservative ... or any other artificial or synthetic
4 ingredient, and (2) the product and its ingredients are not more than minimally processed."

5 19. According to the USDA, "[m]inimal processing may include: (a) those traditional
6 processes used to make food edible or to preserve it or to make it safe for human consumption, e.g.,
7 smoking, roasting, freezing, drying, and fermenting, or (b) those physical processes which do not
8 fundamentally alter the raw product and/or which only separate a whole, intact food into component
9 parts, e.g., grinding meat, separating eggs into albumen and yolk, and pressing fruits to produce
10 juices."⁴ However, "[r]elatively severe processes, e.g., solvent extraction, acid hydrolysis, and
11 chemical bleaching would clearly be considered more than minimal processing."⁵

12 20. Under USDA policy, a product cannot be labeled as being "natural" if an ingredient
13 would significantly change the character of the product to the point that it could no longer be
14 considered a natural product. Moreover, any product purporting to be "natural" must conspicuously
15 identify any synthetic ingredients used on the label (e.g., "all natural ingredients except dextrose,
16 modified food starch, etc."). For example, a "turkey roast" cannot be called a "natural" product if
17 it contains beet coloring but can still bear the statement "all natural ingredients modified by beet
18 coloring." Defendants do not, however, include any such limiting language on the Misbranded
19 Products.⁶

20 21. The terms "synthetic" and "artificial" closely resemble each other and in common
21 parlance are taken as synonymous. The scientific community defines "artificial" as something not
22 found in nature, whereas "synthetic" is defined as something man-made, whether it merely mimics
23 nature or is not found in nature.⁷ In the scientific community, "synthetic" includes substances that

24 ⁴ See the United States Department of Agriculture Food Standards and Labeling Policy book
25 available at http://www.fsis.usda.gov/OPPDE/larc/Policies/Labeling_Policy_Book_082005.pdf (last
visited December 18, 2013).

26 ⁵ *Ibid.*

26 ⁶ *Ibid.*

27 ⁷ Peter E. Nielsen, *Natural-synthetic-artificial!*, Artificial DNA: PNA & XNA, Volume 1, Issue 1
28 (July/August/September 2010), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3109441/> (last
visited December 18, 2013).

1 are also “artificial,” but a synthetic substance also can be artificial or non-artificial.⁸ However, the
2 common understanding of “artificial” resembles the scientific community’s definition of
3 “synthetic.” Indeed Webster’s New World Dictionary defines “artificial” as “anything made by
4 human work, especially if in intimation of something natural,” whereas “synthetic” is defined as “a
5 substance that is produced by chemical synthesis and is used as a substitute for a natural substance
6 which it resembles.”⁹

7 22. Congress has defined “synthetic” to mean “a substance that is formulated or
8 manufactured by a chemical process or by a process that chemically changes a substance extracted
9 from a naturally occurring plant, animal, or mineral sources, except that such term shall not apply
10 to substances created by naturally occurring biological processes.” 7 U.S.C. § 6502(21). *See also*
11 7 C.F.R. § 205.2 (defining, in USDA’s National Organic Program regulations, a “nonsynthetic” as
12 “a substance that is derived from mineral, plant, or animal matter and does not undergo a synthetic
13 process as defined in section 6502(21) of the Act (7 U.S.C. § 6502(21))”).

14 23. The Misbranded Products are unlawfully labeled because, although they purport to
15 be all natural with no artificial flavors or preservatives, the labels themselves disclose the presence
16 of synthetic ingredients, artificial flavors, and color additives such as citric acid, maltodextrin, and
17 paprika extract for color.

18 24. Citric acid is a highly processed preservative and flavoring that, contrary to popular
19 belief, is typically not fruit-derived and thus not natural but is usually produced from certain strains
20 of the mold *Aspergillus niger*, which is mass produced, and the application of chemical solvents
21 such as sulfuric acid.

22 25. Similarly, maltodextrin is a highly processed food additive used primarily as a
23 texturizer and filler. It does not occur in nature. To produce maltodextrin, acid, enzymes, or acids
24 and enzymes are applied in sequence to a starch slurry to induce partial hydrolysis (saccharification).
25 In other words, the acids or enzymes convert depolymerized starch to glucose or maltose molecules.
26 Once maltose is high enough for maltodextrin, the acids and enzymes are neutralized, removed and

27 ⁸ *Ibid.*

28 ⁹ *See* Webster’s New World Dictionary of the American Language, 2nd College Ed. (Simon & Schuster, 1984), “artificial,” definition SYN at p.79.

1 deactivated, and the resulting product is then refined, purified, and concentrated.

2 26. Moreover, upon information and belief, the citric acid and maltodextrin used in the
3 Misbranded Products are not natural because they are produced using corn starch made from
4 genetically modified corn, a fact that contradicts Defendants’ representations that the Misbranded
5 Products are “natural” and contain “Non-GMO ingredients.” The genetic makeup of GMO plants
6 has been altered by scientists in a lab for the express purpose of causing such plants to exhibit traits
7 that are not naturally their own. GMOs therefore are not natural by design and are entirely
8 incompatible with Defendants’ all-natural representations, as well as Defendants’ specific “non-
9 GMO” claims.

10 27. Furthermore, the Misbranded Products are not natural because they contain color
11 additives such as paprika extract. Any coloring or preservative can preclude the use of the term
12 “natural” even if the coloring or preservative is derived from natural sources. *See* FDA Compliance
13 Guide CPG Sec. 587.100 (“The use of the words ‘food color added,’ ‘natural color,’ or similar words
14 containing the term ‘food’ or ‘natural’ may be erroneously interpreted to mean the color is a
15 naturally occurring constituent in the food. Since all added colors result in an artificially colored
16 food, we would object to the declaration of any added color as ‘food’ or ‘natural.’”)

17 28. Defendants also unlawfully failed to disclose these chemical preservatives and
18 artificial colors and flavorings in their products. Defendants place great importance on concealing
19 the fact that their products contain chemical preservatives and artificial colors and flavors. Indeed
20 Defendants’ product labels proclaim the absence of chemical preservatives and artificial colors and
21 flavors.

22 29. The falsity of Defendants’ statements and labeling claims would be revealed if
23 Defendants complied with the law and disclosed the presence and function of the chemical
24 preservatives and artificial flavors and colors they add as ingredients to their products. Rather than
25 comply with the law, Defendants have violated the numerous statutory provisions that require that
26 the presence and function of chemical preservatives and artificial flavors to be disclosed on product
27 labels.

28 ///

1 30. Specifically, Defendants have violated 21 C.F.R. § 101.22, 21 U.S.C. § 343(a), and
2 21 U.S.C. § 343(k), all of which are adopted by and incorporated into the Sherman Law. A statement
3 of artificial flavoring, artificial coloring, or chemical preservative shall be placed on the food or on
4 its container or wrapper, or on any two or all three of these, as may be necessary to render such
5 statement likely to be read by the ordinary person under customary conditions of purchase and use
6 of such food.

7 31. Pursuant to 21 C.F.R. § 101.22(c), a statement of artificial flavoring, artificial
8 coloring, or chemical preservative shall be placed on the food or on its container or wrapper, or on
9 any two or all three of these, as may be necessary to render such statement likely to be read by the
10 ordinary person under customary conditions of purchase and use of such food.

11 32. Pursuant to 21 C.F.R. § 101.22(j), a food to which a chemical preservative(s) is added
12 shall, except when exempt pursuant to 101.100 bear a label declaration stating both the common or
13 usual name of the ingredient(s) and a separate description of its function, e.g., “preservative,” “to
14 retard spoilage,” “a mold inhibitor,” “to help protect flavor,” or “to promote color retention.”

15 33. The Misbranded Products fail to comply with the requirements of 21 C.F.R. §
16 101.22. Although they contain citric acid, which functions as a preservative in Defendants’
17 products, the labels of these products fail to describe the function of this chemical preservative thus
18 violating the law and concealing its presence.

19 34. 21 C.F.R. § 101.22(a)(5) provides that, “The term *chemical preservative* means any
20 chemical that, when added to food, tends to prevent or retard deterioration thereof, but does not
21 include common salt, sugars, vinegars, spices, or oils extracted from spices, substances added to
22 food by direct exposure thereof to wood smoke, or chemicals applied for their insecticidal or
23 herbicidal properties.”

24 35. Citric acid is not a type of common salt, sugar, vinegar, spice, or oil extracted from
25 spices, nor is it a substance added to food by direct exposure thereof to wood smoke, or a chemical
26 applied for its insecticidal or herbicidal properties. As used by Defendants in its products this
27 chemical prevents or retards deterioration of the products. Therefore citric acid is a “chemical
28 preservative” in Defendants’ products, as defined in 21 C.F.R. § 101.22(a)(5).

1 at all, at the bottom of the bag, where consumers will overlook it, especially because the bottoms of
2 the bags crumple when stocked on store shelves, thus obscuring the comparative statement. (*See*
3 *ibid.*) The placement of the reference food in a footnote—in direct violation of federal law—was
4 intended to dupe consumers, who often make purchasing decisions based on front-of-the-package
5 representations in a matter of seconds.

6 41. Defendants’ reduced-fat chips are not reduced in fat by the represented percentage
7 because the comparison between kettle chips, a specific variety of potato chips, and regular potato
8 chips, a category encompassing many different varieties of chips, is inappropriate and deceptive.

9 42. The FDA requires manufacturers to identify the reference food in a way that is not
10 misleading. *See* 21 CFR § 101.13(j)(2)(i); 58 Fed. Reg. 2302–01, 2363 (Jan. 6, 1993). According
11 to the FDA, the company may be in violation of the reference-food regulations even if it has used
12 the comparison language suggested by the FDA if the company exercises poor judgment in avoiding
13 claims that are misleading because of their “overall context or presentation.” 58 Fed.Reg. 2302-01,
14 2363 (Jan. 6, 1993).

15 43. Under 21 CFR § 101.13(j)(1)(ii)(A) and (B), the reference food must be
16 representative of “the type of food that includes the product that bears the claim.” That way, for
17 example, “a manufacturer of Italian salad dressing cannot choose a particularly unhealthy
18 formulation of Italian salad dressing as a comparator. *See Smajlaj v. Campbell Soup Co.*, 782
19 F.Supp.2d 84, 94 (D.N.J. 2011). Nor is it appropriate for a food manufacturer to compare a specific
20 variety of food with the entire category into which it falls. The FDA considers comparisons with a
21 class of similar products to be misleading.¹⁰

22 44. Defendants’ reduced fat chips have regular Kettle Brand equivalents, and therefore
23 consumers reasonably draw a comparison with Defendants’ regular Kettle Brand potato chips,

24 ¹⁰ *See* 56 FR 60445, 60448 (Nov. 27, 1991) (“The agency ... does not consider ... a similar product
25 or class of similar products ... to be an appropriate point of reference comparing ‘reduced’ foods.
26 Such a reference point reflects a much wider variety of products ... For example, if a product is
27 labeled as ‘reduced fat imitation bacon bits,’ it is claiming that it contains reduced fat when
28 compared to other imitation bacon bits. If such a claim could be made on the basis of a data base
of products similar to imitation bacon bits, that data base would likely include a range of products,
including bacon. The imitation bacon bits could have reduced fat when compared to the data base
but not necessarily any less fat than other imitation bacon bit products. In such circumstances, the
claim would clearly be misleading. Thus, FDA believes that comparison to a data base of similar
products is not an appropriate basis for a ‘reduced¹⁰ claim.”)

1 48. During the class period Plaintiff purchased, among other products, Kettle Brand
2 Backyard Barbecue Potato Chips, Kettle Brand Sea Salt Chips, Kettle Brand Reduced Fat Sea Salt
3 Chips, Kettle Brand Cheddar Beer Potato Chips, and Tias! Nacho Cheddar tortilla chips (“Purchased
4 Products”) from various markets throughout California, including but not limited to his local Ralphs
5 supermarket in Encino, California, and a Walgreen drug store in San Francisco, California.

6 49. Before purchasing Kettle Brand Backyard Barbecue Potato Chips referred to above,
7 Plaintiff read the following statements on the front and back of the packages: “absolutely nothing
8 artificial,” “A NATURAL OBSESSION,” and “all natural potato chips,” “great taste ... naturally,” “OUR
9 NATURAL PROMISE,” “Only all natural colors and flavors,” “No preservatives,” “Non-GMO
10 ingredients,” and “Real food ingredients,” as well as the statement identified in paragraph 12 above.

11 50. Before purchasing Defendants’ Kettle Brand Reduced Fat Sea Salt Chips, Plaintiff
12 relied only upon the statement “40% reduced fat potato chips,” which appeared in a large bright
13 green band across the middle of the principal display panel. (See photo attached in Addendum 3
14 hereto.)

15 51. Plaintiff relied on representations on the product label and believed that he was
16 purchasing products that were all natural and free of synthetic or chemical ingredients, artificial
17 flavoring, and food additives and, as to the Reduced Fat Sea Salt Chips, were reduced in fat by the
18 stated percentage compared with Defendants’ regular Sea Salt Chips or other regular kettle chips.
19 Plaintiff ascribed value to these labeling representations and/or would not have purchased these
20 products but for the identified representations and/or paid more money than he would have paid for
21 other similar products that were not natural because they contained synthetic or artificial ingredients
22 or were not reduced in fat as represented. In this way, Plaintiff did not receive the natural and
23 reduced-fat products he bargained for and has lost money as a result by purchasing Defendants’
24 chips rather than some other product (or no other product) and/or paying a premium for Defendants’
25 products because they were purportedly all natural and reduced in fat as represented.

26 52. On or around September 16, 2013, Plaintiff sent a letter to Diamond Foods
27 informing it that it has engaged in unfair methods of competition and/or deceptive acts or practices,
28 including but not limited to violation of California Civil Code § 1770, in connection with the sale

1 of the Misbranded Products, and requested that it correct, repair, replace, or otherwise rectify its
2 unlawful conduct. Diamond Foods responded by denying liability and declining to correct, repair,
3 replace, or otherwise rectify its unlawful conduct. Because more than 30 days have elapsed since
4 the receipt of Plaintiff's letter, Plaintiff herein seeks seek actual, punitive, and statutory damages as
5 appropriate on behalf of himself and similarly situated consumers, as well as equitable including
6 injunctive relief.

7 **CLASS ALLEGATIONS**

8 53. Plaintiff brings this action as a class action pursuant to Federal Rule of Civil
9 Procedure 23(b)(2) and 23(b)(3) on behalf of the following classes:

- 10 (a) All persons in the United States or, alternatively, California who purchased the
11 Misbranded All-Natural Products from four years prior to the filing of the Complaint and
12 continuing to the present.
13 (b) All persons in the United States or, alternatively, California who purchased the
14 Misbranded Reduced-Fat Products from four years prior to the filing of the Complaint
15 and continuing to the present.

16 54. The class excludes counsel representing the class, governmental entities,
17 Defendants, any entity in which Defendants have a controlling interest, Defendants' officers,
18 directors, affiliates, legal representatives, employees, co-conspirators, successors, subsidiaries, and
19 assigns, any judicial officer presiding over this matter, the members of their immediate families and
20 judicial staff, and any individual whose interests are antagonistic to other putative class members.

21 55. Plaintiff reserves the right to amend or modify the class description with greater
22 particularity or further division into subclasses or limitation to particular issues.

23 56. This action has been brought and may properly be maintained as a class action under
24 Federal Rule of Civil Procedure 23 because there is a well-defined community of interest in the
25 litigation and the class is easily ascertainable.

26 **A. Numerosity**

27 57. The potential members of the class as defined are so numerous that joinder of all
28 members of the class is impracticable. Although the precise number of putative class members has
not been determined at this time, Plaintiff is informed and believes that the proposed classes include
thousands of members.

1 **B. Common Questions Predominate**

2 58. There are questions of law and fact common to the class that predominate over any
3 questions affecting only individual putative class members. Thus proof of a common set of facts
4 will establish the right of each class member to recovery. These common questions of law and fact
5 include but are not limited to:

- 6 a. Whether Defendants’ conduct was a “fraudulent practice” within the meaning of
7 the Unfair Competition Law (“UCL”), Business & Professions Code § 17200, in
8 that it was likely to mislead consumers;
- 9 b. Whether Defendants’ conduct was an “unfair practice” within the meaning of the
10 UCL in that it offended established public policy and is immoral, unethical,
11 oppressive, unscrupulous or substantially injurious to consumers;
- 12 c. Whether Defendants’ conduct was an “unlawful” practice within the meaning of
13 the UCL;
- 14 d. Whether Defendants’ conduct was likely to deceive a consumer acting reasonably
15 in the same circumstances;
- 16 e. Whether Defendants advertise or market the Misbranded Products in a way that is
17 false or misleading;
- 18 f. Whether Defendants violated California Business and Professions Code § 17500 et
19 seq.;
- 20 g. Whether Defendants violated California Civil Code § 1750 et seq.;
- 21 h. Whether Plaintiff and members of the putative class are entitled to restitution,
22 injunctive, declaratory and/or other equitable relief;
- 23 i. Whether Defendants have been unjustly enriched through the misrepresentations
24 alleged herein; and
- 25 j. Whether Plaintiff and the members of the class sustained monetary loss.

26 **C. Typicality**

27 59. Plaintiff’s claims are typical of the claims of the members of the putative classes
28 because Plaintiff bought Defendants’ Misbranded Products during the applicable class period.

1 Defendants' unlawful, unfair, and/or fraudulent actions concern the same business practices
2 described herein irrespective of where they occurred or were experienced. Plaintiffs and each class
3 member sustained similar injuries arising out of Defendants' conduct in violation of law. The
4 injuries of each member of the class were caused directly by Defendants' wrongful conduct. In
5 addition, the factual underpinning of Defendants' misconduct is common to all members of the
6 putative class and represents a common thread of misconduct resulting in injury to all members of
7 the class. Plaintiff's claims arise from the same practices and course of conduct that give rise to the
8 claims of the members of the putative class and are based on the same legal theories.

9 **D. Adequacy**

10 60. Plaintiff will fairly and adequately represent and protect the interests of the class.
11 Counsel who represent Plaintiff and putative class members are experienced and competent in
12 litigating class actions.

13 **E. Superiority of Class Action**

14 61. A class action is superior to other available means for the fair and efficient
15 adjudication of this controversy. Individual joinder of putative class members is not practicable,
16 and questions of law and fact common to putative class members predominate over any questions
17 affecting only individual putative class members. Each putative class member has been damaged
18 and is entitled to recovery by reason of Defendants' false labeling. Moreover, because the damages
19 suffered by individual members of the class may be relatively small, the expense and burden of
20 individual litigation would make it difficult or impossible for individual members of the class to
21 redress the wrongs done to them, while an important public interest will be served by addressing the
22 matter as a class action. Class-action treatment will allow those persons similarly situated to litigate
23 their claims in the manner that is most efficient and economical for the parties and the judicial
24 system.

25 62. The prerequisites to maintaining a class action for injunctive or equitable relief
26 pursuant to Fed. R. Civ. P. 23(b)(2) are met because Defendants have acted or refused to act on
27 grounds generally applicable to the class, thereby making appropriate final injunctive or equitable
28 relief with respect to the class as whole.

1 80. Defendants sold Misbranded Products in California and throughout the United
2 States during the class period.

3 81. Plaintiff and the members of the putative class suffered a substantial injury by virtue
4 of buying Defendants' Misbranded Products, which they would not have purchased absent
5 Defendants' illegal conduct.

6 82. Defendants' deceptive marketing, advertising, packaging and labeling of their
7 Misbranded Products and their sale of unsalable misbranded products that were illegal to possess
8 were of no benefit to consumers, and the harm to consumers and competition is substantial.

9 83. Defendants sold Plaintiff and the members of the putative class Misbranded
10 Products that were not capable of being legally sold or held and that had no economic value and
11 were legally worthless. Plaintiff and the members of the putative class paid a premium price for the
12 Misbranded Products.

13 84. Plaintiff and the members of the putative class who purchased Defendants'
14 Misbranded Products had no way of reasonably knowing that the products were misbranded and
15 were not properly marketed, advertised, packaged and labeled, and thus could not have reasonably
16 avoided the injury each of them suffered.

17 85. The consequences of Defendants' conduct as set forth herein outweigh any
18 justification, motive or reason therefor. Defendants' conduct is and continues to be unlawful,
19 unscrupulous and contrary to public policy, and is substantially injurious to Plaintiff and the
20 members of the putative class.

21 86. As a result of Defendants' conduct, Plaintiff and the members of the putative class,
22 pursuant to Business and Professions Code § 17203, are entitled to an order enjoining such future
23 conduct by Defendants, and such other orders and judgments which may be necessary to disgorge
24 Defendants' ill-gotten gains and restore any money paid for Defendants' Misbranded Products by
25 Plaintiff and the members of the putative class.

26 ///

27 ///

28 ///

THIRD CAUSE OF ACTION

**Fraudulent Business Practices in Violation of
Business and Professions Code § 17200, et seq.**

87. Plaintiff incorporates by reference each allegation set forth above.

88. Defendants' conduct as set forth herein constitutes fraudulent business practices under California Business and Professions Code sections § 17200, *et seq.*

89. Defendants sold Misbranded Products in California and throughout the United States during the class period.

90. Defendants' misleading marketing, advertising, packaging, and labeling of the Misbranded Products and misrepresentation that the products were capable of sale, capable of possession, and not misbranded were likely to deceive reasonable consumers, and in fact, Plaintiff and the members of the putative class were deceived. Defendants have engaged in fraudulent business acts and practices.

91. Defendants' fraud and deception caused Plaintiff and the members of the putative class to purchase Defendants' Misbranded Products that they would otherwise not have purchased had they known the true nature of those products.

92. Defendants sold Plaintiff and the members of the putative class Misbranded Products that were not capable of being sold or legally held and that had no economic value and were legally worthless. Plaintiff and the members of the putative class paid a premium price for the Misbranded Products.

93. As a result of Defendants' conduct as set forth herein, Plaintiff and each member of the putative class, pursuant to Business and Professions Code § 17203, are entitled to an order enjoining such future conduct by Defendants, and such other orders and judgments which may be necessary to disgorge Defendants' ill-gotten gains and restore any money paid for Defendants' Misbranded Products by Plaintiff and the members of the putative class.

///

///

///

FOURTH CAUSE OF ACTION

**Misleading Advertising in Violation of
Business and Professions Code § 17500, et seq.**

94. Plaintiff incorporates by reference each allegation set forth above.

95. Plaintiff asserts this cause of action for violations of California Business and Professions Code § 17500, *et seq.*, for misleading and deceptive advertising against Defendants.

96. Defendants sold Misbranded Products in California and throughout the United States during the class period. Defendants engaged in a scheme of offering Defendants' Misbranded Products for sale to Plaintiff and the members of the putative class by way of product packaging and labeling. These materials misrepresented and/or omitted the true contents and nature of Defendants' Misbranded Products.

97. Defendants' advertisements and inducements were made within California and throughout the United States and come within the definition of advertising as contained in Business and Professions Code §17500, *et seq.*, in that such product packaging and labeling were intended as inducements to purchase Defendants' Misbranded Food Products and are statements disseminated by Defendants to Plaintiff and the members of the putative class that were intended to reach the members of the putative class. Defendants knew, or in the exercise of reasonable care should have known, that these statements were misleading and deceptive as set forth herein.

98. In furtherance of its plan and scheme, Defendants prepared and distributed within California and nationwide via product packaging and labeling statements that misleadingly and deceptively represented the composition and the nature of Defendants' Misbranded Products. Plaintiff and members of the putative class necessarily and reasonably relied on Defendants' materials and were the intended targets of such representations.

99. Defendants' conduct in disseminating misleading and deceptive statements in California and nationwide to Plaintiff and the members of the putative class was and is likely to deceive reasonable consumers by obfuscating the true composition and nature of Defendants' Misbranded Products, in violation of the "misleading prong" of California Business and Professions Code § 17500, *et seq.*

1 100. As a result of Defendants' violations of the "misleading prong" of California
2 Business and Professions Code § 17500, *et seq.*, Defendants have been unjustly enriched at the
3 expense of Plaintiff and the members of the putative class. Misbranded products cannot be legally
4 sold or held and have no economic value and are legally worthless. Plaintiff and the members of
5 each Class paid a premium price for the Misbranded Products.

6 101. Plaintiff and the members of the putative class, pursuant to Business and
7 Professions Code § 17535, are entitled to an order enjoining such future conduct by Defendants, and
8 such other orders and judgments which may be necessary to disgorge Defendants' ill-gotten gains
9 and restore any money paid for Defendants' Misbranded Food Products by Plaintiff and the
10 members of the putative class.

11 **FIFTH CAUSE OF ACTION**

12 **Untrue Advertising in Violation of**

13 **Business and Professions Code § 17500, *et seq.***

14 102. Plaintiff incorporates by reference each allegation set forth above.

15 103. Plaintiff asserts this cause of action against Defendant for violations of California
16 Business and Professions Code § 17500, *et seq.*, regarding untrue advertising. Defendants sold
17 Misbranded Products in California and throughout the United States during the class period.

18 104. Defendants engaged in a scheme of offering Defendants' Misbranded Products for
19 sale to Plaintiff and the members of the putative class by way of product packaging and labeling.
20 These materials misrepresented and/or omitted the true contents and nature of Defendants'
21 Misbranded Products. Defendants' advertisements and inducements were made in California and
22 throughout the United States and come within the definition of advertising as contained in Business
23 and Professions Code §17500, *et seq.*, in that the product packaging and labeling were intended as
24 inducements to purchase Defendants' Misbranded Product and are statements disseminated by
25 Defendants to Plaintiff and the members of the putative class. Defendants knew, or in the exercise
26 of reasonable care should have known, that these statements were untrue.

27 105. In furtherance of its plan and scheme, Defendants prepared and distributed in
28 California and nationwide via product packaging and labeling statements that falsely advertise the

1 composition of Defendants' Misbranded Products, and falsely misrepresented the nature of those
2 products. Plaintiff and the members of the putative class were the intended targets of such
3 representations and would reasonably be deceived by Defendants' materials.

4 106. Defendants' conduct in disseminating untrue advertising throughout California
5 deceived Plaintiff and the members of the putative class by obfuscating the contents, nature, and
6 quality of Defendants' Misbranded Products, in violation of the "untrue prong" of California
7 Business and Professions Code § 17500.

8 107. As a result of Defendants' violations of the "untrue prong" of California Business
9 and Professions Code § 17500, *et seq.*, Defendants have been unjustly enriched at the expense of
10 Plaintiff and the members of the putative class. Misbranded products cannot be legally sold or held
11 and have no economic value and are legally worthless. Plaintiff and the members of the putative
12 class paid a premium price for the Misbranded Products.

13 108. Plaintiff and the members of the putative class, pursuant to Business and
14 Professions Code § 17535, are entitled to an order enjoining such future conduct by Defendants, and
15 such other orders and judgments which may be necessary to disgorge Defendants' ill-gotten gains
16 and restore any money paid for Defendants' Misbranded Food Products by Plaintiff and the
17 members of the putative class.

18 **SIXTH CAUSE OF ACTION**

19 **Violation of the Consumers Legal Remedies Act,**

20 **California Civil Code §§ 1750, *et seq.***

21 109. Plaintiff incorporates by reference each allegation set forth above.

22 110. This cause of action is brought pursuant to the Consumers Legal Remedies Act,
23 California Civil Code §§ 1750, *et seq.* (the "CLRA").

24 111. Plaintiff and each member of the putative class are "consumers" within the meaning
25 of Civil Code § 1761(d).

26 112. The purchases of the Defendants' Misbranded Products by consumers constitute
27 "transactions" within the meaning of Civil Code § 1761(e), and the Misbranded Products offered by
28 Defendants constitute "goods" within the meaning of Civil Code § 1761(a).

1 113. Defendants have violated, and continue to violate, the CLRA in at least the following
2 respects:

- 3 a. In violation of Civil Code § 1770(a)(5), Defendants represented that the
4 Misbranded Products had characteristics which they did not have;
- 5 b. In violation of Civil Code § 1770(a)(7), Defendants represented that the
6 Misbranded Products were of a particular standard, quality, or grade, of which they
7 were not; and
- 8 c. In violation of Civil Code § 1770(a)(9), Defendants advertised the Misbranded
9 Products with the intent not to provide what it advertised.

10 114. As a direct and proximate cause of Defendants' violation of the CLRA as alleged
11 hereinabove, Plaintiff and members of the putative class have suffered damages, including but not
12 limited to inducing them to purchase the Misbranded Products and pay a premium therefor where
13 such products did not conform to Defendants' representations, thereby causing Plaintiff and putative
14 class members to incur a pecuniary loss.

15 115. Pursuant to California Civil Code § 1780, Plaintiff, on behalf of himself and the
16 putative class, seeks damages, restitution, injunctive relief, punitive damages, attorneys' fees, and
17 the costs of litigation.

18 **SEVENTH CAUSE OF ACTION**
19 **Restitution Based On Quasi-Contract/Unjust Enrichment**

20 116. Plaintiff incorporates by reference each allegation set forth above. Plaintiffs plead
21 this cause of action in the alternative.

22 117. Defendants' conduct in enticing Plaintiff and putative class members to purchase
23 the Misbranded Products through their false and misleading advertising and packaging as described
24 throughout this Complaint is unlawful because the statements contained on Defendants' product
25 labels are untrue. Defendants' took monies from Plaintiff and members of the putative class for
26 products promised to be "natural" or "all natural" (or words of similar import) and reduced in fat by
27 stated percentages, even though the Misbranded Products did not conform to these representations.

28 118. Defendants have been unjustly enriched at the expense of Plaintiff and the putative
class as result of Defendants' unlawful conduct alleged herein, thereby creating a quasi-contractual

1 obligation on Defendants to restore these ill-gotten gains to Plaintiff and putative class members.

2 119. As a direct and proximate result of Defendants' unjust enrichment, Plaintiff and
3 putative class members are entitled to restitution or restitutionary disgorgement, in an amount to be
4 proved at trial.

5 **PRAYER FOR RELIEF**

6 WHEREFORE, Plaintiff, on behalf of himself and on behalf of the other members of the
7 putative class, prays as follows:

8 A. For an order certifying that this action is properly brought and may be maintained as
9 a class action, that Plaintiff be appointed the Class Representative, and that Plaintiff's counsel be
10 appointed counsel for the class;

11 B. For restitution in such amount that Plaintiff and all putative class members paid to
12 purchase the Misbranded Products, the premiums paid therefor, value ascribed thereto on account
13 of the misrepresentation as alleged above, and/or restitutionary disgorgement of the profits
14 Defendants have obtained from those transactions;

15 C. For compensatory damages for causes of action for which they are available;

16 D. For statutory damages allowable under Civil Code § 1780;

17 E. For punitive damages for causes of action for which they are available;

18 F. For a declaration and order enjoining Defendants from advertising their products
19 misleadingly in violation of California's Sherman Food, Drug, and Cosmetic Law, and other
20 applicable laws and regulations as specified in this Complaint;

21 G. For an order awarding reasonable attorneys' fees and the costs of suit herein;

22 H. For an award of pre- and post-judgment interest;

23 I. For an order requiring an accounting for, and imposition of, a constructive trust upon
24 all monies received by Defendants as a result of the unfair, misleading, fraudulent and unlawful
25 conduct alleged herein; and

26 J. Such other and further relief as may be deemed necessary or appropriate.

27 ///

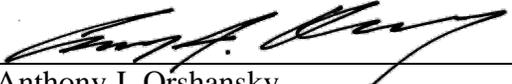
28 ///

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Respectfully submitted,

DATED: August 15, 2014

COUNSELONE, PC

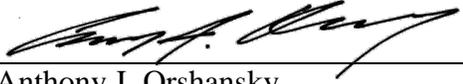
By 
Anthony J. Orshansky
Justin Kachadoorian
Attorneys for Plaintiff RICHARD HALL
and the Putative Class

JURY DEMAND

Plaintiff hereby demands a jury trial on all issues so triable.

DATED: August 15, 2014

COUNSELONE, PC

By 
Anthony J. Orshansky
Justin Kachadoorian
Attorneys for Plaintiff RICHARD HALL
and the Putative Class

Addendum 1

Addendum 1 – Misbranded Products

Kettle Chips

Fully Loaded Baked Potato

Sweet Onion

Sea Salt & Vinegar

Spicy Thai

Backyard Barbeque

Honey Dijon

New York Cheddar

Sour Cream & Onion

Cheddar Beer

Jalapeño Jack

Maple Bacon

Jalapeño

Krinkle Cut Chips

Zesty Ranch

Cheddar & Sour Cream

Buffalo Bleu

Classic Barbeque

Salt & Fresh Ground Pepper

Reduced Fat Chips

Sea Salt & Vinegar

Salt & Fresh Ground Pepper

Bakes Chips

Sea Salt & Vinegar

Hickory Honey Barbeque

Cheddar & Roasted Tomato

Sour Cream and Onion

Organic Chips

Country Style Barbecue

Sweet Chili Garlic

Tias!

Nacho Cheddar

Zesty Ranch

Sweet Baja Barbecue

Chili con Queso

Salsa Picante

Addendum 2

KENT

— BRAND —

POTATO CHIPS

**BACKYARD
BARBEQUE**

great taste...natural

net weight 5 oz (142g)

OUR NATURAL PROM

- ✦ 0 grams trans fat
- ✦ Only all natural colors and flavors
- ✦ Only natural oils
- ✦ No preservatives
- ✦ Non-GMO ingredients
- ✦ Gluten free
- ✦ Real food ingredients

Ingredients: Potatoes, safflower and/or
safflower oil, honey powder (dried cane syrup,
sulfonator oil, sugar, salt, onion powder,
corn), rice flour, sugar, salt, onion powder,
onion, rice flour, sugar, salt, onion powder,
onion extract, tomato powder, paprika, torula
extract, garlic powder, chili pepper, citric acid,
black pepper, paprika extract (color), natural
flavor.

Nutrition Facts

Serving Size 1 oz (28g/about 13 chips)
Servings Per Container: 5

Amount Per Serving		Calories from Fat 80
		% Daily Value*
Total Fat	9g	14%
Saturated Fat	1g	5%
Trans Fat	0g	
Unsaturated Fat	1g	

Bold flavor and healthy stuff
They taste so great because they're
all natural, real food ingredients.
 potatoes, naturally
and craft cooking methods.

And they're backed by a commitment to
sustainability like wind power,
power, green building and local
Kettle Brand® Potato Chips
fasting.  all natural potato
a company that cares.

WWW.KETTLEBRAND.COM

0 BICU™
DEÑO

flower and/or
er (dried cane syrup
oil, onion powder,
der, paprika, torula
pepper, citric acid,
xtract (color), natural

Facts

about 13 chips)
5

ries (from Fat 80	
% Daily Value*	14%
	5%

**These Backyard Barbeque® chips have
bold flavor and hearty crunch.**

**They taste so great because they're made from
all natural, real food ingredients, the finest
Kettle Brand® potatoes, natural oils, and
craft cooking medium.**



**And they're backed by a clean
sustainability like wind power, solar
power, green building and biodiesel.**

**Kettle Brand® Potato Chips: simply
tasting. All natural potato chips made
by a company that cares.**

3 A NATURAL OBSESSION

NET WT 1.56 OZ (44g)
BEST BEFORE: 16/08/14

WATTLE

BRAND

CHIPS

CHEDDAR BEER™

a match made in HEAVEN

all natural potato chips • never any trans fats

net weight (56g)



Addendum 3



new!

new!

KETTLE

KETTLE

BRAND

BRAND

40% reduced fat
POTATO CHIPS

40% reduced fat
POTATO CHIPS

SEA SALT

SEA SALT

SEA SALT

...naturally

...naturally

...naturally

Addendum 4

Kettle Brand® Reduced Fat Potato Chips 6g fat
 Regular Doritos® Chips 11g fat
 *Per serving

Ingredients: Potatoes, sunflower and/or
 sunflower and/or canola oil, sea salt

Nutrition Facts

Serving Size 1 oz (28g/about 13 chips)
 Chips Per Container: about 3

Amount Per Serving	1 oz (28g)	% Daily Value*
Calories	130	240
% Daily Value*		
Calories from Fat	50	90
Total Fat 6g, 10g		9% 15%
Saturated Fat 0.5g, 1g		3% 5%
Trans Fat 0g, 0g		
Polyunsaturated Fat 1g, 1g		
Monounsaturated Fat 4.5g, 8g		
Cholesterol 0g, 0mg		0% 0%
Sodium 150mg, 280mg		7% 12%
Potassium 480mg, 860mg		14% 25%
Total Carbohydrate 19g, 33g		6% 11%
Dietary Fiber 1g, 2g		4% 8%
Sugars 0g, 0g		
Protein 2g, 4g		
Vitamin A		0% 0%
Vitamin C		10% 20%
Calcium		0% 0%
Iron		2% 2%

*Percent Daily Values are based on a 2,000
 calorie diet. Your daily values may be higher.

These Se
 and hear
 Fat.

They ta
 made fr
 ingredien
 oils and c

And they
 sustainab
 power, gr

Kettle Bra
 tasting, a
 by a comp

WWW

OUR N