

1 **CARLSON LYNCH SWEET
KILPELA & CARPENTER, LLP**

2 Todd D. Carpenter (234464)
3 402 West Broadway, 29th Floor
4 San Diego, California 92101
5 Telephone: (619) 347-3517
6 Facsimile: (619) 756-6990
7 tcarpenter@carlsonlynch.com

8 **SCOTT+SCOTT, ATTORNEYS AT LAW, LLP**

9 John T. Jasnoch (281605)
10 707 Broadway, Suite 1000
11 San Diego, CA 92101
12 Telephone: (619) 233-4565
13 Facsimile: (619) 233-0508
14 Email: jjasnoch@scott-scott.com

15 *Attorneys for Plaintiff*

16 [Additional Counsel on Signature Page.]

17 **UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

18 SAEID AZIMPOUR, on Behalf of
19 Himself and All Others Similarly
20 Situated,

21 Plaintiff,

22 vs.

23 SEARS, ROEBUCK & COMPANY,

24 Defendant.

25 Case No. 15-cv-2798-JLS-WVG

26 **THIRD AMENDED CLASS ACTION
COMPLAINT**

27 **DEMAND FOR JURY TRIAL**

1 Plaintiff Saeid Azimpour brings this action on behalf of himself and all others
 2 similarly situated against Defendant Sears, Roebuck & Company (“Sears” or
 3 “Defendant”), and states:

4 **I. NATURE OF ACTION**

5 1. This is a class action regarding Defendant’s false and misleading
 6 advertisement of “original” prices, “sale” prices, and corresponding phantom
 7 “markdowns” on merchandise sold in its retail stores. During the Class Period (defined
 8 below), Defendant advertised false former prices and false price discounts for
 9 merchandise sold throughout its retail stores.

10 2. During the Class Period, Defendant continually misled consumers by
 11 advertising merchandise at discounted “sale” prices. Defendant would compare the “sale”
 12 prices to false former retail prices, which were misrepresented as “original” or “regular”
 13 retail prices. The advertised discounts overstated and did not represent a *bona fide* price
 14 at which Defendant formerly sold the merchandise and were nothing more than mere
 15 phantom markdowns, because the represented former prices were artificially inflated and
 16 were never the original prices for merchandise sold at Defendant’s retail stores. In
 17 addition, the represented “original” prices were not the prevailing market retail prices
 18 within the three months immediately preceding the publication of the advertised former
 19 prices, as required by California law.

20 3. Defendant conveys its deceptive pricing scheme to consumers through the
 21 use of in-store displays. The pricing scheme is prominently displayed with each
 22 “discounted” price listed adjacent to the “regular” prices, which never existed and/or did
 23 not constitute the prevailing market retail prices for such products within the three months
 24 immediately preceding the publication of the advertisement. In addition, upon check-out,
 25 Defendant provides consumers, including Plaintiff, with sales receipts continuing the
 26 misrepresentations regarding false price discounts.

27 4. Through its false and misleading marketing, advertising, and pricing scheme,
 28 Defendant violated, and continues to violate, California and federal law prohibiting

1 advertising goods for sale as discounted from false former prices, and prohibiting
 2 misleading statements about the existence and amount of price reductions. Specifically,
 3 Defendant violated, and continues to violate, California Business and Professions Code
 4 §§17200, *et seq.* (the “UCL”), California Business and Professions Code §§17500, *et seq.*
 5 (the “FAL”), the California Consumers Legal Remedies Act, California Civil Code
 6 §§1750, *et seq.* (the “CLRA”), and the Federal Trade Commission Act (“FTCA”), which
 7 prohibits “unfair or deceptive acts or practices in or affecting commerce” (15 U.S.C.
 8 §45(a)(1)) and false advertisements (15 U.S.C. §52(a)).

9 5. Plaintiff brings this action on behalf of himself and other similarly situated
 10 consumers who have purchased one or more items at Defendant’s retail stores that were
 11 deceptively represented as discounted from false former prices in order to halt the
 12 dissemination of this false, misleading, and deceptive price scheme, correct the false and
 13 misleading perception it has created in the minds of consumers, and obtain redress for
 14 those who have purchased merchandise tainted by this scheme. Plaintiff seeks to obtain
 15 damages, restitution, and other appropriate relief in the amount by which Defendant was
 16 unjustly enriched as a result of its sales of merchandise offered at a false discount.
 17 Finally, Plaintiff seeks reasonable attorneys’ fees pursuant to Cal. Code Civ. Proc.
 18 §1021.5 as this lawsuit seeks the enforcement of an important right affecting the public
 19 interest and satisfies the statutory requirements for an award of attorneys’ fees.

20 **II. JURISDICTION AND VENUE**

21 6. This Court has original jurisdiction of this action pursuant to the Class Action
 22 Fairness Act, 28 U.S.C. §1332 (d)(2). The matter in controversy, exclusive of interest and
 23 costs, exceeds the sum or value of \$5,000,000 and at least some members of the proposed
 24 Class have a different citizenship from Defendant.

25 7. The Southern District of California has personal jurisdiction over Defendant
 26 because Defendant is a corporation or other business entity authorized to conduct and
 27 which does conduct business in the State of California. Defendant is registered with the
 28 California Secretary of State to do sufficient business with sufficient minimum contacts in

1 California, and/or otherwise intentionally avails itself of the California market through the
 2 ownership and operation of over 200 retail stores within the State of California.

3 8. Venue is proper under 18 U.S.C. §1965(a) because Defendant transacts
 4 substantial business in this District. A substantial part of the events giving rise to
 5 Plaintiff's claims arose here.

6 **III. PARTIES**

7 **Plaintiff**

8 9. Plaintiff Saeid Azimpour resides in San Diego County, California.
 9 Azimpour, in reliance on Defendant's false and deceptive advertising, marketing, and
 10 "discount" pricing schemes, purchased merchandise from Defendant and was damaged
 11 thereby. Mr. Azimpour, went shopping for new bedding and pillows on July 19, 2015. Mr.
 12 Azimpour visited several stores in the Westfield UTC Mall, including Defendant's retail
 13 store, located at 4545 La Jolla Village Dr, San Diego, CA 92122. Mr. Azimpour shopped
 14 for several pillows at Sears, Sleep Number and Macy's that day. Mr. Azimpour, believing
 15 that he was receiving a substantial discount on a typically more expensive pillow,
 16 purchased a Cannon Firm Density Pillow, standard size for \$9.99. *See* exhibit, "A"
 17 ("Purchas Receipt" for Cannon Firm Density Pillow, July 19, 2015). Mr. Azimpour
 18 believed he was receiving a 50% off discount on a pillow that was represented to have an
 19 original price of \$19.99. Mr. Azimpour examined the price sign bearing the original price
 20 and also examined the red sign, with black letters announcing, "Sale" and stating "Save
 21 \$10". The Sale Sign announced the discounted price of \$9.99 and the regular price was
 22 described immediately next to it as, "reg. \$19.99". In reliance on this representation, Mr.
 23 Azimpour made his purchase. Attached as Exhibit "B" is a pricing sign that Mr.
 24 Azimpour describes as a nearly identical to the price sign he observed prior to making his
 25 purchase and the accompanying produce packaging and pricing.

26 10. Mr. Azimpour believed that he was receiving a substantial discount and that
 27 the pillow he was purchasing was of a significantly greater value than the amount he was
 28 paying for them. Instead, the pillow Mr. Azimpour purchased was of a lesser value than

1 what he paid. By failing to price the pillow and other merchandise at their actual original
 2 or regular price for a substantial period of time, Defendant artificially inflated the market
 3 price or perceived value of the clothing it sells, including the pillow purchased by
 4 Plaintiff. By failing to price its merchandise, including the pillow purchased by Plaintiff,
 5 at its original or regular price for a substantial period of time and in compliance with
 6 California law, Sears interfered with market forces; driving the selling price of its
 7 products higher than they would be if Defendant had complied with the law. Defendant's
 8 false discounting practice, as described herein, has the effect of setting an artificially high
 9 market value for its merchandise. Customers purchase merchandise from Sears believing
 10 they are receiving a substantial discount on their purchases, when in fact they are not.
 11 They are instead purchasing an item they would not otherwise buy and/or are paying a
 12 higher price premium than they would otherwise pay were the products subject to fair
 13 market competition and pricing.

14 11. Despite the filing of Mr. Azimpour's lawsuit, Plaintiff's counsel's
 15 investigation has revealed that the pillow Mr. Azimpour purchased remained continuously
 16 on sale at every Sears store in San Diego County for the exact sale price at which Mr.
 17 Azimpour paid for his pillow, \$9.99, from the filing of this suit up to through November
 18 8, 2016.

19 **Defendant**

20 12. Plaintiff alleges upon information and belief that Defendant Sears, Roebuck
 21 & Company is a New York corporation with its principal executive offices in Hoffman
 22 Estates, Illinois. It is a subsidiary of the publicly traded Delaware corporation, Sears
 23 Holdings Corporation (NYSE: SHLD). Defendant advertises, markets, distributes, and/or
 24 sells products to hundreds of thousands of consumers in California and throughout the
 25 United States.

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1 **IV. FACTUAL BACKGROUND**

2 **A. Sears Regularly Engages in Deceptive Pricing**

3 13. Consumers' Checkbook/Center for the Study of Services ("CSS") is an
 4 independent, nonprofit consumer organization based in Washington, D.C. Its stated
 5 purpose is "to provide consumers information to help them get high quality services and
 6 products at the best possible prices."

7 14. Beginning in June 2014, and continuing through March 2015, CSS conducted
 8 a survey of seven national retail chains and Amazon.com, tracking prices weekly for six
 9 to ten big-ticket items from each retailer.¹ Most price checks were made online with spot
 10 checking of in-store prices.

11 15. The CSS survey discovered that for some of the stores, including Sears,
 12 "some of the products for almost all of the weeks we checked were offered at sale prices."

13 16. Specifically, the CSS report made the following findings regarding Sears'
 14 price discounting scheme:

15 Of the seven chains we tracked, ***Sears had the most egregious always-on-***
 16 ***sale pricing practices:*** For the nine items we checked at Sears, almost all
 17 were almost always offered at a sale price. Two of the items were offered at
 18 sale prices for 44 out of 44 weeks, one was offered at a sale price for 43 out
 19 of 44 weeks, and one was offered at a sale price for 40 out of 44 weeks.
 20 Except for one item, all the items we tracked at Sears were always or almost
 21 always listed at sale prices. During the rare times Sears sold items at their
 22 regular prices, they were still listed as being "on sale." During these times,
 23 Sears simply omitted the item's regular price.

24 Sears' sale prices are also shown as more steeply discounted from its regular
 25 prices than the sale prices of the other chains we checked. Most items are
 26 shown as being on sale for 40% or more off their regular prices, leading
 27 customers to believe the "current" sale offers them fantastic deals. The
 28 opposite is usually the case: Many items sold by Sears can be purchased for
 lower prices elsewhere.

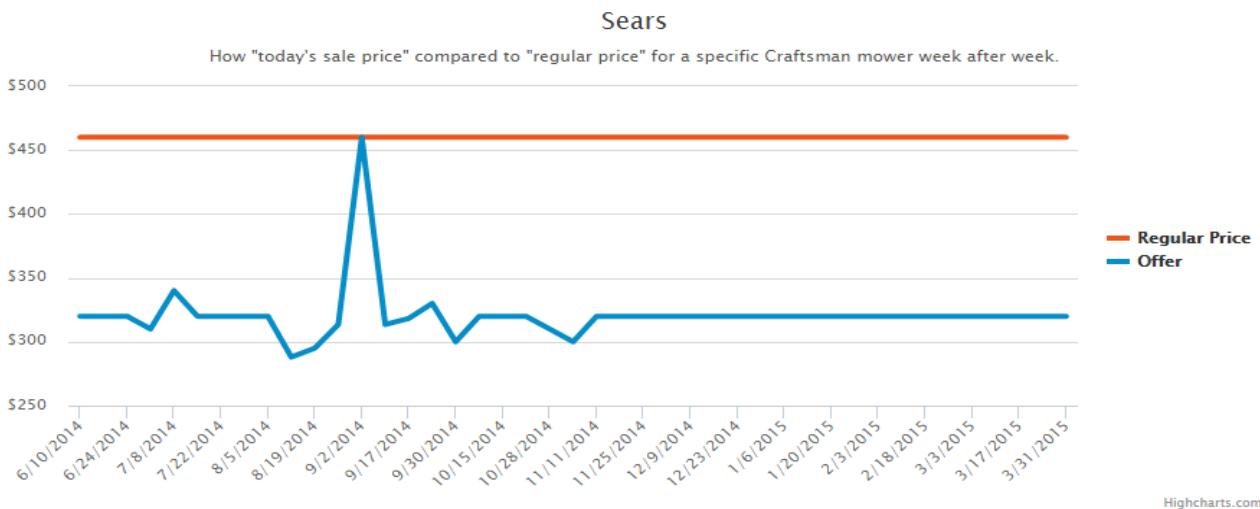
26 * * *

27 1 28 The report of the CSS survey "Sale Fail" can be found at <http://www.checkbook.org/salefail/> (last
 accessed December 10, 2015).

[F]or most of the items we tracked, Sears always or almost always listed them as being on sale. For a few of the items, Sears charged its “regular” prices for only a few weeks. And Sears seemed to list items at regular prices only during weeks that are historically low-traffic weeks (for example, at the end of summer for the mower we priced). ***Checkbook.org believes Sears’ pricing practices are deceptive and misleading.***

[Emphasis added.]

17. One representative item offered by Sears and tracked by CSS was offered at the “regular” price only once in the course of the study:



18. As the CSS report put it, at Sears, “***the sales often never end.***” [Emphasis added.]

20. **B. Plaintiff’s Counsel’s Investigation into Sears’ Sale Discounting Practices**

21. Plaintiff’s counsel launched a wide-ranging investigation into the sale discounting practices of dozens of retailers in the spring of 2015. Plaintiff’s counsel tracked the pricing on various consumer goods at various retail stores, including Sears’ retail stores for several months preceding and subsequent to Azimpour’s purchase.

22. Plaintiffs’ counsel’s investigation focused primarily on products that are sold exclusively at Sears retail stores. Thus, the “relevant market” for the items Plaintiff investigated is exclusively the Sears retail stores where the products are sold. Plaintiff’s counsel’s investigation revealed that the “original” or “regular” price of the pillow Mr.

1 Azimpour purchased was **never** the prevailing market price at the Sears retail store where
 2 he made his purchase in the 90 days preceding Mr. Azimpour's purchase. Plaintiffs'
 3 counsel's investigation revealed that this was a pervasive practice at Sears retail stores
 4 throughout San Diego County, as dozens of other items remained continuously discounted
 5 for at least the 90-day period preceding Mr. Azimpour's purchase. Sears engages in a
 6 systematic scheme to continuously discount its exclusively branded merchandise and
 7 other merchandise without ever offering its merchandise for sale at its "original" or
 8 "regular" prices for any substantial period of time and in most cases, not at all.

9 21. Plaintiff's counsel's investigation tracked several Sears' retail items offered
 10 for sale at multiple store locations throughout California. Plaintiff's counsel's
 11 investigation involved sending investigators into Sears retail stores to manually record the
 12 pricing of items offered for sale within the stores. Plaintiff's counsel's investigation was
 13 conducted for several months preceding Plaintiff's purchase and for several months
 14 subsequent to Plaintiff's purchase. Plaintiff's counsel has continued to observe the sales
 15 discounting practices at Sears following the filing of this lawsuit. Plaintiff's counsel's
 16 investigation revealed that all items offered for sale at Defendants' retail stores during the
 17 investigation were routinely and constantly discounted from the regular or original prices
 18 listed on the price tags of the merchandise.

19 22. For example, for the duration of Plaintiff's investigation in the 90 days
 20 preceding Mr. Azimpour's purchase (and in some cases, well beyond the 90 days
 21 preceding his purchase), the following merchandise was advertised as continuously "on-
 22 sale" at the Sears retail store where Mr. Azimpour made his purchase:

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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	Item: Date recorded merchandise as On Sale:	Regular Price:	Sale Price:	Remained on Sale through at least July 20 th , 2016
	Black Kenmore 1.6 Cu.Ft. Over the Range Microwave	March 31, 2015	\$259.00 \$65.00 off	Yes
	White Kenmore 15 cubic ft. Top Freezer Refrigerator	April 20, 2015	\$569.99 \$90.00 off	Yes
	Kenmore 25.4 cu. Ft. Side by Side Refrigerator White	April 19, 2015	\$1229.99 \$899.99	Yes
	Sears Taryn Super Pillow Top Full Mattress	April 1, 2015	\$1024.99 \$615.00	Yes
	Big Fab Find Supersize Jumbo Fiber Pillow	Aril 1, 2015	\$9.99 \$3.99	Yes
	Sleep Innovations	April 2, 2015	\$49.99 \$16.99	Yes

1	Memory Foam				See Exhibit,
2	Contour Pillow				“C” – pricing
3					sign.
4	GE 30" Double	April 15, 2015	\$2099.99	\$1889.99	Yes
5	Electric Wall				
6	Oven Stainless				
7	Steel				
8	Kenmore Elite	March 13, 2015	\$1199.99	\$799.99	Yes
9	24" Built-In				
10	Dishwasher				
11	Stainless Steel				
12	Cannon Firm	March 13, 2015	\$19.99	\$9.99	Yes
13	Density Pillow				
14	Regular				
15	Cannon Firm	March 13, 2015	\$29.99	\$14.99	Yes
16	Density Pillow				
17	King Size				
18	Beautyrest	April 2, 2015	\$6124.99	\$2204.99	Yes
19	Black Evie Firm				
20	Full Set				
21	Mattress				
22	Beautyrest	April 2, 2015	\$6499.99	\$2339.99	Yes
23	Black Evie firm				
24	Queen Size Full				
25	Set Mattress				
26	Beautyrest	April 2, 2015	\$7999.99	\$2879.99	Yes
27	Black Evie Firm				
28					

1	King Size Full			Pricing placard
2	Set Mattress			July 11, 2015.
3	Sleep Innovations Gel Cluster Pillow, Standard	April 2, 2015	\$29.99	\$14.99 Yes <i>See Exhibit E, Pricing placard July 11, 2015.</i>
4				
5				
6				
7				
8	Stearns & Foster Walnut Grove Luxury Firm Euro Pillowtop Full Set	April 20, 2015	\$3899.99	\$1754.99 Yes <i>See Exhibit F, Pricing placard July 11, 2015.</i>
9				
10				
11				
12				
13				
14	Stearns & Foster Walnut Grove Luxury Firm Euro Pillowtop Queen Set	April 20, 2015	\$3999.99	\$1799.99 Yes <i>See Exhibit F, Pricing placard July 11, 2015.</i>
15				
16				
17				
18				
19				
20	Stearns & Foster Walnut Grove Luxury Firm Euro Pillowtop King Set	April 20, 2015	\$4999.99	\$2249.99 Yes <i>See Exhibit F, Pricing placard July 11, 2015.</i>
21				
22				
23				
24				
25				
26	Stearns & Foster Walnut	April 20, 2015	\$5149.99	\$2322.99 Yes
27				
28				

1	Grove Luxury Firm Euro Pillowtop Queen w/ Adjustable Base R up				<i>See Exhibit F, Pricing placard July 11, 2015.</i>
7	Stearns & Foster Walnut Grove Luxury Firm Euro Pillowtop Queen w/adjustable base R 7	April 20, 2015	\$7549.98	\$3522.48	Yes <i>See Exhibit F, Pricing placard July 11, 2015.</i>
15	Beautyrest Twin 2" Gel Swirl Memory foam topper	April 15, 2015	\$199.99	\$119.99	Yes <i>See Exhibit G, Pricing placard July 11, 2015.</i>
20	Beautyrest Full 2" Gel Swirl Memory foam topper	April 15, 2015	\$249.99	\$149.99	Yes
24	Beautyrest Queen 2" Gel Swirl Memory foam topper	April 15, 2015	\$299.99	\$179.99	Yes

1	Beautyrest King 2" Gel Swirl Memory foam topper	April 15, 2015	\$339.99	\$203.99	Yes
5	Beautyrest Black Ava Plush Full Mattress Set	April 15, 2015	\$5499.99	\$1979.99	Yes <i>See Exhibit H, Pricing placard July 20, 2015.</i>
10	Beautyrest Black Ava Queen Full Mattress Set	April 15, 2015	\$5799.99	\$2069.99	Yes <i>See Exhibit H, Pricing placard July 20, 2015.</i>
14	Beautyrest Black Ava King Full Mattress Set	April 15, 2015	\$6999.99	\$2519.99	Yes <i>See Exhibit H, Pricing placard July 20, 2015.</i>

19 23. Plaintiff's counsel's investigation revealed that each of the above described
 20 items were offered at the same price and the same corresponding discounts at other Sears
 21 retail locations in San Diego County, including the Sears at 575 Fletcher Pkwy, El Cajon,
 22 CA 92020 and 565 Broadway, Chula Vista, CA 91910.

23 24. Plaintiff's counsel's investigation also revealed that all mattresses for sale at
 24 Sears retail stores in San Diego County remained continuously discounted during the
 25 duration of Plaintiff's investigation. Mattresses were advertised at 60% off from
 26 approximately May 12, 2015 and continued to be listed on sale at the conclusion of
 27 Plaintiff's investigation through September 15, 2015. At no time during this time period

1 were any mattresses offered for sale at their original or regular price. Sears' deceptive
 2 behavior included announcing sales for what appeared to be a limited time period, for
 3 example, offering 60% off plus an extra 10% off plus a free gift" on all Beautyrest
 4 mattresses from June 14, 2015 through July 11, 2015. *See Exhibit D*, placard
 5 demonstrating sale on Beautyrest mattresses from 06/14/2015 – 07/11/15. However,
 6 when the represented sale ended on July 11, 2015, a new, nearly identical sale would
 7 begin on July 12, 2015, advertising the sale applicable to all Beautyrest mattresses for
 8 60% off plus an extra 10% off from July 12, 2015 through August 15, 2015. *See Exhibit*
 9 *H*, placard demonstrating the sale applicable to all Beautyrest mattresses from 07/12/2015
 10 – 08/15/15.

11 25. Plaintiff's counsel's investigation revealed that the pillow Mr. Azimpour
 12 purchased, the Standard size, Firm Density Cannon Pillow, remains on sale to this day at
 13 the identical discount and sale price that Mr. Azimpour paid. *See Exhibit, B*, Pricing
 14 placard for the Firm Density Cannon Pillow as displayed October, 8, 2016 at Sears retail
 15 store located in the UTC mall in San Diego, California.

16 26. Defendant's false discounting practice, as described herein, has the effect of
 17 setting an artificially high market value for its "on sale" merchandise. Customers purchase
 18 merchandise from Sears retail stores believing they are receiving a substantial discount on
 19 their purchases, when in fact they are not. They are instead purchasing an item that they
 20 might not otherwise buy and paying a higher price than they would otherwise pay were
 21 the products subject to fair market competition and pricing.

22 27. Plaintiff's counsel's investigation of Sears retail stores reveals that the pillow
 23 purchased by Mr. Azimpour was never offered at the full retail price in the 90 days
 24 preceding his purchase on July 19, 2015.

25 28. Despite Plaintiffs' counsel's best efforts at investigation, the full extent of
 26 Defendant's false and deceptive pricing scheme can only be revealed through a full
 27 examination of records exclusively in the possession of Defendant.

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1 **C. Plaintiff's Purchase of Purported Discounted Merchandise**

2 29. On July 19, 2015, Mr. Azimpour purchased an all-white, standard sized firm
 3 density Cannon Pillow from the Sears retail store located at the UTC mall in San Diego,
 4 California. At the time of his purchase, Mr. Azimpour reviewed the price placard situated
 5 directly on the shelves where the inventory of pillows was presented. The price placard
 6 listed the "regular price" of the pillow he purchased, as "reg. \$19.99" and it listed in bold
 7 black lettering, "Sale," emblazoned on a red background and announced the sale price of
 8 \$9.99. Mr. Azimpour believes the placard he observed prior to making his purchase
 9 decision is nearly identical to the one set forth in Exhibit B. Believing he was able to pay
 10 significantly less than what certain products were worth and typically sell for in the retail
 11 marketplace and/or from Defendant, Plaintiff was induced to purchase merchandise which
 12 was offered at a price considerably lower than the stated regular price. Specifically,
 13 relying upon Defendant's misrepresentations and false and deceptive advertising, Plaintiff
 14 purchased a Cannon firm density standard pillow.

15 30. Plaintiff would not have purchased the merchandise without the
 16 misrepresentations made by Sears. As a result, Plaintiff has been personally victimized by
 17 and suffered economic injury as a direct result of Defendant's unlawful and unfair
 18 conduct.

19 31. Furthermore, upon check-out on July 19, 2015, Sears provided Plaintiff with
 20 a sales receipt containing misleading information regarding false regular prices and
 21 discounts Plaintiff supposedly received on the merchandise he purchased. Specifically,
 22 the receipt states "SALE" in large, bold, all-caps lettering directly above the item
 23 purchased and the amount paid for the item purportedly on sale.

24 32. Defendant knows that its comparative price advertising is false, deceptive,
 25 misleading, and unlawful under California and federal law.

26 33. Plaintiff relied upon Defendant's artificially inflated "regular" prices and
 27 false discounts when purchasing merchandise from Defendant. Plaintiff would not have

1 made such purchases but for Defendant's representations of fabricated "original" prices
 2 and false discounts.

3 34. Plaintiff and the Class reasonably and justifiably acted and relied on the
 4 substantial price differences that Defendant advertised, and made purchases believing that
 5 they were receiving a substantial discount on an item of greater value than it actually was.
 6 Plaintiff, like other Class members, relied on and was damaged by these pricing schemes
 7 that Defendant carried out.

8 **V. CLASS ALLEGATIONS**

9 35. Plaintiff brings this action on behalf of himself and all other similarly
 10 situated Class members pursuant to Rule 23(a) and (b)(3) of the Federal Rules of Civil
 11 Procedure and seeks certification of the following Class against Defendant (the
 12 "California Class"):

13 All individuals residing in the State of California who purchased one or more
 14 items from Defendant offered at a purported discount from an "original" or
 15 "regular" price any time between December 11, 2011 to the date of
 certification.

16 36. Excluded from the Class is Defendant, as well as its officers, employees,
 17 agents, or affiliates, and any judge who presides over this action, as well as all past and
 18 present employees, officers, and directors of Sears and all online purchasers.

19 37. Plaintiff reserves the right to expand, limit, modify, or amend this class
 20 definition, including the addition of one or more subclasses, in connection with his motion
 21 for class certification, or at any other time, based upon, *inter alia*, changing circumstances
 22 and/or new facts obtained during discovery.

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

26 1. **Numerosity:** The Class members are so numerous that joinder of all members
 27 is impracticable. Plaintiff is informed and believes that the proposed Class contains
 28

1 hundreds of thousands of individuals who have been damaged by Defendant's conduct as
 2 alleged herein. The precise number of Class members is unknown to Plaintiff.

3 2. ***Existence and Predominance of Common Questions of Law and Fact:***

4 This action involves common questions of law and fact, which predominate over any
 5 questions affecting individual Class members. These common legal and factual questions
 6 include, but are not limited to, the following:

- 7 a. whether, during the Class Period, Sears used false "regular" or "original"
 8 price labels and falsely advertised price discounts on merchandise it sold in
 9 its retail stores;
- 10 b. whether, during the Class Period, the "original" prices advertised by Sears
 11 were the prevailing market prices for the respective merchandise during the
 12 three months period preceding the dissemination and/or publication of the
 13 advertised former prices;
- 14 c. whether Sears' alleged conduct constitutes violations of the laws asserted;
- 15 d. whether Sears engaged in unfair and/or unlawful business practices under the
 16 laws asserted;
- 17 e. whether Sears engaged in false or misleading advertising; and
- 18 f. whether Plaintiff and the Class are entitled to damages and/or restitution and
 19 the proper measure of that loss.

20 3. ***Typicality:*** Plaintiff's claims are typical of the claims of the members of the
 21 Class because, *inter alia*, all Class members have been deceived (or were likely to be
 22 deceived) by Sears' false and deceptive price advertising scheme, as alleged herein.
 23 Plaintiff is advancing the same claims and legal theories on behalf of himself and all
 24 members of the Class.

25 4. ***Adequacy:*** Plaintiff will fairly and adequately protect the interests of the
 26 members of the Class. Plaintiff has retained counsel experienced in complex consumer
 27 class action litigation, and Plaintiff intends to prosecute this action vigorously. Plaintiff
 28 has no antagonistic or adverse interest to those of the Class.

1 5. ***Superiority:*** The nature of this action and the nature of laws available to
 2 Plaintiff and the Class make the use of the class action format a particularly efficient and
 3 appropriate procedure to afford relief to him and the Class for the wrongs alleged. The
 4 damages or other financial detriment suffered by individual Class members is relatively
 5 modest compared to the burden and expense that would be entailed by individual
 6 litigation of their claims against Sears. It would, thus, be virtually impossible for Plaintiff
 7 and Class members, on an individual basis, to obtain effective redress for the wrongs done
 8 to them. Absent the class action, Class members and the general public would not likely
 9 recover, or would not likely have the chance to recover, damages or restitution, and Sears
 10 will be permitted to retain the proceeds of its unfair and unlawful misdeeds.

11 39. All Class members, including Plaintiff, were exposed to one or more of
 12 Sears' misrepresentations or omissions of material fact claiming that former "original"
 13 advertised prices were in existence. Due to the scope and extend of Sears' consistent false
 14 "discount" price advertising scheme, disseminated in a years-long campaign to consumers
 15 via in-store displays, it can be reasonably inferred that such misrepresentations or
 16 omissions of material fact were uniformly made to all members of the Class. In addition,
 17 it can be reasonably presumed that all Class members, including Plaintiff, affirmatively
 18 acted in response to the representations contained in Sears' false advertising scheme when
 19 purchasing merchandise from Sears.

20 40. Sears keeps extensive computerized records of its customers through, *inter*
 21 *alia*, customer loyalty programs, co-branded credit cards, and general marketing
 22 programs. Sears has one or more databases through which a significant majority of Class
 23 members may be identified and ascertained, and it maintains contact information,
 24 including email and home addresses, through which notice of this action could be
 25 disseminated in accordance with due process requirements.

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27 ///

CAUSES OF ACTION

FIRST CAUSE OF ACTION

Violation of Unfair Competition Law – Unlawful Acts Business and Professions Code §17200, *et seq.* on Behalf of the California Class

41. Plaintiff repeats and re-alleges the allegations contained in every preceding paragraph as if fully set forth herein.

42. The UCL defines unfair business competition to include any “unlawful, unfair or fraudulent” act or practice, as well as any “unfair, deceptive, untrue or misleading” advertising. Cal. Bus. & Prof. Code §17200.

43. The UCL imposes strict liability. Plaintiff need not prove that Defendant intentionally or negligently engaged in unlawful or unfair business practices – only that such practices occurred.

44. The harm to Plaintiff and California Class members outweighs the utility of Defendant's practices. There were reasonably available alternatives to further Defendant's legitimate business interests, other than the misleading and deceptive conduct described herein.

45. A business act or practice is “unlawful” under the UCL if it violates any other law or regulation.

46. The FTCA prohibits “unfair or deceptive acts or practices in or affecting commerce” (15 U.S.C. §45(a)(1)) and prohibits the dissemination of any false advertisements. (15 U.S.C. §52(a)). Under the FTCA, false former pricing schemes similar to the ones implemented by Sears are described as deceptive practices that would violate the FTCA:

(a) One of the most commonly used forms of bargain advertising is to offer a reduction from the advertiser's own former price for an article. If the former price is the actual, bona fide price at which the article was offered to the public on a regular basis for a reasonably substantial period of time, it provides a legitimate basis for the advertising of a price comparison. Where the former price is genuine, the bargain being advertised is a true one. If, on the other hand, the former price being advertised is not bona fide but

fictitious – for example, where an artificial, inflated price was established for the purpose of enabling the subsequent offer of a large reduction – the “bargain” being advertised is a false one; the purchaser is not receiving the unusual value he expects.

(b) A former price is not necessarily fictitious merely because no sales at the advertised price were made. The advertiser should be especially careful, however, in such a case, that the price is one at which the product was openly and actively offered for sale, for a reasonably substantial period of time, in the recent, regular course of his business, honestly and in good faith – and, of course, not for the purpose of establishing a fictitious higher price on which a deceptive comparison might be based.

16 C.F.R. §233.1.

47. California law also expressly prohibits false former pricing schemes. Cal. Bus. & Prof. Code §17501, entitled “*Worth or value; statements as to former price;*” states:

For the purpose of this article the worth or value of any thing advertised is the prevailing market price, wholesale if the offer is at wholesale, retail if the offer is at retail, at the time of publication of such advertisement in the locality wherein the advertisement is published.

No price shall be advertised as a former price of any advertised thing, unless the alleged former price was the prevailing market price as above defined within three months next immediately preceding the publication of the advertisement or unless the date when the alleged former price did prevail is clearly, exactly and conspicuously stated in the advertisement.

[Emphasis added.]

48. As detailed below, Cal. Civil Code §1770(a)(9) prohibits a business from “[a]dvertising goods or services with intent not to sell them as advertised,” and subsection (a)(13) prohibits a business from “[m]aking false or misleading statements of fact concerning reasons for, existence of, or amounts of price reductions.”

49. Defendant's practices, as set forth above, have violated the FTCA and California law. Consequently, Defendant's practices constitute an unlawful business practice within the meaning of the UCL.

50. Defendant's violations of the UCL through its unlawful business practices are ongoing and present a continuing threat that members of the public will be deceived into purchasing products based on price comparisons of arbitrary and inflated "regular" prices to "discount prices" that created phantom markdowns and led to financial damage for consumers, like Plaintiff and the California Class.

51. Pursuant to the UCL, Plaintiff is entitled to disgorgement and restitution to Plaintiff and the California Class of all of Defendant's revenues associated with its unfair competition, or such portion of those revenues as the Court may find equitable.

SECOND CAUSE OF ACTION
**Violation of Unfair Competition Law – Unfair Acts
Business and Professions Code §17200, *et seq.*
on Behalf of the California Class**

52. Plaintiff repeats and re-alleges the allegations contained in every preceding paragraph as if fully set forth herein.

53. A business act or practice is “unfair” under the UCL if it offends an established public policy or is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers, and that unfairness is determined by weighing the reasons, justifications, and motives of the practice against the gravity of the harm to the alleged victims.

54. The FTCA prohibits “unfair or deceptive acts or practices in or affecting commerce” (15 U.S.C. §45(a)(1)) and prohibits the dissemination of any false advertisements. (15 U.S.C. §52(a)). Under the FTCA, false former pricing schemes similar to the ones implemented by Sears are described as deceptive practices that would violate the FTCA:

(a) One of the most commonly used forms of bargain advertising is to offer a reduction from the advertiser's own former price for an article. If the former price is the actual, bona fide price at which the article was offered to the public on a regular basis for a reasonably substantial period of time, it provides a legitimate basis for the advertising of a price comparison. Where the former price is genuine, the bargain being advertised is a true one. If, on

1 the other hand, the former price being advertised is not bona fide but
 2 fictitious – for example, where an artificial, inflated price was established for
 3 the purpose of enabling the subsequent offer of a large reduction – the
 4 “bargain” being advertised is a false one; the purchaser is not receiving the
 unusual value he expects.

5 (b) A former price is not necessarily fictitious merely because no sales at
 6 the advertised price were made. The advertiser should be especially careful,
 7 however, in such a case, that the price is one at which the product was openly
 8 and actively offered for sale, for a reasonably substantial period of time, in
 9 the recent, regular course of his business, honestly and in good faith – and, of
 course, not for the purpose of establishing a fictitious higher price on which a
 deceptive comparison might be based.

10 16 C.F.R. §233.1

11 55. Defendant’s actions constitute “unfair” business acts or practices because, as
 12 alleged above, Defendant engaged in misleading and deceptive price comparison
 13 advertising that represented false “regular” prices and “discount” prices that were nothing
 14 more than fabricated “regular” prices leading to phantom markdowns and therefore
 15 violated the FTCA. Defendant’s acts and practices offended an established public policy,
 16 and constitute immoral, unethical, oppressive, and unscrupulous activities that are
 17 substantially injurious to consumers.

18 56. Defendant engaged, and continues to engage, in conduct that constitutes
 19 unfair practices as such conduct violates the legislatively declared policies of: (1) the
 20 FTCA; (2) California Civil Code §1770 against committing acts and practices intended to
 21 deceive consumers regarding the representation of goods in certain particulars; (3) 15
 22 U.S.C. §§45(a)(1) and 52(a) against unfair or deceptive practices and false advertising;
 23 and (4) California Business and Professions Code §17500 and specifically §17501 against
 24 false advertising. Defendant gains an unfair advantage over its competitors, whose
 25 labeling, advertising, and marketing for other similar products must comply with these
 26 laws.

1 57. Defendant's conduct, including misrepresenting the pricing of its
 2 merchandise, is substantially injurious to consumers. Such conduct has caused, and
 3 continues to cause, substantial injury to consumers because consumers would not have
 4 purchased its merchandise at all but for Defendant's false promotion of its merchandise
 5 as, among other things, being offered at a significant discount. Consumers have, thus,
 6 overpaid for Sears merchandise. Such injury is not outweighed by any countervailing
 7 benefits to consumers or competition. Indeed, no benefit to consumers or competition
 8 results from Defendant's conduct. Since consumers reasonably rely on Defendant's
 9 representations of its merchandise and injury results from ordinary use of its merchandise,
 10 consumers could not have reasonably avoided such injury. *Davis v. Ford Motor Credit*
 11 Co., 179 Cal. App. 4th 581, 597-98 (2009); *see also Drum v. San Fernando Valley Bar*
 12 *Ass'n*, 182 Cal. App. 4th 247, 257 (2010) (outlining the third test based on the definition
 13 of "unfair" in Section 5 of the FTCA).

14 58. By committing the acts alleged above, Defendant has engaged in unfair
 15 business acts and practices which constitute unfair competition within the meaning of
 16 California Business and Professions Code §17200.

17 59. Plaintiff purchased Sears merchandise in reliance on Defendant's
 18 representations that its merchandise is, among other things, being offered at a significant
 19 discount. Plaintiff would not have purchased its merchandise at all but for Defendant's
 20 false promotion that its merchandise is, among other things, being offered at a significant
 21 discount. Plaintiff and the California Class have all paid money for Sears merchandise.
 22 However, Plaintiff and the California Class did not obtain the full value of the advertised
 23 product due to Defendant's misrepresentations regarding the nature of said products.
 24 Accordingly, Plaintiff and the California Class have suffered injury in fact and lost money
 25 or property as a direct result of Defendant's misrepresentations and material omissions.

26 60. As a result of Defendant's conduct, Plaintiff seeks restitutionary relief under
 27 California Business and Professions Code §17203.

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THIRD CAUSE OF ACTION
Violation of the California False Advertising Law,
California Business and Professions Code §17500, *et seq.*
on Behalf of the California Class

61. Plaintiff repeats and re-alleges the allegations contained in every preceding paragraph as if fully set forth herein.

62. Cal. Bus. & Prof. Code §17500 provides that:

[i]t is unlawful for any . . . corporation . . . with intent . . . to dispose of . . . personal property . . . to induce the public to enter into any obligation relating thereto, to make or disseminate or cause to be made or disseminated . . . from this state before the public in any state, in any newspaper or other publication, or any advertising device, or by public outcry or proclamation, or in any other manner or means whatever, including over the Internet, any statement . . . which is ***untrue*** or ***misleading***, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading . . .

[Emphasis added.]

63. The “intent” required by Cal. Bus. & Prof. Code §17500 is the intent to dispose of property, and not the intent to mislead the public in the disposition of such property.

64. Similarly, Cal. Bus. & Prof. Code §17501, entitled "*Worth or value; statements as to former price,*" states:

For the purpose of this article the worth or value of any thing advertised is the prevailing market price, wholesale if the offer is at wholesale, retail if the offer is at retail, at the time of publication of such advertisement in the locality wherein the advertisement is published.

No price shall be advertised as a former price of any advertised thing, unless the alleged former price was the prevailing market price as above defined within three months next immediately preceding the publication of the advertisement or unless the date when the alleged former price did prevail is clearly, exactly and conspicuously stated in the advertisement.

[Emphasis added.]

65. This statute further provides, “[n]o price shall be advertised as a former price of any advertised thing, unless the alleged former price was the prevailing market price . . .

. within three months next immediately preceding the publication of the advertisement or unless the date when the alleged former price did prevail is clearly, exactly and conspicuously stated in the advertisement.” Cal Bus. & Prof. Code §17501.

66. Defendant's routine of advertising "regular" sales prices associated with its merchandise, which were never the true prevailing prices of those products and were materially greater than the true prevailing prices was an unfair, untrue, and misleading practice. This deceptive marketing practice gave consumers the false impression that the products were regularly sold on the market for a substantially higher price than they actually were. Therefore, leading to the false impression that the merchandise was worth more than it actually was.

67. Defendant misled consumers by making untrue and misleading statements and failing to disclose what is required as stated in the Code, as alleged above.

68. As a direct and proximate result of Defendant's misleading and false advertisements Plaintiff and California Class members have suffered injury in fact and have lost money. As such, Plaintiff requests that this Court order Defendant to restore this money to Plaintiff and all California Class members. Otherwise, Plaintiff, California Class members, and the broader general public will be irreparably harmed and/or denied an effective and complete remedy.

FOURTH CAUSE OF ACTION

**Violation of the Consumers Legal Remedies Act (“CLRA”),
California Civil Code §1750, *et seq.*
on Behalf of the California Class**

69. Plaintiff repeats and re-alleges the allegations contained in every preceding paragraph as if fully set forth herein.

70. This cause of action is brought pursuant to the Consumers Legal Remedies Act (“CLRA”), California Civil Code §1750, *et seq.* Plaintiff and each member of the proposed class are “consumers” as defined by California Civil Code §1761(d). Defendant’s sale of merchandise to Plaintiff and the California Class were “transactions” within the meaning of California Civil Code §1761(e). The products purchased by

1 Plaintiff and the California Class are “goods” within the meaning of California Civil Code
 2 §1761(a).

3 71. Defendant violated, and continues to violate, the CLRA by engaging in the
 4 following practices proscribed by California Civil Code §1770(a) in transactions with
 5 Plaintiff and the California Class which were intended to result in, and did result in, the
 6 sale of merchandise:

- 7 a. representing that its merchandise has characteristics, uses, and/or
 8 benefits, which it does not;
- 9 b. advertising goods or services with intent not to sell them as advertised;
- 10 c. making false or misleading statements of fact concerning reasons for,
 11 existence of, or amounts of price reductions.

12 72. Pursuant to §1782(a) of the CLRA, on December 10, 2015, Plaintiff’s
 13 counsel notified Defendant in writing by certified mail of the particular violations of
 14 §1770 of the CLRA and demanded that it rectify the problems associated with the actions
 15 detailed above and give notice to all affected consumers of Defendant’s intent to act.
 16 Defendant failed to respond to Plaintiff’s letter or to agree to rectify the problems
 17 associated with the actions detailed above and give notice to all affected consumers within
 18 30 days of the date of written notice, as proscribed by §1782.

19 73. Plaintiff and the California Class suffered injuries caused by Defendant’s
 20 misrepresentations because: (a) they were induced to purchase a product they would not
 21 have otherwise purchased if they had known that Sears merchandise was not, among other
 22 things, being offered at a significant discount; and/or (b) they paid a price premium due to
 23 the false and misleading pricing, advertising, and marketing of Sears merchandise.

24 74. Plaintiff and the California Class are entitled to, pursuant to California Civil
 25 Code §1780, the payment of costs and attorneys’ fees, damages, and any other relief
 26 deemed appropriate and proper by the Court under California Civil Code §1780.

FIFTH CAUSE OF ACTION
Unjust Enrichment on Behalf of the California Class

75. Plaintiff repeats and re-alleges the allegations contained in every preceding paragraph as if fully set forth herein.

76. Plaintiff brings this claim individually as well as on behalf of the California Class.

77. At all times relevant hereto, Defendant deceptively priced, marketed, advertised, and sold merchandise to Plaintiff and the Class.

78. Plaintiff and members of the Class conferred upon Defendant non-gratuitous payments for merchandise that they would not have if not for Defendant's deceptive pricing, advertising, and marketing. Defendant accepted or retained the non-gratuitous benefits conferred by Plaintiff and members of the Class, with full knowledge and awareness that, as a result of Defendant's deception, Plaintiff and members of the Class were not receiving a product of the quality, nature, fitness, or value that had been represented by Defendant and reasonable consumers would have expected.

79. Defendant has been unjustly enriched in retaining the revenues derived from purchases of merchandise by Plaintiff and members of the Class, which retention under these circumstances is unjust and inequitable because Defendant misrepresented, among other things, that its merchandise was being offered at a significant discount, which caused injuries to Plaintiff and members of the Class because they paid for, and/or paid a price premium due to the misleading pricing and advertising.

80. Retaining the non-gratuitous benefits conferred upon Defendant by Plaintiff and members of the Class under these circumstances made Defendant's retention of the non-gratuitous benefits unjust and inequitable. Thus, Defendant must pay restitution to Plaintiff and members of the Class for unjust enrichment, as ordered by the Court.

VI. PRAYER FOR RELIEF

Wherefore, Plaintiff, on behalf of himself and on behalf of the other members of the Class, requests that this Court award relief against Sears as follows:

1 A. An order certifying the Class and designating Plaintiff as the Class
2 Representative and his counsel as Class Counsel;

3 B. Awarding Plaintiff and the proposed Class members damages;

4 C. Awarding restitution and disgorgement of all profits and unjust enrichment
5 that Defendant obtained from Plaintiff and the Class members as a result of its unlawful
6 and unfair business practices described herein;

7 D. Order Defendant to engage in a corrective advertising campaign;

8 E. Awarding attorneys' fees and costs; and

9 F. For such other and further relief as the Court may deem necessary or
10 appropriate.

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1 **VIII. DEMAND FOR JURY TRIAL**

2 Plaintiff hereby demands a jury trial for all of the claims so triable.

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4 Dated: May 10, 2017

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6 **CARLSON LYNCH SWEET**
KILPELA & CARPENTER, LLP

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/s/ Todd D. Carpenter
Todd D. Carpenter (234464)
402 West Broadway, 29th Floor
San Diego, California 92101
Telephone: (619) 347-3517
Facsimile: (619) 756-6990
tcarpenter@carlsonlynch.com

Gary F. Lynch
1133 Penn Avenue, 5th Floor
Pittsburgh, PA 15222
Telephone: (412) 253-6307
glynch@carlsonlynch.com

SCOTT+SCOTT, ATTORNEYS AT LAW, LLP
John T. Jasnoch (281605)
jjasnoch@scott-scott.com
Joseph Pettigrew (236933)
jpettigrew@scott-scott.com
707 Broadway, Suite 1000
San Diego, CA 92101
Telephone: 619-233-4565
Facsimile: 619-233-0508

Joseph P. Guglielmo
jguglielmo@scott-scott.com
The Chrysler Building
405 Lexington Avenue, 40th Floor
New York, NY 10174
Telephone: 212-223-6444
Facsimile: 212-223-6334

Erin G. Comite
ecomite@scott-scott.com

1 156 South Main Street
2 P.O. Box 192
3 Colchester, CT 06415
4 Telephone: 860-537-5537
Facsimile: 860-537-4432

5 **WOOD LAW FIRM, LLC**
6 E. Kirk Wood
7 ekirkwood1@bellsouth.net
8 P. O. Box 382434
9 Birmingham, AL 35238-2434
Telephone: 205-908-4906
Facsimile: 866-747-3905

10 *Attorneys for Plaintiff*
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