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and Proposed Class Counsel*

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

RANDY NUNEZ, on behalf of himself and all others similarly situated,

Case No. 3:15-cv-02717-JAH-WVG

Plaintiff,

# **FOURTH AMENDED CLASS ACTION COMPLAINT**

VS.

SAKS INCORPORATED, a Tennessee corporation, and DOES 1-50, inclusive,

## Defendants.

1. **Violation of California's Unfair Competition Laws ("UCL"); California Business & Professions Code §§17200, *et seq.***
2. **Violation of California's False Advertising Laws ("FAL"); California Business & Professions Code §§17500, *et seq.***
3. **Violations of California Consumer Legal Remedies Act ("CLRA"); Civ. Code §§1750, *et seq.***

**[Demand for Jury Trial]**

1 Plaintiff RANDY NUNEZ (“Plaintiff”) brings this action on behalf of himself and  
2 all others similarly situated against Defendant SAKS INCORPORATED (“Saks” or  
3 “Defendant”) and states:

4 **I. NATURE OF ACTION**

5 1. Defendant Saks operates the luxury department store chain, “Saks Fifth  
6 Avenue,” with locations throughout the United States. Defendant also operates a chain of  
7 its own stand-alone outlet stores, “Saks Off Fifth” (hereinafter, “Off Fifth”), which sells  
8 discount merchandise. This case focuses solely on merchandise sold in the Off Fifth outlet  
9 stores.

10 2. This is a class action regarding Defendant’s false and misleading  
11 advertisement of deep discounts on the Saks Fifth Avenue-branded clothing and apparel  
12 sold *exclusively* at the Saks’ outlet stores, Off Fifth. The Saks Fifth Avenue-branded  
13 clothing sold at Off Fifth is of a lesser quality than the Saks Fifth Avenue-branded clothing  
14 sold at the luxury Saks Fifth Avenue department stores. Moreover, the discounts offered  
15 by Defendant on its Saks Fifth Avenue-branded products sold at Off Fifth are fake sales –  
16 the advertised discounts are not real, as discussed below.

17 3. Defendant utilizes a false and misleading “reference price” in the marketing  
18 and selling of its Saks Fifth Avenue-branded merchandise at its Off Fifth outlet stores.  
19 Defendant advertises all of its Saks Fifth Avenue-branded merchandise for sale in its Off  
20 Fifth outlet stores by attaching on the merchandise a price tag that sets forth a fictional  
21 “Market Price.” The Market Price is crossed out and immediately beneath it is a  
22 substantially discounted price, described as “You Pay: \$\_\_\_\_.” Immediately beneath the  
23 “You Pay: \$\_\_\_\_” price is the percentage (“%”) of savings the customer is purportedly  
24 saving off of the reference price by purchasing the product. (For convenience, Plaintiff will  
25 use the term “You Pay” to refer to the discount price.)

26 4. Defendant’s Vendor Standards Manual requires that for all Off Fifth  
27 merchandise, the “Market Price” must appear on the price tag along with the sales price:

1       **“OFF 5TH:** Your price ticket must contain a dual retail, meaning MSRP or ‘Market Price’  
2 retail *plus* the OFF-5TH selling retail communicated by your OFF 5TH buying office.”  
3 Exhibit B at 19.

4       5. Specifically, Defendant conveys its deceptive pricing scheme to consumers  
5 through the use of in-store price tags. The price tags convey both the false “Market Price”  
6 price as well as the significantly discounted “You Pay” price. The price tag also includes  
7 the % of the discount the customer is purportedly saving. *See* Exhibit A (example of price  
8 tag on Saks Fifth Avenue-branded Catalina Cuff shoes). The price tag may also simply  
9 state the “Market Price” crossed out with the discount price below it. Examples of these  
10 pricing tickets taken from the Vendor Standards Manual are provided below:



19       *See* Exhibit B at 27-30. The false and misleading pricing strategy is uniform for all Saks  
20 Fifth Avenue-branded merchandise sold at Off Fifth.

21       6. However, the “Market Price” is a total fiction. The only stores in which the  
22 Saks Fifth Avenue-branded merchandise are actually sold are the Off Fifth outlet stores.  
23 Thus, the only “Market Price” for the Saks Fifth Avenue-branded merchandise is the price  
24 at which the merchandise is sold in the Off Fifth outlet stores, since Off Fifth is the only  
25 “Market” for Saks Fifth Avenue-branded merchandise.

26       7. The Saks Fifth Avenue-branded merchandise is *never* offered for sale, nor  
27 actually sold at the “Market Price.” Indeed, according to Defendant’s Vendor Standards

1 Manual, Defendant receives the Saks Fifth Avenue-branded merchandise to be sold at Off  
2 Fifth directly from the vendor with price tags displaying the Market Price and sales  
3 reduction already on the price tag, evidencing Defendant's intention never to sell the  
4 product at the reference price. It is only ever sold at the "You Pay" price. Therefore,  
5 "Market Price" is false and used exclusively to induce consumers into believing that the  
6 merchandise was once sold at the Market Price and from which the false discount and  
7 corresponding "You Pay" price is derived. Defendant's deceptive pricing scheme has the  
8 effect of tricking consumers into believing they are getting a significant deal by purchasing  
9 merchandise at a steep discount, when, in reality, consumers are paying for merchandise at  
10 its normal or regular retail price.

11 8. The advertised discounts are fictitious because the original reference price, or  
12 Market Price, did not represent a *bona fide* price at which Defendant formerly sold a  
13 substantial quantity of the merchandise for a reasonable period of time, as required by the  
14 Federal Trade Commission ("FTC"). In addition, the represented "Market Price" was not  
15 the prevailing market retail price within the three months immediately preceding the  
16 publication of the advertised former "Market Price," as required by California law.

17 9. Through its false and misleading marketing, advertising, and pricing scheme,  
18 Defendant violated, and continues to violate, California, federal, and other state laws  
19 prohibiting advertising goods for sale as discounted from former prices that are false and  
20 prohibiting misleading statements about the existence and amount of price reductions.  
21 Specifically, Defendant violated, and continues to violate, California Business and  
22 Professions Code §§17200, *et seq.* (the "UCL"), Cal. Bus. & Prof. Code §§17500, *et seq.*  
23 (the "FAL"), California Consumer Legal Remedies Act, California Civil Code §§1750, *et seq.*  
24 (the "CLRA"), and Federal Trade Commission Act ("FTCA"), which prohibits "unfair  
25 or deceptive acts or practices in or affecting commerce" (15 U.S.C. §45(a)(1)) and false  
26 advertisements (15 U.S.C. §52(a)).

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28

1       10. Plaintiff brings this action on behalf of himself and all other similarly situated  
2 consumers who have purchased one or more Saks Fifth Avenue-branded items at  
3 Defendant's Off Fifth outlet stores that were deceptively represented as discounted from  
4 false former "Market" prices in order to halt the dissemination of this false, misleading, and  
5 deceptive pricing scheme, to correct the false and misleading perception it has created in  
6 the minds of consumers, and to obtain redress for those who have purchased merchandise  
7 tainted by this deceptive pricing scheme. Plaintiff seeks to permanently enjoin Defendant  
8 from using false and misleading claims regarding retail price comparisons in its packaging,  
9 labeling, and advertising. Further, Plaintiff seeks to obtain damages, restitution, and other  
10 appropriate relief in the amount by which Defendant was unjustly enriched as a result of its  
11 sales of merchandise offered at a false discount.

12       11. Finally, Plaintiff seeks reasonable attorneys' fees pursuant to C.C.P. §1021.5,  
13 as this lawsuit seeks the enforcement of an important right affecting the public interest and  
14 satisfies the statutory requirements for an award of attorneys' fees.

15 **II. JURISDICTION AND VENUE**

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

20       13. The Southern District of California has personal jurisdiction over the  
21 Defendant named in this action because Defendant is a corporation or other business entity  
22 authorized to conduct and does conduct business in the State of California. Defendant is  
23 registered with the California Secretary of State to do sufficient business with sufficient  
24 minimum contacts in California and/or otherwise intentionally avails itself of the California  
25 market through the ownership and operation of over 20 retail stores within the State of  
26 California.

27

28

1       14.   Venue is proper under 28 U.S.C. §1391(b)(2) because Defendant transacts  
2 substantial business in this District. A substantial part of the events giving rise to Plaintiff's  
3 claims arose here.

4 **III. PARTIES**

5       **A. Plaintiff**

6       15.   Plaintiff Randy Nunez resides in San Diego, California. Plaintiff, in reliance  
7 on Defendant's false and deceptive advertising, marketing, and "discount" pricing schemes,  
8 purchased a pair of Saks Fifth Avenue-branded shoes for approximately \$86.39 on or  
9 around July 15, 2015, at an Off Fifth retail store located at 1750 Camino De La Reina, San  
10 Diego, California 92108. Plaintiff went to Defendant's Off Fifth outlet store in search of a  
11 pair of business casual dress shoes he could wear to work. Plaintiff picked out a pair of all  
12 leather, black, Penny Slip Ons, size 11 M with rubber bottom soles (the "Penny Loafers").  
13 The Penny Loafers were Saks Fifth Avenue-branded shoes. Plaintiff examined the shoes,  
14 tried them on to ensure they fit, and examined the price tag on the shoes. The price tag of  
15 the shoes was a white sticker with black print, approximately 2" long by 1 1/2" wide. The  
16 price tag on the shoes listed the "Market Price" of the shoes as "\$145.00." The \$145.00  
17 was crossed out with a single black line. Immediately beneath the \$145.00 price was the  
18 "You Pay" price; and beneath that was the discounted sale price of the shoes, "\$79.99."  
19 Beneath the \$79.99 was the representation: "44% Savings." The relevant portion of the  
20 price tag looked similar to this:

21           MARKET PRICE:

22           \$145.00

23           YOU PAY:

24           \$79.99

25           44% SAVINGS

26       16.   After examining the price tag, in particular the "Market Price," Plaintiff  
27 believed the Saks Fifth Avenue-branded Penny Loafers had previously been sold for  
28

1 \$145.00. When he examined the “You Pay” price of \$79.99, and the corresponding 44%  
2 Savings representation, Plaintiff reasonably believed he was purchasing a pair of shoes that  
3 had a value significantly higher than the \$79.99 purchase price. In short, Plaintiff believed  
4 he was getting a good deal.

5 17. However, this product was never offered for sale or actually sold at \$145.00,  
6 nor was it offered or actually sold at that price within the 90-day time period immediately  
7 preceding Plaintiff’s purchase. Therefore, Plaintiff was damaged by his purchase of the  
8 product.

9 18. Plaintiff would like to purchase Saks Fifth Avenue-branded merchandise from  
10 Off Fifth in the future, but he currently cannot trust that Defendant will label such  
11 merchandise with truthful price information in compliance with California law. Given the  
12 surreptitious nature of Defendant’s fraudulent pricing scheme, Plaintiff cannot know  
13 whether Defendant’s purported “Market Price” represents a bona fide price or a false  
14 reference price, or whether Defendant’s claim that the “You Pay” price represents a  
15 significant discount is true or false. If Defendant agrees to voluntarily change its practices,  
16 or if Defendant is ordered to do so by a court of competent jurisdiction, such that Plaintiff  
17 can reasonably trust that Defendant’s price tags will contain truthful price information in  
18 compliance with California law, Plaintiff will return to shop for Saks Fifth Avenue-branded  
19 merchandise at Off Fifth.

20 **B. Defendant**

21 19. Plaintiff is informed and believes, and upon such information and belief  
22 alleges, Defendant Saks Incorporated is a Tennessee corporation with its principal executive  
23 offices in New York, New York. Defendant is a subsidiary of Hudson Bay Company, a  
24 Canadian corporation with its principal executive offices in Toronto, Canada. Defendant  
25 operates Off Fifth outlet stores and the saksoff5th.com website and advertises, markets,  
26 distributes, and/or sells clothing and clothing accessories in California and throughout the  
27 United States.

20. Plaintiff does not know the true names or capacities of the persons or entities sued herein as DOES 1-50, inclusive, and therefore sues such Defendants by such fictitious names. Plaintiff is informed and believes, and upon such information and belief alleges, that each of the DOE Defendants is in some manner legally responsible for the damages suffered by Plaintiff and the Class members, as alleged herein. Plaintiff will amend this Complaint to set forth the true names and capacities of these Defendants when they have been ascertained, along with appropriate charging allegations, as may be necessary.

#### IV. FACTUAL BACKGROUND

## A. The Fraudulent Sale Discounting Scheme

21. Off Fifth is a clothing and apparel retailer, selling products such as men's and women's shirts, pants, jeans, jackets, belts, shoes, wallets, handbags, and gloves. Off Fifth operates over 80+ stores in the United States, including 17 in California. Off Fifth sells a variety of clothing and apparel products from various manufacturers, as well as its own Saks Fifth Avenue brand of clothing and apparel products. This case involves only the Saks Fifth Avenue-branded products sold by Defendant in its Off Fifth outlet stores.

22. The Saks Fifth Avenue brand of products sold in the Off Fifth outlet stores are exclusively sold at Off Fifth; they are not sold anywhere else. There is no other market for the Saks Fifth Avenue-branded products sold at Off Fifth other than at Defendant's Off Fifth outlet stores.

23. Defendant engages in a scheme to defraud its customers by perpetually discounting its Saks Fifth Avenue-branded merchandise in its Off Fifth outlet stores. Every single piece of Saks Fifth Avenue-branded merchandise sold in Off Fifth outlet stores is advertised with two prices: the “Market Price” price and corresponding “You Pay” price. The “Market Price” conveys to the consumer the purported regular price of the item. The “You Pay” price conveys to the customer a deeply discounted price at which the item is presently being offered for sale. The two prices (“Market Price” and “You Pay”) are conveyed to consumers on the price tags of every items sold. The price tags are

1 approximately 3" long by 2" inches wide. They are white tags with black lettering. *See,*  
2 *e.g.*, Exhibit A.

3 24. However, at no time are the Saks Fifth Avenue-branded products ever offered  
4 for sale anywhere at the "Market Price." The "Market Price" is merely a false reference  
5 price that Defendant utilizes to deceptively manufacture a deeply discounted sale price,  
6 referred to as the "You Pay" price, on every piece of Saks Fifth Avenue-branded  
7 merchandise sold in the Off Fifth outlet stores during the Class Period (defined below).

8 25. This practice is not accidental; it is a fraudulent scheme intended to deceive  
9 consumers into: (1) making purchases they otherwise would not have made; and/or  
10 (2) paying substantially more for merchandise consumers believed was heavily discounted;  
11 and for which they reasonably believed was worth more than its actual value.

12 26. Retailers, including Defendant, understand that consumers are susceptible to a  
13 good bargain, and therefore, Defendant has substantial interest in lying in order to generate  
14 sales. A product's "regular" or "original" price matters to consumers. In this case,  
15 Defendant has marked its merchandise with a "Market Price," which it intends to be the  
16 equivalent of a "regular" or "original" price. The regular and/or original price conveys to  
17 consumers, including Plaintiff, the product's worth and the prestige that ownership of the  
18 product conveys. *See* Dhruv Grewal & Larry D. Compeau, *Comparative Price Advertising:*  
19 *Informative or Deceptive?*, 11 J. OF PUB. POL'Y & MKTG. 52, 55 (Spring 1992) ("By creating  
20 an impression of savings, the presence of a higher reference price enhances subjects'  
21 perceived value and willingness to buy the product."); *id.* at 56 ("[E]mpirical studies  
22 indicate that as discount size increases, consumers' perceptions of value and their  
23 willingness to buy the product increase, while their intention to search for a lower price  
24 decreases.").

25 27. Defendant's pricing advertisements uniformly include both the false regular  
26 price ("Market Price") with a line stricken through that price and the purported sale price  
27 right below the Market Price, described as the "You Pay" price. This uniform scheme is

1 intended to, and does, provide misinformation to the customer. This misinformation  
2 communicates to consumers, including Plaintiff, that the Saks Fifth Avenue-branded  
3 products have a greater value than the advertised “You Pay” sale price.

4 28. As the Ninth Circuit recognizes, “[m]isinformation about a product’s ‘normal’  
5 price is . . . significant to many consumers in the same way as a false product label would  
6 be.” *Hinojos v. Kohl’s Corp.*, 718 F.3d 1098, 1106 (9th Cir. 2013).

7 **B. Plaintiff’s Counsel’s Investigation**

8 29. Plaintiff’s counsel’s investigation of Defendant revealed that Saks Fifth  
9 Avenue-branded merchandise is priced uniformly. That is, Saks Fifth Avenue-branded  
10 merchandise sold at Off Fifth bears a price tag with a false “Market Price” and a  
11 corresponding, substantially discounted, “You Pay” price. Plaintiff’s counsel’s  
12 investigation confirmed that Saks Fifth Avenue-branded shoes were priced with a false  
13 “Market Price” and a corresponding “You Pay” price in the 90-day time period immediately  
14 preceding Plaintiff’s purchase of his Saks Fifth Avenue-branded Penny Loafers.

15 30. Plaintiff’s counsel’s investigation led to the discovery of Defendant’s “Vendor  
16 Standards Manual,” which explicitly directs all vendors who sell merchandise in the Off  
17 Fifth outlet stores to price their products as described herein.

18 31. The pricing scheme employed by Defendant is uniform and, according to the  
19 Vendor Standards Manual (attached as Exhibit B), is applied to every item that is sold with  
20 a “Market Price” at the Off Fifth stores. The Vendor Standards Manual used by Defendant  
21 to tag and price the items sold in its stores provides direction for how every item sold at Off  
22 Fifth stores are priced. According to the Manual, a price tag on an item sold at an Off Fifth  
23 store “must contain a dual retail, meaning MSRP or ‘Market Price’ retail plus the OFF 5TH  
24 selling retail communicated by your OFF 5TH buying office” (i.e., the “You Pay” price).  
25 Exhibit B at 19. Thus, the pricing deception experienced by Plaintiff is common to every  
26 member of the Class that purchased sale priced items at Defendant’s Off Fifth stores.

1           32. Plaintiff's counsel's investigation cataloged the pricing practices at both of the  
2 Off Fifth outlet stores in San Diego County, including at 1750 Camino de la Reina, San  
3 Diego, California 92108 ("Mission Valley") and 11940 Carmel Mountain Road, San Diego,  
4 California 92128 ("Carmel Valley"). The false "Market Price" price and corresponding  
5 purported "You Pay" pricing scheme was both uniform and identical at all stores  
6 investigated. For example, Plaintiff's counsel's investigation revealed that the following  
7 items were continuously discounted at the stores and during the time periods indicated:

Saks Fifth Avenue-Branded Item	"You Pay" Price	Continuously Discounted from (at least)	Through	Stores Observed	Photo Exhibit
All Shoes		February 26, 2015	Present	Mission Valley Carmel Valley	
Penny Slip On; Black Leather Penny Loafer	\$79.99	April 4, 2015	At least July 15, 2015	Mission Valley Carmel Valley	
Loralei Ballet Flats	\$97.99	March 15, 2015	At least August 15, 2015	Mission Valley Carmel Valley	
Zarah Mesh Flats	\$49.99	March 15, 2015	At least August 15, 2015	Mission Valley Carmel Valley	
Randi Metallic Leather Ballet Flats	\$49.00	March 15, 2015	At least August 15, 2015	Mission Valley Carmel Valley	
Nubuck Leather Drivers	\$59.99	March 15, 2015	At least August 15, 2015	Mission Valley Carmel Valley	
Cotton Bathrobe; Black	\$48.99	February 5, 2015	At least August 15, 2015	Mission Valley Carmel Valley	
Black Ice Cotton Polo Shirt	\$34.99 -and again- \$34.99	February 5, 2015 -and again- March 5, 2016	At least August 15, 2015 -and again- At least August 18, 2016	Mission Valley -and again- Mission Valley	

	<b>Saks Fifth Avenue-Branded Item</b>	<b>“You Pay” Price</b>	<b>Continuously Discounted from (at least)</b>	<b>Through</b>	<b>Stores Observed</b>	<b>Photo Exhibit</b>
1	<b>Black Striped Ice Cotton Pique Polo Shirt</b>	\$27.99	March 5, 2016	At least August 18, 2016	Mission Valley	
2	<b>Slim Fit Total Striped Wool Suit</b>	\$199.99	January 6, 2016	At least May 24, 2016	Mission Valley	
3	<b>Trim Fit Wool Suit</b>	\$199.99	January 6, 2016	At least May 24, 2016	Mission Valley	
4	<b>Slim Fit Wool Suit</b>	\$199.99	January 6, 2016	At least May 24, 2016	Mission Valley	
5	<b>Black Slim Fit Cotton Sportshirt</b>	\$26.99	January 6, 2016	At least May 24, 2016	Mission Valley	
6	<b>Black Slim Fit Cotton Gingham Shirt</b>	\$23.99	January 6, 2016	At least May 24, 2016	Mission Valley	
7	<b>Trim Fit Stretch Cotton Dress Shirt</b>	\$39.99	March 26, 2016	At least July 30, 2016	Mission Valley Carmel Valley	
8	<b>Catalina Cuff High Heel Shoe</b>	\$69.99	January 11, 2017	April 20, 2017	Mission Valley Carmel Valley	C
9	<b>Pl-Estyn’s Light Doe</b>	\$59.99	January 11, 2017	April 20, 2017	Mission Valley Carmel Valley	D
10	<b>Esmeraldo Penny Loafer</b>	\$59.99	January 11, 2017	April 20, 2017	Mission Valley Carmel Valley	E
11	<b>Men’s Ties</b>	\$59.99	January 11, 2017	April 20, 2017	Mission Valley Carmel Valley	F
12	<b>Women’s Spaghetti String Tank Tops</b>	\$9.99	January 11, 2017	April 20, 2017	Mission Valley Carmel Valley	G
13	<b>Men’s Slim Fit Dress Shirt</b>	\$39.99	January 11, 2017	April 20, 2017	Mission Valley Carmel Valley	H

1       33. The fraudulent pricing scheme applies to all Saks Fifth Avenue-branded  
2 products offered on sale at every Off Fifth outlet store, including the pair of shoes purchased  
3 by Plaintiff on July 15, 2015. By way of example, all items in the above referenced chart  
4 were offered at a “You Pay” price substantially less than their “Market Price” for every day  
5 Plaintiff’s counsel’s investigation was conducted and for well over 90 days at a time.

6       34. In fact, as of the date of this filing, all Saks Fifth Avenue-branded items offered  
7 for sale at Off Fifth that Plaintiff’s counsel investigated, including the shoes purchased by  
8 Plaintiff, remained on sale at the “You Pay” discounted prices.

9       **C. Plaintiff and the Class Are Injured by Defendant’s Deceptive Pricing  
10 Scheme**

11       35. The “Market Price” listed and advertised on Defendant’s products are fake  
12 reference prices, utilized only to perpetuated Defendant’s fake-discount scheme.

13       36. Defendant knows that its comparative price advertising is false, deceptive,  
14 misleading, and unlawful under California, federal, and other state laws.

15       37. Defendant fraudulently concealed from and intentionally failed to disclose to  
16 Plaintiff and other members of the Class the truth about its advertised discount prices and  
17 former reference prices.

18       38. At all relevant times, Defendant has been under a duty to Plaintiff and the Class  
19 to disclose the truth about its false discounts.

20       39. Plaintiff relied upon Defendant’s artificially inflated “Market Price” and false  
21 discounts when purchasing the Saks Fifth Avenue-branded shoes from Defendant. Plaintiff  
22 would not have made such purchase, but for Defendant’s representations regarding the false  
23 “Market Price” and the fictitious sales price of the merchandise.

24       40. Plaintiff and the Class reasonably and justifiably acted and relied on the  
25 substantial price differences that Defendant advertised and made purchases believing that  
26 they were receiving a substantial discount on an item of greater value than it actually was.  
27 Plaintiff, like other Class members, was lured in, relied on, and damaged by this deceptive  
28 pricing scheme that Defendant carried out.

41. Defendant intentionally concealed and failed to disclose material facts regarding the truth about false former price advertising in order to provoke Plaintiff and the Class to purchase merchandise in its Off Fifth outlet stores.

## **V. CLASS ALLEGATIONS**

42. Plaintiff brings this action on behalf of himself and all other similarly situated Class members pursuant to Rules 23(a), (b)(2), and (b)(3) of the Federal Rules of Civil Procedure and seeks certification of the following Class against Defendant for violations of California state laws:

All persons who, while in the State of California and from during the applicable statute of limitations period (the “Class Period”), purchased from Saks Off Fifth one or more Saks Fifth Avenue-branded products at discounts from the advertised “Market Price” and who have not received a refund or credit for their purchase(s).

Defendant is excluded from the Class, as well as its officers, employees, agents or affiliates, and any judge who presides over this action, as well as all past and present employees, officers, and directors of Saks. Plaintiff reserves the right to expand, limit, modify, or amend this class definition, including the addition of one or more subclasses, in connection with his motion for class certification, or at any other time, based upon, *inter alia*, changing circumstances and/or new facts obtained during discovery.

43. ***Numerosity:*** The Class members are so numerous that joinder of all members is impracticable. Plaintiff is informed and believes that the proposed Class contains hundreds of thousands of individuals who have been damaged by Defendant's conduct as alleged herein. The precise number of Class members is unknown to Plaintiff.

44. ***Existence and Predominance of Common Questions of Law and Fact:*** This action involves common questions of law and fact, which predominate over any questions affecting individual Class members. These common legal and factual questions include, but are not limited to, the following:

- 1 a. Whether, during the Class Period, Defendant used false “Market” or
- 2 “original” price labels and falsely advertised price discounts on its Saks
- 3 Fifth Avenue-branded products it sold in its Off Fifth outlet stores;
- 4 b. Whether, during the Class Period, the “original” or “Market” prices
- 5 advertised by Defendant were the prevailing market prices for the
- 6 respective Saks Fifth Avenue-branded products during the three months’
- 7 period preceding the dissemination and/or publication of the advertised
- 8 former prices;
- 9 c. Whether Defendant’s alleged conduct constitutes violations of the laws
- 10 asserted;
- 11 d. Whether Defendant engaged in unfair, unlawful, and/or fraudulent
- 12 business practices under the laws asserted;
- 13 e. Whether Defendant engaged in false or misleading advertising;
- 14 f. Whether Plaintiff and Class members are entitled to damages and/or
- 15 restitution and the proper measure of that loss; and
- 16 g. Whether an injunction is necessary to prevent Defendant from continuing
- 17 to use false, misleading, or illegal price comparison.

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

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

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

48. All Class members, including Plaintiff, were exposed to one or more of Defendant's misrepresentations or omissions of material fact claiming that former "Market" prices were, in fact, *bona fide*. Due to the scope and extent of Defendant's consistent false "discount" price advertising scheme, disseminated in a years-long campaign to California consumers – it can be reasonably inferred that such misrepresentations or omissions of material fact were uniformly made to all members of the Class. In addition, it can be reasonably presumed that all Class members, including, Plaintiff, affirmatively acted in response to the representations contained in Defendant's false advertising scheme when purchasing his Saks Fifth Avenue-branded Penny Loafers at an Off Fifth outlet store.

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

## VI. CAUSES OF ACTION

**FIRST CAUSE OF ACTION**  
**Violation of the California Unfair Competition Law,  
Cal. Bus. & Prof. Code §§17200, *et seq.***

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

51. 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.

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

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. Defendant's actions constitute "unfair" business acts or practices because, as alleged above, Defendant engaged in misleading and deceptive price comparison advertising that represented false "Market" prices and corresponding deeply discounted "You Pay" prices. The "You Pay" prices were nothing more than fabricated "regular" prices leading to phantom markdowns. Defendant's acts and practices offended an established public policy and engaged in immoral, unethical, oppressive, and unscrupulous activities that are substantially injurious to consumers.

55. The harm to Plaintiff and 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.

56. A business act or practice is “fraudulent” under the UCL if it is likely to deceive members of the consuming public.

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

58. Defendant's acts and practices alleged above constitute fraudulent business acts or practices as they have deceived Plaintiff and are highly likely to deceive members of the consuming public. Plaintiff relied on Defendant's fraudulent and deceptive representations regarding its "Market" prices for products that Defendant sells exclusively at its Off Fifth stores. These misrepresentations played a substantial role in Plaintiff's decision to purchase those products at steep discounts, and Plaintiff would not have purchased those products without Defendant's misrepresentations.

59. Defendant's acts and practices alleged above constitute unlawful business acts or practices as they have violated state and federal law in connection with the deceptive pricing scheme. 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 Saks, 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 article price, 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 her 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(a)-(b).

1       60. California law also expressly prohibits false former pricing schemes. Cal. Bus.  
2 & Prof. Code §17501, entitled “Value determinations; Former price advertisement,” states:

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

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

12       [Emphasis added].

13       61. As detailed in Plaintiff’s Third Cause of Action below, Cal. Civ. Code  
14 §1770(a)(9), prohibits a business from “[a]dvertising goods or services with intent not to  
15 sell them as advertised” and subsection (a)(13) prohibits a business from “[m]aking false or  
16 misleading statements of fact concerning reasons for, existence of, or amounts of price  
17 reductions.”

18       62. The violation of any law constitutes an unlawful business practice under Cal.  
19 Bus. & Prof. Code §17200.

20       63. As detailed herein, the alleged acts and practices were intended to, or did,  
21 result in violations of the FTCA, 15 U.S.C. §45(a)(1), FAL, Consumers Legal Remedies  
22 Act (“CLRA”), Cal. Civ. Code §§1750, *et seq.*, and specifically Cal. Civ. Code  
23 §§1770(a)(9) and (a)(13).

24       64. Defendant’s practices, as set forth above, have misled Plaintiff, the proposed  
25 class, and the general public in the past and will continue to mislead them in the future.  
26 Consequently, Defendant’s practices constitute an unlawful and unfair business practice  
27 within the meaning of the UCL.

28       65. Defendant’s violation of the UCL through its unlawful, unfair, and fraudulent  
29 business practices are ongoing and present a continuing threat that members of the public  
30 will be deceived into purchasing products based on price comparisons of arbitrary and  
31 inflated “Market” prices to substantially discounted “You Pay” prices that created merely

1 phantom markdowns and lead to financial damage for consumers, like Plaintiff and the  
2 proposed Class

3 66. Pursuant to the UCL, Plaintiff is entitled to preliminary and permanent  
4 injunctive relief ordering Defendant to cease this unfair competition, as well as  
5 disgorgement and restitution to Plaintiff and the Class of all of Defendant's revenues  
6 associated with its unfair competition, or such portion of those revenues as the Court may  
7 find equitable.

8 **SECOND CAUSE OF ACTION**  
9 **Violation of the California False Advertising Law,**  
10 **Cal. Bus. & Prof. Code §§17500, et seq.**

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

13 68. Cal. Bus. & Prof. Code §17500 provides that:

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

22 [Emphasis added].

23 69. The "intent" required by Cal. Bus. & Prof. Code §17500 is the intent to dispose  
24 of property and not the intent to mislead the public in the disposition of such property.

25 70. Similarly, this section provides that:

26 [N]o price shall be advertised as a former price of any advertised thing, unless  
27 the alleged former prices was the prevailing market price . . . within three  
28 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.

29 Cal Bus. & Prof. Code §17501.

30 71. Defendant's routine of advertising discounted prices from the false "Market"  
31 prices associated with its Saks Fifth Avenue-branded products that were never the true  
32 prevailing "Market" prices of those products and were materially greater than the true  
33

1 prevailing prices was an unfair, untrue, and misleading practice. This deceptive marketing  
2 practice gave consumers the false impression that the products were regularly sold on the  
3 market for a substantially higher price than they actually were. Therefore leading to the  
4 false impression that the Saks Fifth Avenue-branded products were worth more than they  
5 actually were.

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

8 73. As a direct and proximate result of Defendant's misleading and false  
9 advertisements Plaintiff and Class members have suffered injury-in-fact and have lost  
10 money. As such, Plaintiff requests that this Court order Defendant to restore this money to  
11 Plaintiff and all Class members and enjoin Defendant from continuing these unfair practices  
12 in violation of the UCL in the future. Otherwise, Plaintiff, Class members, and the broader  
13 general public will be irreparably harmed and/or denied an effective and complete remedy.

14 **THIRD CAUSE OF ACTION**  
15 **Violation of the Consumers Legal Remedies Act,**  
16 **Cal. Civ. Code §§1750, et seq.**

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

19 75. This cause of action is brought pursuant to the CLRA, Cal. Civ. Code §§1750,  
20 *et seq.*, and similar laws in other states. Plaintiff and each member of the proposed Class  
21 are "consumers" as defined by Cal. Civ. Code §1761(d). Defendant's sale of the Saks Fifth  
22 Avenue-branded products to Plaintiff and the Class were "transactions" within the meaning  
23 of Cal. Civ. Code §1761(e). The products purchased by Plaintiff and the Class are "goods"  
within the meaning of Cal. Civ. Code §1761(a).

24 76. Defendant violated, and continues to violate, the CLRA by engaging in the  
25 following practices proscribed by Cal. Civ. Code §1770(a) in transactions with Plaintiff and  
26 the Class that were intended to result in, and did result in, the sale of the Saks Fifth Avenue-  
27 branded products:

- a. advertising goods or services with intent not to sell them as advertised; and
- b. making false or misleading statements of fact concerning reasons for, existence of, or amounts of price reductions.

77. Pursuant to §1782(a) of the CLRA, on December 2, 2015, Plaintiff's counsel notified Defendant in writing by certified mail of the particular violations of §1770 of the CLRA and demanded that it rectify the problems associated with the actions detailed above and give notice to all affected consumers of Defendant's intent to act. Defendant responded on January 4, 2016, and did not agree to rectify the problems associated with the actions detailed above and give notice to all affected consumers within 30 days of the date of written notice, as proscribed by §1782. Plaintiff now seeks all claims for actual, punitive, and statutory damages, as appropriate, against Defendant.

## VII. PRAYER FOR RELIEF

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

- A. An order certifying the Class and designating Plaintiff as the Class Representative and his counsel as Class Counsel;
- B. Awarding Plaintiff and members of the proposed Class damages;
- C. Awarding restitution and disgorgement of all profits and unjust enrichment that Defendant's obtained from Plaintiff and the Class members as a result of its unlawful, unfair, and fraudulent business practices described herein;
- D. Awarding declaratory and injunctive relief as permitted by law or equity, including enjoining Defendant from continuing the unlawful practices as set forth herein and directing Defendant to identify, with Court supervisions, victims of its misconduct and pay them all money they are required to pay;

1                   E. Order Defendant to engage in a corrective advertising campaign;  
2                   F. Awarding attorneys' fees and costs; and  
3                   G. For such other and further relief as the Court may deem necessary or  
4                   appropriate.

5 **VIII. DEMAND FOR JURY TRIAL**

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

7 Dated: August 16, 2019

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10 **ATTORNEYS AT LAW LLP**

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