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MICHAEL LEESE, on behalf of himself and
all others similarly situated,

Plaintiff,

v.

JOS. A. BANK CLOTHIERS, INC.,

Defendant.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
BURLINGTON COUNTY

DOCKET NO. BUR-L- 437-17

Civil Action

CLASS ACTION COMPLAINT

JURY TRIAL DEMANDED

Plaintiff Michael Leese ("Plaintiff" or "Plaintiff Leese"), on behalf of himself and all others similarly situated, through his undersigned attorneys, files this class action Complaint against Defendant Jos. A. Bank Clothiers, Inc. ("Defendant"), and alleges as follows:

NATURE OF THE ACTION

1. Plaintiff brings this class action on behalf of a class of New Jersey citizens who, like Plaintiff, were victims of Defendant's uniform deceptive advertising, marketing, and sales practices described herein, which violate the consumer protection laws of New Jersey.

2. Specifically, it is alleged that Defendant engaged in a systematic scheme of false and misleading advertising, marketing, and sales practices with respect to the advertising and sale of apparel and other merchandise to New Jersey customers in its Jos. A. Bank retail stores in New Jersey, as well as via its online store website, www.josabank.com. This scheme, which is

set forth in more detail herein, may be summarized as follows.

3. First, Defendant routinely and regularly sends form mailings and emails to its customers, which advertise in large, bold font that, for a limited time, a selection of merchandise is on sale at prices that have been discounted **"UP TO"** a specified percentage, e.g., **"UP TO 70% OFF All Outerwear."**

4. The mailings and emails invite customers to take advantage of the advertised sale either on Defendant's website or at Defendant's retail stores.

5. If a customer visits Defendant's online website, www.josabank.com, he or she will see a similar advertisement in large, bold font – typically on a large banner prominently placed across the top of the website page – representing again that the selection of merchandise is on sale at prices that have been discounted **"UP TO"** the specified percentage, e.g., **"UP TO 70% OFF All Outerwear."** Upon clicking the advertisement, the customer will be shown a list of merchandise that is part of the advertised **"UP TO 70% OFF"** sale.

6. Alternatively, if the customer visits a Jos. A. Bank retail store, he or she will see similar advertisements on various displays throughout the store – typically on large, brightly-colored placards with bold font – also representing that the selection of merchandise is on sale at prices that have been discounted **"UP TO"** the specified percentage, e.g., **"UP TO 70% OFF All Outerwear."**

7. Not all of the merchandise included on the online list of sale items or displayed under the in-store placards, however, has been discounted by **"70% OFF"** a former price.

8. Rather, the advertised **"70% OFF"** discount is actually a maximum discount that applies only to a small subset of all the merchandise included in the advertised sale.

9. The vast majority of the merchandise included in the sale has been discounted far

less than the advertised maximum discount of “70% OFF.”

10. Yet Defendant’s mail, email, online, and in-store advertisements do not convey the fact that many items included in the sale have been discounted less than 70%.

11. Indeed, Defendant’s advertisements do not contain the range of discounts applied to merchandise included in the sale, e.g., 30-70% off, nor do they reference the minimum discount offered.

12. Further, nowhere on its website or in its stores does Defendant identify the specific discount applied to any individual item.

13. For example, one of the items included in an advertised “UP TO 70% OFF” sale may be a topcoat with a listed former price of \$995.00 and a “sale” price of \$499.00, which is only a 50% discount. Yet Defendant does not specify or note in any way that the topcoat – or any sale item for that matter – is only discounted by 50% (rather than 70%), either in its initial mail and email advertisements, on its website, or in its retail stores.

14. Instead, Defendant’s website simply lists the item’s sale price as follows:
~~\$995.00~~ \$499.00 SALE, without any reference to the percentage discount applied to the item. Defendant’s retail stores similarly fail to specify the percentage discount applied to the item, with the item’s price tag listing only its former, non-sale price of \$995.00

15. Even if a customer purchases the item on Defendant’s website or at a retail store, Defendant still does not disclose the specific percentage discount applied as part of the sale, either on the online checkout/order summary page or on the online or in-store receipt.

16. This practice is contrary to New Jersey law, which requires advertisers of discounted merchandise to “state the minimum percentage reduction as conspicuously ... as the maximum percentage reduction.” N.J.A.C. § 13:45A-9.5(a)(1) (emphasis added).

17. Pursuant to this regulation, it is illegal in New Jersey to advertise only the maximum percentage discount in connection with a sale, or to qualify such advertisement as “up to” this maximum percentage discount, without also stating the minimum percentage discount associated with the sale.

18. Rather, Defendant is required by New Jersey law to include in its mail, email, online, and in-store sale advertisements the minimum percentage discount in addition to the maximum – e.g., “30 to 70% off.” By listing only the maximum percentage reduction in its advertisements and omitting the minimum percentage discount, Defendant has violated New Jersey law.

19. It is also false and misleading and a violation of New Jersey law for Defendant to indiscriminately include an item that has been discounted far less than 70% in an “UP TO 70% OFF” sale while failing to disclose the lesser discount.

20. Moreover, New Jersey law requires advertisers of discounted merchandise to **“[s]et forth the basis upon which the former price [of the discounted merchandise] was established,”** further mandating that **“terms such as ‘competitor’s price’ or ‘our regular price’ or words of similar import shall be used to designate the basis for the former price.”** N.J.A.C. § 13:45A-9.5(a)(2) (emphasis added).

21. Thus, Defendant is also required by New Jersey law to state the basis of any listed former price upon which a percentage reduction is based. By simply listing on its website the former price with a line through it, e.g., ~~\$995.00~~ \$499.00 SALE, or on an item’s in-store price tag the former price only, without including any explanatory language stating the basis of that former price, such as “competitor’s price” or “regular price,” Defendant has violated New Jersey law.

22. In addition to violating these regulations, Defendant's sales practices identified herein are also false and misleading because they suggest to Defendant's customers a greater discount than is actually offered, in that Defendant falsely implies that all or many items included in an advertised sale are being sold at the advertised maximum discount, and fails to identify any lesser or minimum discounts, which in fact apply to the majority of sale items. By failing to disclose the lesser percentage discounts applied to specific merchandise, Defendant is actively concealing those lesser discounts.

23. Plaintiff brings this lawsuit against Defendant to stop these unlawful practices, to recover for the proposed class of New Jersey customers of the Jos. A. Bank retail stores and website the civil penalties to which they are entitled and the overcharges that they paid, and to obtain for customers the actual discounts they were entitled to receive but did not due to Defendant's deceptive practices.

PARTIES

24. Plaintiff Michael Leese is an individual and a resident and citizen of New Jersey. During the class period, Plaintiff received mail and email advertisements from Defendant, visited Defendant's Jos. A. Bank website, purchased goods from Defendant's Jos. A. Bank retail store, and suffered an ascertainable loss and monetary damages as alleged herein as a result of Defendant's unlawful conduct.

25. Defendant Jos. A. Bank Clothiers, Inc. is a for-profit corporation formed and existing under the laws of the State of Delaware with its principal place of business located at 500 Hanover Pike, Hampstead, Maryland 21074, and thus is a citizen of Delaware and Maryland.

26. At all times during the relevant class period, Defendant owned and operated, and continues to own and operate, approximately 800 Jos. A. Bank retail stores throughout the

United States, including approximately 26 Jos. A. Bank retail stores in New Jersey.

27. At all times during the relevant class period, Defendant also owned and operated, and continues to own and operate, the online Jos. A. Bank store retail website, located at www.josabank.com, which advertises, markets, and sells retail products in every state in the United States, including New Jersey.

28. Defendant created the policies and procedures described herein and, at all times during the relevant class period, participated in, endorsed, implemented, and performed the conduct alleged herein.

JURISDICTION AND VENUE

29. This Court has in personam jurisdiction over the Defendant because, inter alia, Defendant owns and operates approximately 26 Jos. A. Bank retail stores in New Jersey, including at least three in Burlington County, and it advertises in and sells and ships merchandise via its website to residents of New Jersey, including Burlington County. Accordingly, Defendant has transacted business in this county, has maintained continuous and systematic contacts in this county prior to and during the class period, and has purposefully availed itself of the benefits of doing business in this county. As such, Defendant maintains minimum contacts with this county that are more than sufficient to subject it to service of process and to comply with due process of law.

30. This matter is properly venued in Burlington County, New Jersey, in that Plaintiff is a resident of Burlington County, New Jersey, received Defendant's mail and email advertisements in Burlington County, New Jersey, viewed Defendant's website in Burlington County, New Jersey, and purchased merchandise from one of Defendant's stores in Burlington County, New Jersey. Moreover, Defendant operates at least three Jos. A. Bank retail stores in

Burlington County, New Jersey.

31. There is no federal subject matter jurisdiction over these claims in that all claims in this matter arise exclusively under New Jersey law, Plaintiff's individual claims are less than \$75,000, and the total amount in controversy in this matter, including attorney's fees, is less than \$5 million.

FACTUAL ALLEGATIONS

32. Defendant is in the for-profit business of selling apparel and other merchandise in its Jos. A. Bank retail stores, as well as via its online Jos. A. Bank store retail website located at www.josabank.com.

33. This lawsuit concerns Defendant's false and misleading business practices with respect to its advertising, marketing, and sale of discounted merchandise in its retail stores in New Jersey and via its website www.josabank.com to New Jersey customers in a manner that is contrary to New Jersey law.

34. Specifically, Defendant's uniform advertising, marketing, and sales practices detailed herein violate New Jersey law in two distinct aspects.

35. First, Defendant frequently and routinely advertises that various categories of merchandise are on sale in its retail stores and on its website at prices that have been discounted "UP TO" a specified percentage.

36. For example, Defendant will send a mail and/or email advertisement to its customers that a certain category of merchandise – or occasionally all merchandise – on its website and in its retail stores is on sale at a discount of "UP TO 70% OFF."

37. Defendant will post similar advertisements on its website and on placards in its stores, advertising the "UP TO 70% OFF" sale.

38. The vast majority of the merchandise included in the advertised sale, however, is actually discounted far less than the advertised 70%.

39. Rather, the advertised “70% OFF” is the maximum percentage discount offered by Defendant as part of the sale.

40. Defendant’s advertisements do not state the minimum percentage discount offered as part of the sale, which may be as low as 30% off.

41. Nor is the minimum percentage discount identified on the list of merchandise included in the advertised sale on Defendant’s website, on any specific item’s individual website page, or on any of Defendant’s in-store displays.

42. Moreover, Defendant does not identify the specific percentage discount applied to any individual item of merchandise included in the sale, either in its mail, email, website, or in-store advertisements.

43. Specifically, Defendant’s website does not identify the percentage discount applied to any individual item on the list of merchandise included in the advertised sale, on the item’s individual website page, or on the checkout/order summary page. Rather, Defendant simply lists the item’s former, non-sale price (with a line through it) and the sale price, and does not include any discount percentage (e.g., “\$995.00 \$499.00 SALE”).

44. Similarly, Defendant does not identify the percentage discount applied to any individual item in its retail stores, either on the in-store retail display or on the item’s individual price tag. Rather, the item’s price tag simply lists its former, non-sale price, and does not include any discount percentage or even a sale price (e.g., “\$995.00”).

45. Thus, Defendant’s customers cannot determine the exact percentage discount offered by Defendant on any individual item of merchandise included in an advertised sale

unless they calculate the discount on their own.

46. Indeed, the specific percentage discount applied by Defendant to an individual item is not revealed to Defendant's customers even after a customer purchases the item, as neither Defendant's online nor in-store sales receipts list the specific percentage discount applied to the item pursuant to an advertised sale.

47. These advertising, marketing, and sales practices uniformly utilized by Defendant are in direct violation of New Jersey law, which requires advertisers of discounted merchandise to "state the minimum percentage reduction as conspicuously ... as the maximum percentage reduction." N.J.A.C. § 13:45A-9.5(a)(1) (emphasis added).

48. By listing only the maximum percentage reduction in its mail, email, online, and in-store advertisements and omitting entirely the minimum percentage, Defendant has failed to comply with this regulation.

49. For any sale that includes a range of discounts, New Jersey law requires advertisements to state the minimum percentage discount in addition to, and **"as conspicuously ... as,"** the maximum – e.g., 30-70% OFF. By listing only the maximum percentage discount in its advertisements, Defendant has violated New Jersey law.

50. Further, by including in an advertised **"UP TO 70% OFF"** sale merchandise that is being offered for sale at a lesser discount – e.g., 50% off – without stating such lesser discount anywhere on its website or in its retail stores, Defendant falsely suggests that its customers are receiving a greater discount on such merchandise than they actually are.

51. Specifically, by including in an **"UP TO 70% OFF"** sale an item that has only been discounted by 50%, and by failing to specify the lesser discount either on the item's website page or in its retail store, or even on the item's sales receipt, Defendant is actively and

intentionally misleading its customers.

52. Because these uniform advertising, marketing, and sales practices by Defendant have the capacity to deceive – and have in fact deceived – Defendant’s customers, they are also false and misleading in violation of New Jersey law.

53. Second, Defendant continuously and routinely offers merchandise for sale in its retail stores and via its website at discounted “SALE” prices without stating the basis of the listed former price.

54. Specifically, with respect to any item included in a sale, Defendant’s website lists the former price with a line through it and the current “SALE” price, with no further explanation. Defendant’s in-store price tag lists only the former price, without even mentioning the sale price.

55. For example, a topcoat included in an “UP TO 70% OFF” sale may be listed on Defendant’s website as follows: ~~\$995.00~~ \$499.00 SALE. In store, the same topcoat included in the same “UP TO 70% OFF” sale would carry a price tag listing only the former price of \$995.00.

56. Defendant provides no basis for the topcoat’s former price of \$995.00, either on the topcoat’s individual website page or on the topcoat’s in-store price tag. Nor does Defendant provide any basis for the former price on its website checkout/order summary page or on its website or in-store receipts.

57. This practice is also a direct violation of New Jersey law, which requires advertisers to “[s]et forth the basis upon which the former price [of discounted merchandise] was established,” and further mandates that “terms such as ‘competitor’s price’ or ‘our regular price’ or words of similar import shall be used to designate the basis

for the former price.” N.J.A.C. § 13:45A-9.5(a)(2) (emphasis added).

58. Accordingly, Defendant is required to state the basis of the listed former price for each sale item on its website and in its retail store, identifying such former price as a regular price, a competitor’s price, or the like. By only listing a former price, with or without a line through it, without any basis or other justification therefor, Defendant has violated New Jersey law.

59. What happened to Plaintiff Leese helps illustrate Defendant’s unlawful practices complained of herein.

60. On or about November 18, 2016, Plaintiff Leese received an email advertisement from Defendant. See Exhibit A, Email Advertisement. The subject line of the email stated: **“Save up to 70% During the Pre-Thanksgiving Sale.”** The body of the email, among other things, stated in all capital letters and large, bold font **“WEEKEND SPECIALS 4 Days Only! 11/17-11/20 ... PRE-THANKSGIVING SALE UP TO 70% OFF.”** Id. The email also advertised: **“PANTS UP TO 60% OFF ... UP TO 70% OFF All Outerwear.”** Id. Further, the bottom of the email advertisement stated in smaller print: “Up to 70% Off Everything: Select styles only. Discount taken off regular price. ... Offer valid through 11/29/16.” Id.

61. Plaintiff Leese clicked on the email advertisement and was directed to Defendant’s website, www.josabank.com, which similarly advertised the **“UP TO 70% OFF”** sale in large, bold font across the top of the page.

62. Plaintiff Leese clicked on the website advertisement and was shown a list of items that purportedly were part of the advertised **“UP TO 70% OFF”** sale.

63. One of the items listed on Defendant’s website as part of the advertised sale was a **“Traveler Collection Traditional Fit Sportcoat,”** beside which was listed the following price

information: ~~\$398.00~~ \$169.00 SALE.

64. Defendant's website did not list the specific percentage discount applied to the sportcoat pursuant to the sale, nor did it disclose that the sale price of \$169.00 represented a discount of only 57.5% off the former price of \$398.00 rather than the advertised "70% OFF."

65. Approximately three days later, on November 21, 2016, Plaintiff Leese visited Defendant's Jos. A. Bank retail store located at 16 Centerton Road, Mt. Laurel, New Jersey.

66. During his visit, Plaintiff Leese saw numerous large, brightly-colored placards posted both inside and outside the store that, like Defendant's email and website advertisements, similarly advertised in large, bold font the "PRE-THANKSGIVING ... UP TO 70% OFF" sale.

67. One such placard was posted on a rack of suits and sportcoats, which were included in the advertised "UP TO 70% OFF" sale.

68. Plaintiff selected a "Traveler Collection Traditional Fit Sportcoat" from the rack and purchased it from Defendant, paying with his credit card.

69. The listed price on the sportcoat's price tag was \$398.00, but Plaintiff Leese paid Defendant \$169.00 for the sportcoat, pursuant to the advertised "70% OFF" sale.

70. However, the sportcoat purchased by Plaintiff Leese had not been discounted by 70%, as advertised by Defendant, but rather was discounted by only 57.5% off the listed former price of \$398.00.

71. Indeed, the vast majority of items included in the advertised "70% OFF" sale were similarly not discounted by 70%, but rather were discounted by a far lesser percentage.

72. Neither Defendant's in-store displays nor the sportcoat's price tag listed the specific percentage discount applied to the sportcoat purchased by Plaintiff, nor did they disclose

that the sale price of \$169.00 represented a discount of only 57.5% off the former price of \$398.00, rather than the advertised “70% OFF.”

73. Further, Plaintiff Leese’s sales receipt did not disclose the specific percentage discount that Defendant had applied to the sportcoat, or that Plaintiff Leese had received a discount of only 57.5%, as opposed to the advertised “70% OFF” discount. See Exhibit B, Plaintiff Leese’s Receipt.

74. Rather, Plaintiff Leese’s receipt reflecting his purchase of the “TRAV TRAD SPTCT” on “11/21/2016” stated only the former price of “398.00,” the monetary amount of the discount he received (“-229.00”), and the “Total Sales Amount” of “\$169.00.” Id.

75. Indeed, Defendant never informed Plaintiff Leese that the sportcoat he purchased had been discounted less than the advertised “70% OFF.”

76. What happened to Plaintiff Leese was not an accident or an isolated incident.

77. Rather, it was part of a uniform policy in which Defendant engaged in a systematic scheme of false and misleading advertising, marketing, and sales practices with the purpose of persuading customers to purchase items from Defendant’s online and retail Jos. A. Bank stores.

78. Defendant’s specific unlawful practices include:

- a. Disseminating via mail and email, and posting on its website and in its stores, advertisements that list only the maximum percentage discount offered pursuant to a sale, e.g., “UP TO 70% OFF,” without also disclosing the minimum percentage discount;
- b. Discounting individual items included in a sale by a lower percentage than the advertised maximum percentage, but failing to disclose such lesser discounts to its customers; and
- c. Failing to set forth any bases for the former prices listed on its website and in-store price tags, as required by law.

79. Defendant’s unlawful practices described herein go well beyond the Pre-

Thanksgiving sale during which Plaintiff Leese purchased the sportcoat, but rather are utilized by Defendant in the vast majority – if not all – of its advertised sales. See, e.g., Exhibit C (Excerpt from Defendant’s website dated January 25, 2017, advertising the following sales: “ALL CLEARANCE ... Up to 80% Total Savings” and “END-OF-SEASON SPECIALS UP TO 75% OFF”; Excerpt from Defendant’s website dated February 3, 2017, advertising the following sales: “THE FEBRUARY SALE UP TO 70% OFF ALMOST EVERYTHING” and “END-OF-SEASON SPECIALS UP TO 75% OFF”); Exhibit D (Assortment of emails received by Plaintiff Leese between January 20, 2017 and January 26, 2017, advertising, inter alia: “Up to 60% Off Storewide,” “ALL CLEARANCE UP TO 75% OFF,” “UP TO 60% OFF Almost Everything,” “Up to 80% Total Savings,” END-OF-SEASON SPECIALS UP TO 75% OFF,” “SUPER SATURDAY UP TO 75% OFF [online and in-store],” and “JANUARY CLEARANCE UP TO 80% OFF”; Mail advertisement received by Plaintiff Leese in late January 2017, advertising “THE FEBRUARY SALE ... SAVE UP TO 70% ON ALMOST EVERYTHING” and “UP TO 70% OFF ALL OUTERWEAR”).

80. Indeed, Plaintiff Leese has received at least 787 advertising emails from Defendant – at a rate of approximately one per day over the last few years, and sometimes more than one per day – most of which advertised “up to” a maximum percentage off sales. See Exhibit D. By way of example, during the eleven days from January 16 through January 26, 2017, Plaintiff Leese received a total of fifteen emails from Defendant, at least twelve of which advertised one or more “up to” a maximum percentage off sale. See id.

81. Moreover, Defendant’s unlawful practices go well beyond the single sportcoat that Plaintiff Leese purchased, as the vast majority of items included in Defendant’s various sales are not discounted by the advertised maximum percentage, but rather are discounted by a far

lesser percentage.

82. These deceptive advertising, marketing, and sales practices were kept secret, and were affirmatively and fraudulently concealed by Defendant from its customers throughout the class period. As a result, Plaintiff and his fellow Jos. A. Bank online and retail store customers were unaware of Defendant's unlawful conduct alleged herein and did not know they were actually being offered – and in fact receiving – a lesser discount than was advertised by Defendant.

83. Plaintiff and the class members did not discover, nor could they have discovered through reasonable diligence, that Defendant was violating the law as alleged herein until shortly before this litigation was initially commenced, because Defendant used methods to avoid detection and to conceal its violations of the law.

84. Defendant did not tell or otherwise inform Plaintiff or the class members that it was engaged in the deceptive advertising, marketing, and sales practices alleged herein. By their very nature, Defendant's unlawful practices were self-concealing.

85. In sum, Defendant routinely posted and disseminated to Plaintiff and the class advertisements that blatantly violated New Jersey law, and those advertisements, in many instances, induced Plaintiff and the class members to purchase items from Defendant's online and retail stores, for Defendant's profit, with the promise of discounts that never existed. As a result of this unlawful, deceptive conduct, Plaintiff and the class members have suffered harm and damages as set forth herein.

CLASS ACTION ALLEGATIONS

86. **Class Definition:** Plaintiff brings this action as a class action pursuant to New Jersey Court Rule 4:32, seeking civil penalties, damages, and injunctive relief under the New

Jersey Truth in Consumer Contract, Warranty, and Notice Act ("TCCWNA"), N.J.S.A. § 56:12-14, et seq., on behalf of himself and all members of the following proposed class:

All New Jersey citizens who received a mail or email advertisement from Defendant Jos. A. Bank advertising a discount between February 8, 2011 and the present.

87. **Purchaser Subclass Definition:** Plaintiff brings this action as a class action pursuant to New Jersey Court Rule 4:32, seeking damages and injunctive relief under New Jersey consumer protection statutes and common law on behalf of himself and all members of the following proposed subclass:

All New Jersey citizens who purchased any discounted item from Defendant's Jos. A. Bank website or any retail store in New Jersey between February 8, 2011 and the present.

88. Each of the classes for whose benefit this action is brought is so numerous that joinder of all members is impracticable.

89. The exact number and identities of the persons who fit within each proposed class are contained in Defendant's records and can be easily ascertained from those records.

90. The proposed class and subclass are each composed of at least 10,000 persons.

91. Common questions of law and fact exist as to each class member.

92. All claims in this action arise exclusively from uniform policies and procedures of Defendant as outlined herein.

93. No violations alleged in this Complaint are a result of any individualized oral communications or individualized interaction of any kind between class members and Defendant or anyone else.

94. There are common questions of law and fact affecting the rights of the class members, including, inter alia, the following:

- a. whether the uniform advertising, marketing, and sales practices alleged herein exist;

- b. whether Defendant disseminated advertisements that listed only the maximum percentage discount offered in connection with a sale, and failed to include the minimum percentage;
- c. whether Defendant discounted items included in a sale by a lesser percentage than the advertised maximum;
- d. whether Defendant disclosed such lower percentage discounts to its customers;
- e. whether Defendant set forth any bases for the former prices listed on its website and in-store price tags;
- f. the length of time Defendant engaged in the practices alleged herein;
- g. whether the alleged practices violated the New Jersey regulations set forth herein;
- h. whether the alleged practices violated New Jersey consumer protection laws, including TCCWNA and the Consumer Fraud Act;
- i. whether the alleged practices constituted a breach of the implied covenant of good faith and fair dealing;
- j. whether Defendant was unjustly enriched by the alleged practices;
- k. the nature and extent of the injury to the classes and the measure of class-wide damages; and
- l. whether each class is entitled to injunctive relief in the form of an order directing Defendant to send a court-approved notice to all class members, advising of the conduct alleged herein, as well as an order enjoining the conduct alleged herein and establishing a court-administered program to provide refunds of the overcharges to all such class members.

95. Plaintiff is a member of the classes he seeks to represent.

96. The claims of Plaintiff are not only typical of all class members, they are identical.

97. All claims of Plaintiff and the classes arise from the same course of conduct, policy and procedures as outlined herein.

98. All claims of Plaintiff and the classes are based on the exact same legal theories.

99. Plaintiff seeks the same relief for himself as for every other class member.

100. Plaintiff has no interest antagonistic to or in conflict with the classes.

101. Plaintiff will thoroughly and adequately protect the interests of the classes, having retained qualified and competent legal counsel to represent himself and the classes.

102. Defendant has acted and/or refused to act on grounds generally applicable to the classes, thereby making appropriate injunctive and declaratory relief for each class as a whole.

103. The prosecution of separate actions by individual class members would create a risk of inconsistent or varying adjudications with respect to individual members of each class, which would confront Defendant with incompatible standards of conduct.

104. Adjudications with respect to individual members of the classes would as a practical matter be dispositive of the interests of other members not parties to the adjudications and would substantially impair or impede their ability to protect their interests.

105. A class action is superior to other available methods for the fair and efficient adjudication of the controversy since, *inter alia*, the damages suffered by each class member were not great enough to enable them to maintain separate suits against Defendant and in most, if not all, instances were less than \$500 per person.

106. Common questions will predominate, and there will be no unusual manageability issues.

107. Without the proposed class action, Defendant will likely retain the benefit of its wrongdoing and will continue the complained-of practices, which will result in further damages to Plaintiff and class members.

COUNT I

**TRUTH IN CONSUMER CONTRACT, WARRANTY AND NOTICE ACT
N.J.S.A. § 56:12-14, et seq.**

(On behalf of the Class and Purchaser Subclass)

108. Plaintiff realleges and incorporates by reference all previous paragraphs of this Complaint as if fully set forth herein.

109. The New Jersey Truth in Consumer Contract, Warranty and Notice Act (“TCCWNA”) provides a New Jersey statutory cause of action for any instance where a seller of services or goods in New Jersey causes a provision to be placed in a consumer contract, notice or other consumer document which violates the rights of consumers under either New Jersey state law or federal law.

110. Specifically, N.J.S.A. § 56:12-15 of TCCWNA provides that:

No seller, lessor, creditor, lender or bailee shall in the course of his business offer to any consumer or prospective consumer or enter into any written consumer contract or give or display any written consumer warranty, notice or sign . . . any provision that violates any clearly established legal right of a consumer or responsibility of a seller, lessor, creditor, lender or bailee as established by State or Federal law at the time the offer is made or the consumer contract is signed or the warranty, notice or sign is given or displayed. (emphasis added)

111. By the plain terms of this New Jersey statute, it is a violation of TCCWNA for a seller to offer, give, or display any notice or sign to a consumer or prospective consumer, which contains a provision that violates any clearly established right of the consumer or responsibility of the seller arising under either federal or New Jersey state law, regardless of whether a purchase is actually made.

112. This is also the interpretation of TCCWNA given to the Act by the New Jersey Appellate Division. See Bosland v. Warnock Dodge, 396 N.J. Super. 267, 278 (App. Div. 2007),

aff'd 197 N.J. 543, 964 A.2d 741 (2009):

The above provision of the TCCWNA establishes liability whenever a seller offers a consumer a contract, the provisions of which violate any legal right of a consumer.

113. The rights and remedies provided by TCCWNA are separate from, and in addition to, any consumer protections provided in other federal or state statutes and regulations. See N.J.S.A. 56:12-18:

The rights, remedies and prohibitions accorded by the provisions of this act are hereby declared to be in addition to and cumulative of any other right, remedy or prohibition accorded by common law, Federal law or statutes of this State, and nothing contained herein shall be construed to deny, abrogate or impair any such common law or statutory right, remedy or prohibition.

114. Plaintiff and the class are “consumers or prospective consumers” of goods within the meaning of N.J.S.A. § 56:12-15 and 16.

115. Defendant is a “seller” of goods within the meaning of N.J.S.A. § 56:12-15 and 16.

116. The merchandise sold by Defendant at its Jos. A. Bank stores and on its website are goods within the meaning of N.J.S.A. § 56:12-15 and 16.

117. The mail and email advertisements sent to Plaintiff and the class, of which Exhibits A and D are examples, as well as the sale advertisements posted on Defendant’s website, of which Exhibit C is an example, and in its stores are consumer notices or signs within the meaning of N.J.S.A. § 56:12-15 and 16.

118. By the acts alleged herein, Defendant has violated N.J.S.A. § 56:12-15 and 16 because, in the course of its business, Defendant offered, gave, and displayed written consumer notices and signs to Plaintiff and the class, which contained provisions that violated their clearly established legal rights under state law, within the meaning of N.J.S.A. § 56:12-15.

119. Further, by the acts alleged herein, Defendant has violated N.J.S.A. § 56:12-15 and 16 because, in the course of its business, Defendant offered, gave, and displayed written consumer notices and signs to Plaintiff and the class, which violated the clearly established responsibility of Defendant as a seller of goods under state law, within the meaning of N.J.S.A. § 56:12-15.

120. The clearly established legal rights of consumers, and the clearly established legal responsibilities of sellers, under New Jersey law, include the requirement that all advertisements of discounted merchandise **“state the minimum percentage reduction as conspicuously ... as the maximum percentage reduction.”** N.J.A.C. § 13:45A-9.5(a)(1) (emphasis added).

121. In addition, the clearly established legal rights of consumers, and the clearly established legal responsibilities of sellers, under New Jersey law, include the requirement that all advertisements of discounted merchandise **“[s]et forth the basis upon which the former price [of the discounted merchandise] was established”** by using **“terms such as ‘competitor’s price’ or ‘our regular price’ or words of similar import.”** N.J.A.C. § 13:45A-9.5(a)(2) (emphasis added).

122. As outlined in detail herein, the mail and email advertisements that Defendant sent to Plaintiff and the class, as well as the notices and signs posted by Defendant on its website and in its retail stores, violated these clearly established rights and responsibilities of Plaintiff and the class by stating only the maximum percentage discount and omitting the minimum percentage, and by failing to set forth the bases of the listed former prices, contrary to the above cited state regulations.

123. In addition to Defendant’s violation of their statutory rights, Plaintiff and the class

have been further harmed by the acts of Defendant in that they have suffered significant aggravation, harassment, and nuisance from the repeated and frequent unlawful advertising emails sent to them on a near-daily basis by Defendant. As a result of Defendant's actions, Plaintiff and the class have been forced to expend significant time reviewing and deleting these unlawful advertising emails.

124. Pursuant to N.J.S.A. § 56:12-17, this class complaint seeks a statutory penalty of \$100 per violation for Plaintiff and each class member, as well as actual damages and attorney's fees and costs. See N.J.S.A. § 56:12-17, providing that a seller who violates the TCCWNA:

[S]hall be liable to the aggrieved consumer for a civil penalty of not less than \$100.00 or for actual damages, or both at the election of the consumer, together with reasonable attorney's fees and court costs.
(emphasis added)

See also United Consumer Fin. Servs. Co. v. Carbo, 410 N.J. Super. 280, 310 (App. Div.2009) affirming the trial judge's decision to award the \$100 statutory penalty to each class member under N.J.S.A. § 56:12-17 of TCCWNA, stating:

[T]he \$100 civil penalty is not unreasonably disproportionate when viewed in that context, whether it is considered with respect to an individual consumer or the 16,845 consumers whose contracts included the prohibited fee. We note that when assessing the constitutional reasonableness of punitive damage awards, courts are directed to consider and give "substantial deference" to judgments made by the Legislature in fixing civil penalties. Nothing about the facts of this case or the numerosity of this class warrants a more searching evaluation of the reasonableness of awarding the civil penalty selected by the Legislature to each member of this class. (citation omitted)

COUNT II

**NEW JERSEY UNIFORM DECLARATORY JUDGMENT ACT
N.J.S.A. § 2A:16-51, et seq.**

(On behalf of the Class and Purchaser Subclass)

125. Plaintiff realleges and incorporates by reference all previous paragraphs of this Complaint as if fully set forth herein.

126. Plaintiff and the class need, and are entitled to, a declaration that Defendant's advertising, marketing, and sales policies alleged herein are unlawful and that Defendant is barred by law from disseminating or posting advertisements that contain only the maximum percentage discount included in a sale and omit the minimum percentage discount, and from listing former prices without setting forth the bases thereof.

127. Plaintiff and the class members have a significant interest in this matter in that each has been and will continue to be subjected to the unlawful policies alleged herein.

128. Indeed, Plaintiff is a frequent customer of Jos. A. Bank who consistently shops both on the Jos. A. Bank website and at Jos. A. Bank retail stores in New Jersey. He is on the Jos. A. Bank mail and email distribution list – receiving email advertisements on a near-daily basis, as demonstrated by Exhibit D – and is a member of the Jos. A. Bank “Bank Account” frequent shopper rewards program. Further, Plaintiff routinely purchases merchandise from Jos. A. Bank, and will continue to do so in the future. As such, Plaintiff is regularly subjected to Defendant's unlawful conduct alleged herein.

129. Thus, it is certain that Plaintiff will be subject to the challenged unlawful conduct by Defendant again in the future.

130. Based on the foregoing, a justifiable controversy is presented in this case, rendering declaratory judgment appropriate.

131. In addition, because the unlawful uniform policies of Defendant continue, and are on-going, Plaintiff and the class also need, and are entitled to, an order for equitable and injunctive relief, creating a court-mandated program to provide notice to the classes of Defendant's unlawful policies and, for the purchaser subclass, to carry out an audit and make refunds of the unlawful overcharges to Plaintiff and the subclass.

COUNT III

**VIOLATION OF THE NEW JERSEY CONSUMER FRAUD ACT
N.J.S.A. § 56:8-1, et seq.**

(On behalf of the Purchaser Subclass)

132. Plaintiff realleges and incorporates by reference all previous paragraphs of this Complaint as if fully set forth herein.

133. Plaintiff brings this claim individually and on behalf of all other New Jersey class members who purchased merchandise from Defendant's Jos. A. Bank online website and retail stores in New Jersey.

134. Defendant is a seller of goods within the meaning of the New Jersey Consumer Fraud Act.

135. Defendant's sale of merchandise via its online website and in its retail stores – specifically including, but not limited to, the sale of the sportcoat to Plaintiff – constitutes sales of goods.

136. The New Jersey Consumer Fraud Act, N.J.S.A. 56:8-1, et seq. (the "NJCFA"), applies to all sales made by Defendant to New Jersey consumers from Defendant's Jos. A. Bank website and retail stores in New Jersey.

137. The NJCFA was enacted to protect consumers against sharp and unconscionable commercial practices by persons engaged in the sale of goods or services. See Marascio v. Campanella, 689 A.2d 852, 857 (N.J. Ct. App. 1997).

138. The NJCFA is a remedial statute which the New Jersey Supreme Court has repeatedly held must be construed liberally in favor of the consumer to accomplish its deterrent and protective purposes. See Furst v. Einstein Moomjy, Inc., 860 A.2d 435, 441 (N.J. 2004) (“The [NJCFA] is remedial legislation that we construe liberally to accomplish its broad purpose of safeguarding the public.”).

139. “The available legislative history demonstrates that the [NJCFA] was intended to be one of the strongest consumer protection laws in the nation.” New Mea Const. Corp. v. Harper, 497 A.2d 534, 543 (N.J. Ct. App. 1985).

140. For this reason, the “history of the [NJCFA] is one of constant expansion of consumer protection.” Kavky v. Herbalife Int’l of Am., 820 A.2d 677, 681-82 (N.J. Ct. App. 2003).

141. The NJCFA was intended to protect consumers “by eliminating sharp practices and dealings in the marketing of merchandise and real estate.” Lemelledo v. Beneficial Mgmt. Corp., 696 A.2d 546, 550 (N.J. 1997).

142. Specifically, N.J.S.A. § 56:8-2 prohibits “unlawful practices, ...” which are defined as:

The act, use or employment of any unconscionable commercial practice, deception, fraud, false pretense, misrepresentation, or the knowing, concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission whether or not any person has in fact been misled, deceived or damaged thereby.

143. The catch-all term “unconscionable commercial practice” was added to the NJCFA by amendment in 1971 to ensure that the Act covered, *inter alia*, “incomplete disclosures.” Skeer v. EMK Motors, Inc., 455 A.2d 508, 512 (N.J. Ct. App. 1982).

144. In describing what constitutes an “unconscionable commercial practice,” the New Jersey Supreme Court has noted that it is an amorphous concept designed to establish a broad business ethic. See Cox v. Sears Roebuck & Co., 647 A.2d 454, 462 (N.J. 1994).

145. In order to state a cause of action under the NJCFA, a plaintiff does not need to show reliance by the consumer. See Varacallo v. Massachusetts Mut. Life Ins. Co., 752 A.2d 807 (N.J. App. Div. 2000); Gennari v. Weichert Co. Realtors, 691 A.2d 350 (N.J. 1997) (holding that reliance is not required in suits under the NJCFA because liability results from “misrepresentations whether any person has in fact been misled, deceived or damaged thereby”).

146. Rather, the NJCFA requires merely a causal nexus between the false statement and the purchase, not actual reliance. See Lee, supra, 4 A.3d at 579 (“causation under the [NJCFA] is not the equivalent of reliance”).

147. As stated by the New Jersey Supreme Court in Lee, supra, 4 A.3d at 580, “It bears repeating that the [NJCFA] does not require proof of reliance, but only a causal connection between the unlawful practice and ascertainable loss.”

148. By the acts alleged herein, Defendant has violated the NJCFA. Specifically, Defendant:

- a. Disseminated via mail and email, and posted on its website and in its stores, advertisements that listed only the maximum percentage discount offered in connection with a sale, *e.g.*, “UP TO 70% OFF,” without also disclosing the minimum percentage discount;
- b. Discounted individual items included in a sale by a much lower percentage than the advertised maximum percentage, but failed to disclose such lesser discounts to its customers; and

- c. Failed to set forth any bases for the former prices listed on its website and in-store price tags.

149. These uniform practices by Defendant constitute sharp and unconscionable commercial practices relating to the sale of goods in violation of the NJCFA, N.J.S.A. § 56:8-1, et seq.

150. As alleged herein, Defendant has engaged in deceptive conduct which creates a likelihood of confusion or misunderstanding.

151. These actions also constitute “omission[s] of any material fact with intent that others rely upon such concealment,” as Defendant never informed Plaintiff and the class members that the vast majority of items included in advertised sales on its website and in its stores were not discounted by the advertised maximum percentage, nor did Defendant inform Plaintiff and the class of the lesser discounts applied to individual items they purchased. Defendant purposefully omitted and concealed this information so that its customers would believe that they were getting a higher discount – i.e., the advertised maximum discount – on the items they purchased from Defendant, when in fact they were not.

152. As such, Defendant has acted with knowledge that its conduct was deceptive and with intent that such conduct deceive purchasers.

153. Moreover, because Defendant’s conduct described herein is a violation of N.J.A.C. § 13:45A-9.5(a)(1) and (2), such conduct constitutes a per se violation of the CFA, N.J.S.A. § 56:8-1, et seq.

154. Plaintiff and the class members reasonably and justifiably expected Defendant to comply with applicable law, but Defendant failed to do so.

155. Plaintiff and the purchaser subclass have suffered ascertainable loss because they did not receive the advertised maximum discount promised by Defendant on the merchandise they purchased, but rather were given lesser discounts that were concealed by Defendants.

156. As a direct and proximate result of these unlawful actions by Defendant, Plaintiff and the purchaser subclass have been injured and have suffered an ascertainable loss of money.

COUNT IV

BREACH OF CONTRACT UNDER THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING

(On Behalf of the Purchaser Subclass)

157. Plaintiff realleges and incorporates by reference all previous paragraphs of this Complaint as if fully set forth herein.

158. There was no written contract between Defendant and its customers, including Plaintiff and the subclass members.

159. Rather, by operation of the law of New Jersey, there existed an implied contract for the sale of goods between each New Jersey customer who purchased merchandise from Defendant's Jos. A. Bank website and retail store.

160. By operation of the law of New Jersey, there also existed an implied duty of good faith and fair dealing in each such contract.

161. By the acts alleged herein, Defendant has violated that duty of good faith and fair dealing, thereby breaching the implied contract between Defendant and each class member.

162. Specifically, it was a violation of the duty of good faith and fair dealing for Defendant to represent that the merchandise included in a sale was discounted "up to" a maximum percentage, without also disclosing the minimum percentage discount and the specific

discount applied to each individual item of merchandise.

163. It was also a violation of the duty of good faith and fair dealing for Defendant to advertise, market, and sell items on its website and in its stores in a manner that violates New Jersey law.

164. As a direct and proximate result of Defendant's breach of the implied covenant of good faith and fair dealing, Plaintiff and the class members have been injured and have suffered actual damages in an amount to be established at trial.

COUNT V

UNJUST ENRICHMENT/DISGORGEMENT

(On Behalf of the Purchaser Subclass)

165. Plaintiff realleges and incorporates by reference all previous paragraphs of this Complaint as if fully set forth herein.

166. This claim is asserted in the alternative to a finding of breach of contract. Should the Court find that no contract existed here, e.g., due to an absence of a meeting of the minds, this claim asserts that it is unjust to allow Defendant to retain profits from its deceptive, misleading, and unlawful conduct alleged herein.

167. Plaintiff and the purchaser subclass members were charged by – and paid – Defendant for the items they purchased from Defendant's website and retail store. Consequently, Plaintiff and the class have conferred substantial benefits on Defendant by purchasing the items, and Defendant has knowingly and willingly accepted and enjoyed these benefits.

168. Defendant represented that these items were discounted "up to" a maximum percentage, without disclosing a minimum percentage discount as required by law. Defendant

also did not apply the advertised maximum discounts to the items purchased by Plaintiff and the class, but rather applied a lesser discount and failed to disclose this lesser discount to Plaintiff and the class.

169. Further, Defendant failed to set forth any basis for the former prices upon which its discounts were based.

170. As alleged herein, Defendant took these unlawful actions with the intent and sole purpose of attracting more customers and selling more merchandise, at higher prices, on its website and in its stores, for its own benefit and profit.

171. Because the items were advertised as being discounted at higher percentages than they actually were, and because the actual, lower discounts were concealed from its customers, Defendant collected more money than it would have if the items were discounted as advertised.

172. As a result of these complained-of actions by Defendant, Defendant received benefits under circumstances where it would be unjust for them to retain those benefits.

173. Defendant has knowledge or an appreciation of the benefit conferred upon it by Plaintiff and the class members.

174. Equity demands disgorgement of Defendant's ill-gotten gains. Defendant will be unjustly enriched unless Defendant is ordered to disgorge those profits for the benefit of Plaintiff and the class members.

175. Plaintiff and the class members are entitled to restitution and/or disgorgement of all profits, benefits, and other compensation obtained and retained by Defendant from its deceptive, misleading, and unlawful conduct described herein. At minimum, Defendant should be required to refund Plaintiff and the class the difference between the maximum discount set forth in its advertisements and the actual discount applied to the items they purchased.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays that this case be certified and maintained as a class action and for judgment to be entered in favor of Plaintiff and the classes against Defendant as follows:

- A. Enter an order certifying the proposed classes, designating Plaintiff as the representative for each class, and designating the undersigned as class counsel;
- B. Declare that Defendant is financially responsible for notifying all class members of its deceptive advertising, sales, and marketing practices alleged herein;
- C. Declare that Defendant must disgorge, for the benefit of the classes, all or part of the ill-gotten profits it received from its deceptive advertising, sales, and marketing practices alleged herein, or order Defendant to make full restitution to Plaintiffs and the members of the purchasing subclass;
- D. Find that Defendant's conduct alleged herein be adjudged and decreed in violation of the state laws cited above;
- E. Grant economic and compensatory damages on behalf of Plaintiff and all members of the classes, to the maximum extent permitted by applicable law;
- F. Grant punitive or exemplary damages as permitted by law;
- G. Grant the requested injunctive and declaratory relief;
- H. Award interest as permitted by law;
- I. Grant reasonable attorneys' fees and reimbursement all costs incurred in the prosecution of this action; and
- J. Grant such other relief as this Court deems just and proper.

DEMAND FOR TRIAL BY JURY AND CERTIFICATION

Plaintiff hereby demands trial by jury of six on all issues.

I hereby certify, pursuant to R. 4:5-1, that to the best of my knowledge, information and belief at this time the matter in controversy is not the subject of any other action pending in any Court, nor of any pending Arbitration proceeding, that no other action or Arbitration is contemplated, and further that there are no other parties who should be joined in this action.

Pursuant to R. 4:25-4, Stephen P. DeNittis, Esquire is designated as trial counsel.

Dated: February 8, 2017

BY: 

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