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SPORTS WAREHOUSE
7
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9 UNITED STATES DISTRICT COURT
10 SOUTHERN DISTRICT OF CALIFORNIA
11

12 MATT MCDUFFEE, on behalf of
himself and others similarly situated,,
13

14 Plaintiff,
15

16 vs.
17

18 SPORTS WAREHOUSE, a California
corporation, and DOES 1 to 10,
inclusive,
19

20 Defendant.
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Case No. '17CV512 JM MDD

NOTICE OF REMOVAL OF ACTION

(San Diego Superior Court Case No. 37-
2017-00001781-CU-BT-NC)

22 TO THE CLERK OF THE UNITED STATES DISTRICT COURT FOR THE
23 SOUTHERN DISTRICT OF CALIFORNIA:
24

25 PLEASE TAKE NOTICE that defendant Sports Warehouse ("Sports
26 Warehouse") hereby gives NOTICE OF REMOVAL of the above-captioned action
27 from the Superior Court of San Diego County, California, to this Court under 28
29 U.S.C. section 1441(a) on the grounds of diversity jurisdiction under the Class Action
30 Fairness Act ("CAFA") at 28 U.S.C. section 1332(d). In support of this Notice of
31 Removal, Sports Warehouse alleges as follows:
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The Removed Case

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2 1. The removed case is a putative class action lawsuit filed on or about
3 January 17, 2017 by Plaintiff Matt McDuffee (“Plaintiff”), in the Superior Court of
4 the State of California, San Diego County, having been assigned Case Number 37-
5 2017-00001781-CU-BT-NC and styled Matt McDuffee v. Sports Warehouse
6 (“McDuffee”).

Papers From Removed Action

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8 2. As required by 28 U.S.C. section 1446(a), a copy of the Complaint,
9 along with a Civil Case Cover Sheet, Notice of Case Assignment and Case
10 Management Conference, Notice of Eligibility To eFile, Notice of Hearing, and
11 ADR information packet are collectively attached hereto as Exhibit A. A copy of
12 the Summons executed by the Clerk of the Superior Court of California, San Diego
13 County is attached hereto as Exhibit B. These papers are the only process, pleadings
14 or orders served on Sports Warehouse in the San Diego Superior Court action as of
15 the date of this Notice of Removal.

16 3. Promptly after filing this Notice of Removal with the federal District
17 Court for the Southern District of California, Sports Warehouse will file a copy of
18 this Notice of Removal with the Clerk of the Superior Court of San Diego County,
19 California, and will serve notice on Plaintiff, as required by 28 U.S.C.
20 section 1446(d).

The Removal Is Timely

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22 4. On February 13, 2017, Plaintiff caused the Complaint to be delivered
23 personally to an administrative worker at Sports Warehouse’s retail location in San
24 Luis Obispo, California. Because Plaintiff did not provide the Complaint to an
25 “officer” or “general manager” of Sports Warehouse, this attempt did not effectuate
26 service under California law. Cal. Code of Civ. Proc. § 416.10(b); Lee v. City of
27 Beaumont, 12 F.3d 933, 936-37 (9th Cir. 1993) (“The issue of the sufficiency of
28 service of process prior to removal is strictly a state law issue.”). On February 17,

2017, Plaintiff also caused the Complaint to be sent by first class mail to Sports Warehouse's business address. Substitute mail service on a corporate defendant is deemed effective ten days after the mailing. Cal. Civ. Proc. Code § 415.20. Accordingly, Plaintiff effectively served Sports Warehouse on February 27, 2017, ten days after Plaintiff mailed the Complaint.

5. This Notice of Removal is filed within thirty days of February 27, 2017, i.e., the date when Sports Warehouse was first effectively served, as required by 28 U.S.C. section 1446(b), assuming that the Complaint discloses sufficient facts to support removal.¹ Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc., 526 U.S. 344 (1999) (a party must first be subject to a court's authority, i.e., be properly served with summons, before receipt of a complaint can trigger the removal statute's thirty-day filing period); Madren v. Belden, Inc., 2012 U.S. Dist. LEXIS 91635, *5 (N.D. Cal. July 2, 2012) (same).

The Consent Requirement Is Inapplicable

6. Sports Warehouse is the sole defendant, and this case could in any event be removed without the consent of any other defendant as provided by 28 U.S.C. section 1453(b).

Venue

7. Venue is proper under 28 U.S.C. section 1441(a) because this Court is the United States District Court for the district and division embracing the place where the state-court case was filed.

The Grounds for Removal

8. The Federal District Court, Southern District of California, has jurisdiction over this action pursuant to CAFA, 28 U.S.C. section 1332(d) because:
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¹ Should the Court conclude that the amount in controversy or any other fact relevant to establishing federal jurisdiction is not sufficiently certain at this time, Sports Warehouse requests leave to seek removal again after Plaintiff provides appropriate clarification.

1 a. McDuffee is a “class action” as defined in 28 U.S.C.
 2 section 1332(d)(1)(B) and the proposed plaintiff class has an aggregate number of
 3 members of more than 100 as required by 28 U.S.C. section 1332(d)(5)(B). Plaintiff
 4 purports to assert claims on behalf all persons who purchased merchandise from
 5 Sports Warehouse in four years prior to the Complaint’s filing that was advertised
 6 with the word “Was” proximate to the “Sale” price of an item, and who were
 7 residents of California at the time of purchase. (Complaint ¶ 45.) Plaintiff alleges
 8 that the class consists of more than one hundred members. (Id. ¶ 48.)

9 b. There is minimal diversity. Specifically, at least one member of
 10 the proposed class of plaintiffs is a citizen of a different state than Sports
 11 Warehouse. 28 U.S.C. § 1332(d)(2)(A)-(B).

12 c. The amount in controversy based on the aggregation of the
 13 proposed class members’ alleged claims exceeds \$5,000,000.00, exclusive of
 14 interest and costs. 28 U.S.C. § 1332(d)(2) and (6).

15 **Minimal Diversity Exists for CAFA Purposes**

16 9. CAFA’s requirement of “minimal diversity” is set forth in 28 U.S.C.
 17 section 1332(d)(2)(A)-(B). This requirement is satisfied if (1) any member of a
 18 class of plaintiffs is a citizen of a state different from any defendant; or (2) any
 19 member of a class of plaintiffs is a citizen or subject of a foreign state and any
 20 defendant is a citizen of a different state. 28 U.S.C. § 1332(d)(2)(A), (B).

21 10. For purposes of CAFA jurisdiction, a corporation is a citizen of both
 22 the state of its incorporation and its principal place of business. 28 U.S.C.
 23 § 1332(c)(1). To establish citizenship for diversity purposes, a natural person must
 24 be both a citizen of the U.S. and a domiciliary of one particular state. Kantor v.
 25 Wellesley Galleries, Ltd., 704 F.2d 1088, 1090 (9th Cir. 1983). A person’s domicile
 26 is the place where he or she resides with the intention to remain. Kanter v. Warner-
 27 Lambert Co., 265 F.3d 853, 857 (9th Cir. 2001).

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1 11. Both at the time McDuffee was filed and at the time of removal, Sports
2 Warehouse was/is a corporation incorporated pursuant to the laws of the State of
3 California with its principal place of business located in California.

4 12. Plaintiff McDuffee alleges that he is, and was at all relevant times, a
5 legal resident of Oceanside, California. (Complaint ¶ 13.)

6 13. Plaintiff sues on behalf of a class defined as: “All persons who (1)
7 purchased merchandise from Defendant that was advertised in relation to a
8 purported former price introduced with the word ‘Was’ proximate to the ‘Sale’ price
9 of the item, and (2) who was a California resident at the time of the purchase, and
10 (3) made his or her purchase from four years prior to the filing of this lawsuit to the
11 present.” (Complaint ¶ 45.)

12 14. This class undoubtedly will encompass a number of categories of
13 putative class members who resided in California (and purchased Sports Warehouse
14 product) within the last four years, but were not California citizens at the time of the
15 Complaint’s filing and are not California citizens as of this removal.

16 15. For example, some out-of-state students likely purchased Sports
17 Warehouse products during a time in the last four years that they had a California
18 address, but remained citizens of their home states, to which they have now
19 returned. In addition, the proposed class contains individuals who were California
20 citizens during some portion of the four-year long class period, but have since
21 moved to another state and are not now California citizens. There are likely other
22 categories of non-Californians who fall within Plaintiff’s proposed class, which is
23 not defined in terms of citizenship.

24 16. As a result, Sports Warehouse alleges that at least one member of the
25 proposed plaintiff class is a citizen of a state different from Sports Warehouse (i.e., a
26 citizen of a state other than California). This satisfies CAFA’s minimal diversity
27 requirement. 28 U.S.C. § 1332(d)(2)(A), (B).

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The Amount in Controversy.

17. Plaintiff does not specifically allege the total amount of damages that he seeks for himself or on behalf of the class. Sports Warehouse has no obligation to venture beyond the pleadings to try to calculate the amount in controversy. Kuxhausen v. BMW Fin. Servs. NA LLC, 707 F.3d 1136, 1140 (9th Cir. Feb. 25, 2013). Nevertheless, to avoid any challenge to the timeliness of removal, Sports Warehouse has calculated the amount in controversy based on Plaintiff's allegations as exceeding \$5 million, exclusive of interest and costs, as follows:

a. Plaintiff alleges that he and other class members purchased a Sports Warehouse product as a result of deceptive advertising, and that "Plaintiff would not have made [his] purchases from Defendant in the absence of Defendant's misrepresentations." (Complaint ¶ 62.) Plaintiff seeks "an award of damages according to proof," "an award of appropriate equitable relief, including but not limited to restitution of moneys paid to Defendant," "reasonable attorneys' fees and the costs of suit herein," "pre- and post-judgment interest," and "other and further relief as may be deemed necessary or appropriate." (Id., Prayer for Relief.) Plaintiff also advises that he intends to file an amended complaint seeking "punitive damages." (Id. ¶ 84.)

b. Through his Complaint, Plaintiff alleges that he purchased a Babolat Pure Control 95 tennis racquet for \$129.00. (Id. ¶ 36.) He further alleges that he seeks relief "including but not limited to restitution of moneys paid to Defendant." (Id., Prayer for Relief.) Accordingly, on the face of his pleading, Plaintiff seeks at least \$129.00. Although it is disputed, Plaintiff further pleads that he is typical of the putative class, such that this measure may be used for pleading purposes as a typical loss per transaction. (Id. ¶ 50.)

c. Plaintiff also prays for attorneys' fees as permitted by law. The CLRA permits prevailing plaintiffs to recover attorneys' fees. Cal. Civ. Code §§ 1780(e), 1794(d). "Attorneys' fees can be taken into account in determining the

1 amount in controversy if a statute authorizes fees to a successful litigant.” Goldberg
 2 v. CPC International Inc., 678 F.2d 1365, 1367 (9th Cir. 1982); see also, 28 U.S.C.
 3 1332 (“In any class action, the claims of the individual class members shall be
 4 aggregated to determine whether the matter in controversy exceeds the sum or value
 5 of \$5,000,000, exclusive of interest and costs.”). The Court may use 30% of the
 6 potential judgment as a guideline. In re Rite Aid Corp. Securities Litigation, 396
 7 F.3d 294, 303 (3d Cir. 2005) (noting study done by the Federal Judicial Center that
 8 found a median percentage recovery range of 27-30% for all class actions resolved
 9 or settled over a four-year period). Accounting for fees at that rate, each plaintiff’s
 10 potential recovery based on the Complaint’s allegations would be approximately
 11 \$167.70, which is the sum of \$129.00 (representing the price of the racquet) plus
 12 \$38.70 (representing potential attorneys’ fees and which is 30% of \$129.00, or the
 13 purchase price of the racquet).

14 d. If each class member’s claim is worth \$167.70, per the facts and
 15 theories alleged in the Complaint, then 29,816 transactions among the putative class
 16 members are needed to exceed \$5 million. Kuxhausen, 707 F.3d at 1140
 17 (multiplying the number of class members by the amount sought on behalf of each
 18 class member to arrive at the amount in controversy). While Sports Warehouse
 19 contends that it is impossible for it to determine which transactions (if any) fall
 20 within the scope of the class definition (i.e., sales advertised using “Was” proximate
 21 to the “Sale” price of the item), the Complaint alleges that Sports Warehouse has a
 22 “policy and practice” of relying on such advertisements, (id. ¶ 26), and that they
 23 apply to the “vast majority, if not all, of the items so advertised on Defendant’s
 24 websites.” (Id. at ¶ 44.) Based on these allegations, it is reasonable to assume that
 25 Plaintiff’s claims implicate at least 29,816 transactions involving putative class
 26 members. In fact, in the four years prior to the filing of the Plaintiff’s complaint,
 27 and taking Plaintiff’s advertising-related allegations to be true, Sports Warehouse
 28 believes based on its estimated overall sales volume that it has likely consummated

1 well more than 29,816 transactions with members of the putative class as alleged by
2 Plaintiff.

3 e. Although Sports Warehouse disputes liability and disputes that
4 Plaintiff or members of the proposed plaintiff class are entitled to any monetary
5 relief, the amount in controversy based on Plaintiff's allegations exceeds \$5 million,
6 exclusive of interest and costs, for purposes of CAFA jurisdiction. "A defendant's
7 notice of removal need include only a plausible allegation that the amount in
8 controversy exceeds the jurisdictional threshold." Dart Cherokee Basin Operating
9 Co., LLC v. Owens, 135 S. Ct. 547, 554 (2014).

10 **WHEREFORE**, Sports Warehouse hereby removes this action now pending
11 in the Superior Court of San Diego County, California, to this Court and request that
12 further proceedings be conducted in this Court as provided by law.

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14 Dated: March 15, 2017

RUTAN & TUCKER, LLP
ALEJANDRO S. ANGULO
BRADLEY A. CHAPIN

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17 By: /s/ Bradley A. Chapin

18 Bradley A. Chaplin
19 Attorneys for Defendant
20 SPORTS WAREHOUSE
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EXHIBIT A

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ELECTRONICALLY FILED
Superior Court of California,
County of San Diego
01/17/2017 at 01:37:24 PM
Clerk of the Superior Court
By Veronica Navarro, Deputy Clerk

6 Attorneys for Plaintiff MATT MCDUFFEE, on behalf of himself
and others similarly situated
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8 37-2017-00001781-CU-BT-NC
SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 IN AND FOR THE COUNTY OF SAN DIEGO

12 MATT MCDUFFEE, on behalf of himself
and others similarly situated,

13 Plaintiff,

14 v.

15 SPORTS WAREHOUSE, a California
16 corporation, and DOES 1 to 10, inclusive,

17 Defendant.

Case No.

CLASS ACTION COMPLAINT FOR:

- (1) Violation of California Business & Professions Code section 17200 *et seq.* (Unfair Competition Law)
- (2) Violation of California Business & Professions Code section 17500 *et seq.* (False Advertising Law)
- (3) Violation of California's Consumers Legal Remedies Act, California Civil Code section 1750, *et seq.*
- (4) Breach of Contract
- (5) Breach of Warranty
- (6) Unjust Enrichment

DEMAND FOR JURY TRIAL

28
CLASS ACTION COMPLAINT

1 Plaintiff Matt McDuffee (hereinafter, "Plaintiff"), on behalf of himself and all others
2 similarly situated, complains of Defendant Sports Warehouse, a California corporation
3 ("Defendant"), as follows:

4 **NATURE OF ACTION**

5 1. This class action arises from Defendant's false advertising of price discounts of its
6 athletic products and apparel on its websites. Defendant advertises false former prices and false
7 discounts with respect to the products it sells via its websites, including but not limited to

- 8 • <http://www.tennis-warehouse.com/>
9 • <http://www.racquetballwarehouse.com/>
10 • <http://www.totalpickleball.com/>
11 • <http://www.ridingwarehouse.com/>
12 • <http://www.derbywarehouse.com/>
13 • <http://www.icewarehouse.com/>
14 • <http://www.inlinewarehouse.com/>

15 2. Throughout the past four years Defendant has misrepresented price discounts of its
16 online merchandise. Defendant has expressed "sale" prices as offering discounts in specific dollar
17 amounts from purported former retail prices, as well as specific percentage amounts from purported
18 former retail prices.

19 3. The supposed discounts do not exist because the merchandise never was offered at the
20 stated former retail prices or was not offered at the stated former retail price for a substantial period
21 of time within California. The purported former prices are not the prevailing market prices within
22 the three months preceding the publication and dissemination of the advertised former prices, as
23 required by California Law.

24 4. The Federal Trade Commission prohibits this type of false former price advertising:
25 "One of the most commonly used forms of bargain advertising is to offer a reduction from the
26 advertiser's own former price for an article. If the former price is the actual, bona fide price at which
27 the article was offered to the public on a regular basis for a reasonably substantial period of time, it
28 provides a legitimate basis for the advertising of a price comparison. Where the former price is

1 genuine, the bargain being advertised is a true one. If, on the other hand, the former price being
 2 advertised is not bona fide but fictitious—for example, where an artificial price, inflated price was
 3 established for the purpose of enabling the subsequent offer of a large reduction ... [t]he ‘bargain’
 4 being advertised is a false one; the purchaser is not receiving the unusual value he expects.” 16
 5 C.F.R. § 233.1(a).

6 5. California’s False Advertising Law prohibits misrepresentations regarding former
 7 prices. “For the purpose of this article the worth or value of anything advertised is the prevailing
 8 market price, wholesale if the offer is at wholesale, retail if the offer is at retail, at the time of
 9 publication of such advertisement in the locality wherein the advertisement is published. No price
 10 shall be advertised as a former price of any advertised thing, unless the alleged former price was the
 11 prevailing market price as above defined within three months next immediately preceding the
 12 publication of the advertisement or unless the date when the alleged former price did prevail is
 13 clearly, exactly and conspicuously stated in the advertisement.” Bus. & Prof. Code § 17501.

14 6. Defendant knows or should reasonably know that advertising its merchandise prices
 15 as discounts from purported former retail prices at which they were never sold is deceptive and
 16 misleading. Defendant concealed from Plaintiff and the putative class the fact that the merchandise
 17 was not ever actually sold at the price from which it purportedly marked down or was not sold at
 18 the stated former retail price for a substantial period of time within California. Defendant had a
 19 duty to disclose the actual prices at which the merchandise sold for rather than false, inflated prices.

20 7. The facts regarding the purported former retail prices that Defendant misrepresented
 21 or failed to disclose are material facts that a reasonable person would have considered material in
 22 making their decision to purchase the advertised merchandise. Plaintiff relied on Defendant’s
 23 representations that he was receiving discounts from the former retail prices and representations that
 24 he was receiving a bargain against what he ordinarily would have paid.

25 8. Plaintiff and others similarly situated reasonably and justifiably relied to their
 26 detriment on Defendant’s lack of disclosure and concealment of the actual prices at which the
 27 merchandise previously had sold for on Defendant’s websites and at competitor retailers.

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1 9. Defendant intentionally concealed and failed to disclose the truth about its
2 misrepresentations and false former price advertising scheme for the purpose of inducing Plaintiff
3 and others similarly situated to purchase merchandise from its websites.

4 10. Through its false and deceptive marketing, advertising and pricing scheme,
5 Defendant has violated California law prohibiting advertising goods for sale as discounted from
6 former prices which are false, and prohibiting misleading statements about the existence and amount
7 of price reductions. Defendant violated, and continues to violate, California's Business &
8 Professions Code §§ 17200, *et seq.*, California's Business & Professions Code §§ 17500, *et seq.*,
9 and California's Consumers Legal Remedies Act, California Civil Code §§ 1750, *et seq.*

10 11. Plaintiff, individually and on behalf of all others similarly situated, seeks damages,
11 restitution, and injunctive relief to remedy the harm suffered as a result of Defendant's false
12 advertising practices.

13 PARTIES

14 12. Defendant is a California corporation with its principal place of business in San Luis
15 Obispo, California and at all relevant times was engaged in commercial transactions throughout the
16 State of California and throughout the United States of America.

17 13. At all times mentioned herein Plaintiff was and is a resident of Oceanside, California.

18 14. Plaintiff is unaware of the true names and capacities of defendants sued herein as
19 DOES 1 through 10, inclusive, and therefore sues those defendants by such fictitious names.
20 Plaintiff will amend this Complaint to allege their true names and capacities when ascertained.
21 Plaintiff is informed and believes and on that ground alleges that each of the fictitiously named
22 defendants is responsible in some manner for the occurrences alleged and that Plaintiff's injuries
23 and damages, as alleged, are proximately caused by those occurrences.

24 15. Plaintiff is informed and believes and on that ground alleges that, at all relevant
25 times, each Defendant was the principal, agent, partner, joint venturer, officer, director, controlling
26 shareholder, subsidiary, affiliate, parent corporation, successor in interest and/or predecessor in
27 interest of some or all of the other Defendants, and was engaged with some or all of the other
28 Defendants in a joint enterprise for profit, and bore such other relationships to some or all of the

1 other Defendants so as to be liable for their conduct with respect to the matters alleged below.
 2 Plaintiff is informed and believes and on that ground alleges that each Defendant acted pursuant to
 3 and within the scope of the relationships alleged above, and that each knew or should have known
 4 about and authorized, ratified, adopted, approved, controlled, aided and abetted the conduct of all
 5 Defendants.

6 16. Venue as to Defendant is proper in this judicial district pursuant to Code of Civil
 7 Procedure § 395.5 because the obligations giving rise to liability occurred in part in the County of
 8 San Diego, State of California.

9 FACTUAL BACKGROUND

10 *Reference Prices Are Material to Consumers*

11 17. Defendant compares the prices of its products with higher reference prices, which
 12 consumers are led to believe are the prices supposedly charged by Defendant for the same products.
 13 Defendant labels those higher comparative prices as the "Was" prices for those products or as the
 14 manufacturer's suggested retail price (MSRP). This type of comparison pricing, where the retailer
 15 contrasts its selling price for a product with a generally much higher reference price, has become
 16 increasingly common in the retail marketplace.

17 18. Retailers, like Defendant, present these reference prices (commonly referred to as
 18 "advertised reference prices" or "ARPs") to consumers with short tag-line phrases such as "former
 19 price," "was," "regular price," "list price," "MSRP," or "compare at." These marketing phrases are
 20 commonly referred to as "semantic cues."

21 19. Over 30 years of marketing research unanimously concludes that semantic cues
 22 presented with comparative reference prices are material to consumers. That is, they influence
 23 consumers' purchasing decisions.

24 20. For example, a well-respected and frequently cited study by Dhruv Grewal & Larry
 25 D. Compeau, *Comparative Price Advertising: Informative or Deceptive?*, 11 J. of Pub. Pol'y &
 26 Mktg. 52, 55 (Spring 1992), concludes that "[b]y creating an impression of savings, the presence of
 27 a higher reference price enhances [consumers'] perceived value and willingness to buy [a] product."
 28 In other words, comparative reference prices lead consumers to believe they are saving money and

1 increase their willingness to buy products.

2 21. Numerous other consumer and marketing research studies arrive at similar
3 conclusions. For example, Compeau & Grewal, in *Comparative Price Advertising: Believe It Or*
4 *Not*, J. of Consumer Affairs, Vol. 36, No. 2, at 287 (Winter 2002), conclude that “decades of research
5 support the conclusion that advertised reference prices do indeed enhance consumers’ perceptions
6 of the value of the deal.” They also conclude that “[c]onsumers are influenced by comparison prices
7 even when the stated reference prices are implausibly high.” *Id.*

8 22. Joan Lindsey-Mullikin & Ross D. Petty, *Marketing Tactics Discouraging Price*
9 *Search: Deception and Competition*, 64 J. of Bus. Research 67 (January 2011), conclude that
10 “[r]eference price ads strongly influence consumer perceptions of value... Consumers often make
11 purchases not based on price but because a retailer assures them that a deal is a good bargain. This
12 occurs when ... the retailer highlights the relative savings compared with the prices of competitors
13 ... [T]hese bargain assurances (BAs) change consumers’ purchasing behavior and may deceive
14 consumers.”

15 23. Praveen K. Kopalle & Joan Lindsey-Mullikin, *The Impact of External Reference*
16 *Price On Consumer Price Expectations*, 79 J. of Retailing 225 (2003), similarly conclude that
17 “research has shown that retailer-supplied reference prices clearly enhance buyers’ perceptions of
18 value” and “have a significant impact on consumer purchasing decisions.”

19 24. The results of a study by Dr. Jerry B. Gotlieb & Dr. Cyndy Thomas Fitzgerald, *An*
20 *Investigation Into the Effects of Advertised Reference Prices On the Price Consumers Are Willing*
21 *To Pay For the Product*, 6 J. of App’d Bus. Res. 1 (1990), conclude that “reference prices are
22 important cues consumers use when making the decision concerning how much they are willing to
23 pay for the product.” This study further concludes that “consumers are likely to be misled into a
24 willingness to pay a higher price for a product simply because the product has a higher reference
25 price.”

26 25. The indisputable conclusion of decades of scholarly research concerning
27 comparative reference prices, such as the “Was” reference prices used by Defendant, is that they
28 matter—they are material to consumers.

Defendant Uses Inflated "Was" Prices as Reference Prices.

26. Defendant has a policy and practice of advertising merchandise for sale by representing the former price with the word "Was" immediately adjacent to the "Sale" price even though Defendant did not sell the product at the "Was" price within the three months preceding the publication and dissemination of the advertised former prices in the locality wherein the advertisements are published.

27. Through these advertisements Defendant conveys, and intends to convey, to consumers that they are saving the difference between the "Was" price and the "Sale" price. Indeed Defendant often makes this conclusion explicit by including the words "You Save: X" in bold letters underneath the word "Sale." For example, Defendant advertises CCM QuickLite QLT 230 shin guards sold on Defendant's website www.icewarehouse.com. The product is advertised as follows:

Was: \$69.99
SALE: \$34.97
You Save: \$35.02

28. The "Was" prices, however, do not reflect the prevailing retail prices at which Defendant actually sell the products to customers but are rather inflated prices created or used by Defendant that falsely represent the size of the discount customers stand to receive by purchasing Defendant's merchandise.

29. The prevailing retail prices for products customers purchased are materially lower than the "Was" prices advertised by Defendant; indeed the prevailing retail prices are often or always the "Sale" price at which the products are advertised. For example, Defendant did not sell the shin guards identified for \$69.99 for a reasonably substantial period of time in California prior to the product's being offered for sale at the discounted price of \$34.97.

30. Moreover, Defendant advertises some of its products by comparing the "Sale" price with the manufacturer's suggested retail price (MSRP) instead of the "Was" price. The use of MSRP in Defendant's comparative pricing of certain products further leads reasonable consumers to conclude that the "Was" price represents Defendant's former price for the product.

31. The use of such language signals to consumers like Plaintiff that Defendant previously charged the "Was" amount for the product. The Federal Trade Commission (FTC) is in

1 accord. In its Guide against Deceptive Pricing, 16 C.F.R. § 233, the FTC advises that former price
 2 comparisons indicate that the retailer formerly offered the good at the listed price and gives as an
 3 example "Were \$10, Now Only \$7.50!" 16 C.F.R. § 233.1(b)-(c). *See also* 4 C.C.R. § 1301 (stating
 4 that "was" indicates a former price for the product).

5 32. Defendant's practice violates 16 C.F.R. § 233.1, which specifically prohibits the
 6 advertising of false, "phantom" price reductions and discounts off inflated, fictitious "regular" prices
 7 that never actually existed. *See* 16 C.F.R. § 233.1., stating:

8 § 233.1 Former price comparisons.

9 (a) One of the most commonly used forms of bargain advertising is to offer a
 10 reduction from the advertiser's own former price for an article. If the former
 11 price is the actual, bona fide price at which the article was offered to the public
 12 on a regular basis for a reasonably substantial period of time, it provides a
 13 legitimate basis for the advertising of a price comparison. Where the former
 14 price is genuine, the bargain being advertised is a true one. If, on the other
 15 hand, the former price being advertised is not bona fide but fictitious—for
 16 example, where an artificial, inflated price was established for the purpose
 17 of enabling the subsequent offer of a large reduction—the "bargain" being
 18 advertised is a false one; the purchaser is not receiving the unusual value
 19 he expects. In such a case, the "reduced" price is, in reality, probably just
 20 the seller's regular price.

21 (b) A former price is not necessarily fictitious merely because no sales at the
 22 advertised price were made. The advertiser should be especially careful,
 23 however, in such a case, that the price is one at which the product was
 24 openly and actively offered for sale, for a reasonably substantial period of
 25 time, in the recent, regular course of his business, honestly and in good
 26 faith—and, of course, not for the purpose of establishing a fictitious higher
 27 price on which a deceptive comparison might be based. And the advertiser
 28 should scrupulously avoid any implication that a former price is a selling,
 29 not an asking price (for example, by use of such language as, "Formerly sold
 30 at \$ ____"), unless substantial sales at that price were actually made.

31 * * *

32 (d) Other illustrations of fictitious price comparisons could be given. An
 33 advertiser might use a price at which he never offered the article at all; he might
 34 feature a price which was not used in the regular course of business, or which
 35 was not used in the recent past but at some remote period in the past, without
 36 making disclosure of that fact; he might use a price that was not openly offered
 37 to the public, or that was not maintained for a reasonable length of time, but
 38 was immediately reduced.

(e) If the former price is set forth in the advertisement, whether accompanied or not by descriptive terminology such as "Regularly," "Usually," "Formerly," etc., the advertiser should make certain that the former price is not a fictitious one. If the former price, or the amount or percentage of reduction, is not stated in the advertisement, as when the ad merely states, "Sale," the advertiser must take care that the amount of reduction is not so insignificant as to be meaningless. It should be sufficiently large that the consumer, if he knew what it was, would believe that a genuine bargain or saving was being offered. An advertiser who claims that an item has been "Reduced to \$9.99," when the former price was \$10, is misleading the consumer, who will understand the claim to mean that a much greater, and not merely nominal, reduction was being offered." (Emphasis added.)

33. Upon information and belief, the purported "original" prices of the items on Defendants' websites are "not bona fide but fictitious" under 16 C.F.R. § 233.1 because the items were never sold or offered for sale at those prices.

34. Consequently, the purported "reduced" prices are "in reality, ... [Defendant's] regular price[s]" and "the 'bargain[s]' being advertised" by Defendant are "false." 16 C.F.R. § 233.1.

Defendant's "Was" Reference Pricing Deceived Plaintiff and Other Customers.

35. What happened to Plaintiff helps illustrate Defendant's unlawful practices described herein.

36. On October 11, 2016, Plaintiff purchased merchandise from <http://www.tennis-warehouse.com/>. Specifically, Plaintiff purchased a Babolat Pure Control 95 tennis racquet. The racquet was listed as "Sale: \$129.00 Was: \$179.00." The word "Sale" and the \$129.00 price were highlighted in bright red text; there also was a bright red flag at the upper right of the advertisement for the racquet proclaiming "Sale" in white text.

37. Plaintiff understood this advertisement to mean that Defendant had sold the racquet at the "Was" price in California for a reasonably substantial period of time prior to the date of purchase and that he was saving \$50 on Defendant's former price for the racquet. In reliance on the purported discount of \$50 from Defendant's purported former price, Plaintiff purchased the racquet.

38. Upon information and belief, the purported discount was false because Defendant had not sold the racquet or even offered it for sale for \$179 for a reasonably substantial period of time in California prior to the date of purchase. For at least a year if not longer Defendant did not sell or offer the racquet for sale for \$179.

1 39. Indeed, upon information and belief, \$179 did not reflect even the prevailing price
2 for the Babolat Pure Control 95 tennis racquet because it was not the price at which other retailers
3 sold the same product for a reasonably substantial period of time prior to the date of purchase. Upon
4 information and belief, Defendant's competitors, Tennis Express and Midwest Sports, sold and
5 continue to sell the same racquet at the exact same price as Defendant. In other words, the prevailing
6 prices for the racquet that Plaintiff purchased and other products that Defendant advertised as being
7 on sale are substantially less than the advertised "Was" price.

8 40. Moreover, the product purchased by Plaintiff, like other products offered by
9 Defendant at the "Was" price, was perpetually on "sale"; that is, the "sales" prices for these items
10 never end but rather continue on a daily basis and are available anytime a customer visits
11 Defendant's websites. Indeed the racquet Plaintiff purchased never ceased being on "sale" for \$129
12 since Plaintiff made his purchase.

13 41. In sum, the racquet that Plaintiff purchased was not actually on sale or discounted at
14 all when Plaintiff purchased it, as represented by Defendant, and it certainly was not discounted to
15 the extent claimed by Defendant; moreover, the price that Plaintiff paid for the racquet was not the
16 sale or discounted price at all, as represented by Defendant, but rather the everyday, regular price
17 for the item.

18 42. Defendant's misrepresentation about the purported discount price of the racquet,
19 along with other items advertised with false "Was" reference prices, was calculated and intended to,
20 and did in fact, induce Plaintiff's purchase thereof.

21 43. Defendant's advertising misled Plaintiff to believe that he was receiving substantial
22 savings on the purchase of the racquet compared with Defendant's former price for the same
23 product, but this was not the case.

24 44. These unlawful practices go well beyond the racquet purchased by Plaintiff and are
25 applied by Defendant to the vast majority, if not all, of the items so advertised on Defendant's
26 websites.

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CLASS ALLEGATIONS

45. Plaintiff brings this action as a class action pursuant to California Code of Civil Procedure § 382 on behalf of the following class:

All persons who (1) purchased merchandise from Defendant that was advertised in relation to a purported former price introduced with the word "Was" proximate to the "Sale" price of the item, and (2) who was a California resident at the time of the purchase, and (3) made his or her purchase from four years prior to the filing of this lawsuit to the present.

46. Members of the class, as described above, will be referred to as "class members." Excluded from the class are: (1) Defendant, any entity or division in which either Defendant has a controlling interest, and their legal representatives, officers, directors, assigns, and successors, (2) the judge to whom this case is assigned and the judge's staff and members of their immediate families, and (3) Plaintiff's counsel, its staff, and members of their immediate families. Plaintiff reserves the right to amend the above class and to add subclasses as appropriate based on investigation, discovery, and the specific theories of liability.

47. This action has been brought and may properly be maintained as a class action under California Code of Civil Procedure § 382 because there is a well-defined community of interest in the litigation and the class is easily ascertainable.

A. Numerosity

48. Although the precise number of class members has not been determined at this time, Plaintiff estimates that the class consists of more than one hundred members and that the identity of such persons is readily ascertainable by inspection of Defendant's sales records. Therefore it is reasonable that the class members are so numerous that joinder is impracticable, and the disposition of their claims in a class action will provide substantial benefits to the parties and the Court.

B. Common Questions Predominate

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

- a. Whether Defendant violated the FAL by falsely representing price reductions from prices at which merchandise never sold or did not sell in the recent past, thereby providing no discount or bargain to the consumer from a former price;
- b. Whether Defendant violated the UCL's fraudulent prong because consumers are misled into believing that they are receiving a discount from a higher retail price they would normally pay if the item were not on sale, when in fact the consumer is simply paying the purported former price because the item was not previously sold for the higher amount or was not previously sold for the advertised amount in the recent past within California;
- c. Whether Defendant violated the UCL's unfair prong because consumers are not receiving the price bargain that they are promised in the advertising in that the consumer is not paying a "sale" price but instead is paying the regular price because the item was not previously sold at a higher price or was not previously sold for the advertised amount in the recent past within California;
- d. Whether Defendant violated the UCL's unlawful prong because its advertising practices constitute false advertising under the FAL and constitute violations of sections 1770(a)(5), (a)(9), (a)(13), and (a)(16) of the CLRA;
- e. Whether Defendant violated section 1770(a)(5) of the CLRA by representing that the items on Defendant's websites have characteristics that they do not have (i.e., that the items are being offered for sale at a discounted price when they are not);
- f. Whether Defendant violated section 1770(a)(9) of the CLRA by advertising goods with the intent not to sell them as advertised when Defendant offered a discount or sales price on its merchandise when the price was not in fact a discount or sales price;
- g. Whether Defendant violated section 1770(a)(13) of the CLRA by advertising prices as discounts from former prices at which the merchandise was never sold or was not previously sold for the advertised amount in the recent past within California;

- 1 h. Whether Defendant violated section 1770(a)(16) of the CLRA by representing that
- 2 the items on Defendant's websites have been supplied in accordance with previous
- 3 representations (i.e., they were sold for the reference prices) when they were not;
- 4 i. Whether Defendant breached its contracts with Plaintiff and putative class
- 5 members by failing to provide the represented discount;
- 6 j. Whether Defendant's advertised discounts on merchandise constituted warranties
- 7 that Defendant breached by failing to sell the merchandise at a discounted price;
- 8 and
- 9 k. Whether Defendant's conduct in falsely advertising merchandise as discounted
- 10 from prices at which the merchandise never sold, thereby providing no discount or
- 11 bargain to the consumer from a former price, constitutes unjust enrichment.

12 **C. Typicality**

13 50. Plaintiff's claims are typical of the claims of the putative class members because

14 Plaintiff purchased an item from Defendant's website advertised to be on sale with reference to a

15 former price that was not, however, a price at which the product had been sold in the locality within

16 the three months preceding his purchase. In this way, Plaintiff and each class member sustained

17 similar injuries arising out of Defendant's conduct in violation of law. The injuries of each class

18 member were caused directly by Defendant's wrongful conduct. In addition, the factual

19 underpinning of Defendant's misconduct is common to all putative class members and represents a

20 common thread of misconduct resulting in injury to all class members. Plaintiff's claims arise from

21 the same practices and course of conduct that give rise to the claims of the class members and are

22 based on the same legal theories.

23 **D. Adequacy**

24 51. Plaintiff will fairly and adequately represent and protect the interests of the class.

25 Counsel who represent Plaintiff and putative class members are experienced and competent in

26 litigating class actions.

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E. Superiority of Class Action

52. A class action is superior to other available means for the fair and efficient adjudication of this controversy. Individual joinder of putative class members is not practicable, and questions of law and fact common to putative class members predominate over any questions affecting only individual putative class members. Each putative class member has been damaged and is entitled to recovery as a result of the violations alleged herein. Moreover, because the damages suffered by individual members of the class may be relatively small, the expense and burden of individual litigation would make it difficult or impossible for individual members of the class to redress the wrongs done to them, while an important public interest will be served by addressing the matter as a class action. Class action treatment will allow those persons similarly situated to litigate their claims in the manner that is most efficient and economical for the parties and the judicial system. Plaintiff is unaware of any difficulties in managing this case that should preclude class action.

FIRST CAUSE OF ACTION

**VIOLATION OF CALIFORNIA'S UNFAIR COMPETITION LAW,
BUS. & PROF. CODE § 17200, *et seq.* (THE "UCL")**

53. Plaintiff hereby incorporates by reference the allegations contained in this Complaint.

54. California's Unfair Competition Law ("UCL"), California Business & Professions Code section 17200 *et seq.*, protects both consumers and competitors by promoting fair competition in commercial markets for goods and services.

55. The UCL prohibits any unlawful, unfair or fraudulent business act or practice. The UCL defines unfair business competition to include any "unlawful, unfair or fraudulent" act or practice, as well as an "unfair, deceptive, untrue or misleading" advertising. Cal Bus. & Prof Code § 17200. A business practice need only meet one of the three criteria to be considered unfair competition.

56. A business act or practice is "unfair" under the Unfair Competition Law if the reasons, justifications and motives of the alleged wrongdoer are outweighed by the gravity of the

1 harm to the alleged victims.

2 57. Defendant violates the unfair prong of the UCL by falsely representing that
3 consumers are receiving a price discount from a referenced former price for its merchandise when,
4 as alleged above, Defendant actually has inflated the products' purported "former" prices, making
5 the promised discount false, misleading, and deceptive.

6 58. These acts and practices are unfair because they are likely to cause consumers to
7 falsely believe that Defendant is offering value, discounts or bargains from the prevailing market
8 value or worth of the products sold that do not in fact exist. As a result, purchasers, including
9 Plaintiff, have reasonably perceived that they are receiving valuable price reductions on purchases.
10 This perception has induced reasonable purchasers, including Plaintiff, to buy such products from
11 Defendant and to refrain from shopping for the same or similar products from Defendant's
12 competitors, and has deprived them of the full promised discount value.

13 59. The gravity of the harm to members of the putative class resulting from these unfair
14 acts and practices outweighs any conceivable reasons, justifications and/or motives of Defendant in
15 such deceptive acts and practices. Through its unfair acts and practices, Defendant improperly
16 obtained, and continues to obtain, money from Plaintiff and the putative class. Plaintiff requests
17 that Defendant restore this money to Plaintiff and all class members and cease violating the UCL.
18 Without such relief, Plaintiff and the putative class will be irreparably harmed.

19 60. A business act or practice is "fraudulent" under the UCL if it is likely to deceive
20 members of the consuming public.

21 61. Defendant's advertising of false former prices is "fraudulent" within the meaning of
22 the UCL because it has deceived Plaintiff and the general public into believing that Defendant is
23 offering value, discounts, or bargains from the prevailing market value or worth of the products sold
24 that do not in fact exist. As a result, purchasers, including Plaintiff, have reasonably perceived that
25 they are receiving valuable price reductions on purchases.

26 62. In deciding to purchase merchandise from Defendant, Plaintiff relied on Defendant's
27 misleading and deceptive representations regarding its purported former prices. These
28 representations played a substantial role in Plaintiff's decision to purchase a tennis racquet from

1 Defendant, and Plaintiff would not have made these purchases from Defendant in the absence of
2 Defendant's misrepresentations.

3 63. As a result of the foregoing conduct, Defendant has been, and will continue to be,
4 unjustly enriched at the expense of Plaintiff and the putative class. Defendant has been unjustly
5 enriched by obtaining revenues and profits that it would not otherwise have obtained absent its false,
6 misleading, and deceptive conduct.

7 64. Through its fraudulent acts and practices, Defendant has improperly obtained money
8 from Plaintiff and the putative class. Plaintiff requests that this Court order Defendant to restore
9 this money to Plaintiff and the putative class and to enjoin Defendant from continuing to violate the
10 UCL.

11 65. An unlawful business practice is anything that can properly be called a business
12 practice and that at the same time is forbidden by law. A business act or practice is "unlawful"
13 under the UCL if it violates any other law.

14 66. The Federal Trade Commission (FTC) describes false former pricing schemes, such
15 as those practiced by Defendant, as deceptive: "(a) One of the most commonly used forms of
16 bargain advertising is to offer a reduction from the advertiser's own former price for an article. If
17 the former price is the actual, bona fide price at which the article was offered to the public on a
18 regular basis for a reasonably substantial period of time; it provides a legitimate basis for the
19 advertising of a price comparison. Where the former price is genuine, the bargain being advertised
20 is a true one. If, on the other hand, the former price being advertised is not bona fide but fictitious—
21 for example, where an artificial price, inflated price was established for the purpose of enabling the
22 subsequent offer of a large reduction—the 'bargain' being advertised is a false one; the purchaser is
23 not receiving the unusual value he expects." 16 CFR § 233.1.

24 67. California law also prohibits Defendant's advertising practices: "For the purpose of
25 this article, the worth or value of anything advertised is the prevailing market price, wholesale if the
26 offer is at wholesale, retail if the offer is at retail, at the time of publication of such advertisement
27 in the locality wherein the advertisement is published. No price shall be advertised as a former price
28 of any advertised thing, unless the alleged former price was the prevailing market price as above

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

4 68. The CLRA prohibits a business from advertising goods as having characteristics that
 5 they do not have (Cal. Civ. Code § 1770(a)(5)), from "[a]dvertising goods or services with intent
 6 not to sell them as advertised," (Cal. Civil Code § 1770(a)(9)), from "[m]aking false or misleading
 7 statements of fact concerning reasons for, existence of, or amounts of price reductions" (Cal. Civ.
 8 Code § 1770(a)(13), and from representing that items have been supplied in accordance with
 9 previous representations when they have not (Cal. Civ. Code § 1770(a)(16)).

10 69. Defendant's advertising of its merchandise as a discount from a regular retail price,
 11 either as a monetary amount or as a percentage, violates FTC regulations (16 C.F.R. § 233), Cal.
 12 Bus. & Prof. Code § 17501, and Cal. Civ. Code § 1770 (a)(5), (a)(9), (a)(13), and (a)(16) by
 13 advertising false discounts from purported former prices that were, in fact, not the prevailing market
 14 prices within three months next preceding the publication and dissemination of advertisements
 15 containing the false former prices.

16 70. As a result, Defendant has been, and will continue to be, unjustly enriched at the
 17 expense of Plaintiff and members of the proposed Class. Defendant has been unjustly enriched by
 18 obtaining revenues and profits that it would not otherwise have obtained as a result of its false,
 19 deceptive, and misleading conduct.

20 71. Pursuant to California Business & Professions Code Section 17203, Plaintiff seeks
 21 equitable relief, including money unlawfully obtained from Plaintiff and the putative class and an
 22 order enjoining Defendant from continuing to engage in the unfair and unlawful conduct described
 23 above.

24 SECOND CAUSE OF ACTION

25 VIOLATION OF CALIFORNIA'S FALSE ADVERTISING LAW,

26 BUS. & PROF. CODE § 17500, et seq. (THE "FAL")

27 72. Plaintiff hereby incorporates by reference the allegations contained in this
 28 Complaint.

1 73. The California False Advertising Law, prohibits unfair, deceptive, untrue, or
2 misleading advertising, including but not limited to false statements as to worth, value, and former
3 price.

4 74. Defendant's advertising of purported former prices that are significantly inflated
5 from the actual retail price for the particular merchandise is unfair, deceptive, and misleading to
6 consumers, who think they are getting a bargain on a higher quality and more valuable item than
7 they actually are.

8 75. Through its unfair, deceptive, and misleading acts and practices, Defendant has
9 improperly obtained money from Plaintiff and the putative class. Plaintiff respectfully requests that
10 the Court restore these funds to Plaintiff and the putative class and enjoin Defendant's continuing
11 violations of the FAL to prevent further irreparable harm to consumers.

12 THIRD CAUSE OF ACTION

13 VIOLATION OF CALIFORNIA'S CONSUMERS LEGAL REMEDIES ACT,

14 CAL. CIVIL CODE SECTION 1750, *et seq.* (THE "CLRA")

15 76. Plaintiff hereby incorporates by reference the allegations contained in this
16 Complaint.

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

19 78. Plaintiff and each member of the putative class are "consumers" within the meaning
20 of Civil Code § 1761(d).

21 79. Defendant's sale of merchandise through its website constitutes "transactions"
22 within the meaning of Civil Code § 1761(e). The merchandise purchased by Plaintiff and the
23 putative class are "goods" within the meaning of Civil Code § 1761(a).

24 80. Defendant has engaged in unfair methods of competition and unfair and/or deceptive
25 acts or practices against Plaintiff and the putative class in violation of the CLRA by falsely
26 representing that consumers were receiving price discounts from higher former prices of its
27 merchandise, when in fact the merchandise was never sold at the purported higher price or has not
28 sold at such prices in the recent past, making the supposed discount a false bargain in violation of

1 Cal. Civ. Code §§ 1770(a)(5) (prohibiting advertising goods as having characteristics that they do
 2 not have), 1770(a)(9) (prohibiting “[a]dvertising goods or services with intent not to sell them as
 3 advertised”), and 1770(a)(13) (prohibiting “[m]aking false or misleading statements of fact
 4 concerning reasons for, existence of, or amounts of price reductions”); and 1770(a)(16)(prohibiting
 5 representing that the items have been supplied in accordance with previous representations when
 6 they have not).

7 81. As a result of these acts and practices, Plaintiff and the putative class were damaged
 8 in that Defendant’s unlawful and misleading acts and practices affected the decisions of Plaintiff
 9 and the putative class to purchase products from Defendant’s websites. In the absence of
 10 Defendant’s false promises of a discount, Plaintiff and the putative class would not have purchased
 11 merchandise from Defendant.

12 82. Alternatively, had Defendant’s “Was” price actually been the true former highest
 13 price within a reasonably substantial period of time proximate to the date of purchase, and had
 14 Defendant sold the product at a price reflecting the advertised percentage discount¹ between the
 15 “Was” price and the “Sale” price as shown on the websites, Plaintiff and the putative class would
 16 have obtained a greater benefit than the one actually received.

17 83. Pursuant to California Civil Code § 1780(a)(2), Plaintiff, on behalf of himself and the
 18 putative class, requests that this Court award damages to remedy Defendant’s misconduct, punish
 19 Defendant’s wrongdoing, and to enjoin Defendant from continuing to engage in the unlawful and
 20 deceptive methods, acts and practices alleged above.

21 84. Pursuant to Civil Code § 1782, on January 17, 2017, Plaintiff sent Defendant a letter,
 22 by certified mail, in which he outlined the foregoing violations of the CLRA and requested that
 23 Defendant remedy these violations as to Plaintiff and the class. If Defendant does not agree to
 24 correct, repair, replace, or otherwise rectify the violations alleged herein within thirty (30) calendar
 25 days after Defendant’s receipt of Plaintiff’s letter, Plaintiff will file an amended complaint pursuant

26 ¹ The difference between the “Was” price and the “Sale” price reflects a percentage discount on the former price of
 27 the product. This is a fundamental attribute of all discounts. In order for a discount to exist, there must be an original
 28 higher price. The discounted price, then, is some fraction less than one of the original higher price. Without this, the
 offer of a discount would be meaningless to the consumer. The consumer, when evaluating a discount, compares the
 magnitude of the new price with the magnitude of the old higher price, which is the mathematical equivalent of
 finding the percentage discount that is reflected by the new price as compared with the old higher price.

1 to Civil Code § 1782(d) seeking damages, including actual, statutory, and punitive damages.

2 **FOURTH CAUSE OF ACTION**

3 **BREACH OF CONTRACT**

4 85. Plaintiff hereby incorporates by reference the allegations contained in this
5 Complaint.

6 86. Plaintiff and the class members entered into contracts with Defendant.

7 87. The contracts provided that Plaintiff and the class members would pay Defendant for
8 its products.

9 88. The contracts further provided that Defendant would provide Plaintiff and the class
10 members a specific discount on the price of their purchases. This specified discount was a specific
11 and material term of the contract.

12 89. Plaintiff and the class members paid Defendant for the products they purchased and
13 satisfied all other conditions of the contracts.

14 90. Defendant breached the contracts with Plaintiff and the class members by failing to
15 comply with the material term of providing the promised discount, and instead charged Plaintiff and
16 the class members the full price of the products they purchased.

17 91. As a direct and proximate result of Defendant's breach, Plaintiff and the class
18 members have been injured and have suffered actual damages in an amount to be established at trial.

19 **FIFTH CAUSE OF ACTION**

20 **BREACH OF EXPRESS WARRANTY**

21 92. Plaintiff hereby incorporates by reference the allegations contained in this
22 Complaint.

23 93. Plaintiff and the class members formed contracts with Defendant at the time they
24 purchased items from Defendant's websites. The terms of such contracts included the promises and
25 affirmations of fact made by Defendant through its marketing campaign, as alleged herein,
26 including, but not limited to, representing that the items for sale on Defendant's websites were being
27 discounted.

28 ///

1 94. These advertisements constitute express warranties, became part of the basis of the
2 bargain, and are part of the contracts between Defendant and Plaintiff and the class members.

3 95. The affirmations of fact made by Defendant were made to induce Plaintiff and the
4 class members to purchase items from Defendant's websites.

5 96. Defendant intended that Plaintiff and the class members should rely on those
6 representations in making their purchases, and Plaintiff and the class members did so.

7 97. Defendant has breached its express warranties because, as alleged above, the
8 products purchased by Plaintiff and members of the putative class were not discounted by the
9 advertised amounts because the reference prices were inflated.

10 98. As a direct and proximate result of Defendant's breach, Plaintiff and the class
11 members have been injured and have suffered actual damages in an amount to be established at trial.

12 SIXTH CAUSE OF ACTION

13 UNJUST ENRICHMENT

14 99. Plaintiff hereby incorporates by reference the allegations contained in this
15 Complaint.

16 100. An individual is required to make restitution if he or she is unjustly enriched at the
17 expense of another.

18 101. A person is enriched if the person receives a benefit at another's expense.

19 102. The person receiving the benefit is required to make restitution where the
20 circumstances are such that, as between the two individuals, it is unjust for the person to retain it.

21 103. Defendant has been unjustly enriched at the expense of Plaintiff and the putative
22 class by receiving money from purchases of merchandise that Plaintiff and the class made from
23 Defendant that they otherwise would not have made but for Defendant's false promises of discounts.

24 104. Defendant received a benefit, the profits on the prices paid for merchandise, at the
25 expense of Plaintiff and the class because Defendant sold products that it falsely promised were
26 discounted from higher former prices, when in fact there was no higher price from which the
27 products were discounted, and thus consumers unwittingly paid the full, former, regular, or original
28 price and did not receive the promised bargain.

105. It is unjust for Defendant to retain the money it received from Plaintiff and the class because Defendant gained that money by deceiving Plaintiff and the class into believing they were receiving a discount on merchandise they bought when in fact they did not receive any discount from the full, former, regular, or original price because the products were never sold at a price higher than what the consumer paid or were not sold for such prices for a reasonably substantial period of time within the recent past.

106. Plaintiff and the putative class are therefore entitled to restitution of the funds they paid to Defendant for their purchases and which Defendant has unjustly retained or for such amounts as reflect the true value of the discount as advertised of the purchased products.

PRAYER FOR RELIEF

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

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

B. For a declaration that Defendant's practices violate the UCL, FAL, and CLRA, and constitute breach of contract, breach of express warranty, and unjust enrichment;

C. For an award of damages according to proof against Defendant;

D. For an award of appropriate equitable relief, including but not limited to restitution of moneys paid to Defendant and an injunction forbidding Defendant from engaging in further unlawful conduct in violation of the UCL, FAL, and CLRA;

E. For an order awarding reasonable attorneys' fees and the costs of suit herein, including an award of attorneys' fees and costs pursuant to California Code of Civil Procedure § 1021.5 and California Civil Code § 1780(e);

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

G. For such other and further relief as may be deemed necessary or appropriate.

JURY DEMAND

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

DATED: January 17, 2017

COUNSELONE, PC

By


Anthony J. Orshansky
Justin Kashadoorian

*Attorneys for Plaintiff Matt McDuffee and
the Putative Class*

**DECLARATION OF PLAINTIFF MATT MCDUFFEE
PURSUANT TO CAL. CIVIL CODE § 1780(d)**

I, Matt McDuffee, declare:

1. I am over 18 years of age and a named plaintiff in this action. I have personal knowledge of the facts herein, and if called upon to testify to the information contained in this Declaration, I could and would competently do so.

2. During the events giving rise to this lawsuit I resided in San Diego County, and it was in San Diego County that I made my online purchase of products from Defendant's website. Defendant shipped the products I purchased to my home in San Diego County.

3. The County of San Diego is a proper place for trial of this action because Defendant does business in this county and the transaction or substantial portion thereof giving rise to this action occurred in San Diego County.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on January 17, 2017.

By


Matt McDuffee