

1 LAW OFFICES OF ZEV B. ZYSMAN
2 A Professional Corporation
3 Zev B. Zysman (176805)
4 zev@zysmanlawca.com
5 15760 Ventura Boulevard, 16th Floor
6 Encino, CA 91436
7 Tel.: 818-783-8836
8 Fax: 818-783-9985

9 Attorneys for Plaintiff and
10 the Proposed Class

VENTURA
SUPERIOR COURT
FILED

MAY 17 2017

MICHAEL O. PLANET
Executive Officer and Clerk
BY: _____ Deputy
JILL KAMINSKI

11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF VENTURA**

LYNETTE FLIEGELMAN, on behalf of
herself and all others similarly situated,

Plaintiffs

vs.

THE TALBOTS, INC. and DOES 1 through
100, inclusive,

Defendants.

CASE NO. 56-2017-00496659-CU-BT-VTA

CLASS ACTION COMPLAINT

1. Unfair Business Practices in Violation of California Business & Professions Code Sections 17200, *et seq.*
2. Fraudulent Business Practices in Violation of California Business & Professions Code Sections 17200, *et seq.*
3. Unlawful Business Practices in Violation of California Business & Professions Code Sections 17200, *et seq.*
4. False Advertising in Violation of California Business & Professions Code Sections 17500, *et seq.*
5. Violations of California Consumer Legal Remedies Act

CLASS ACTION COMPLAINT

1 Plaintiff Lynette Fliegelman ("Plaintiff"), brings this action against Defendant The
2 Talbots, Inc. ("Defendant" or "Talbots") and DOES 1-100 on behalf of herself, and all others
3 similarly situated, upon information and belief, except as to her own actions; the investigation of
4 her counsel, and the facts that are a matter of public record, as follows:

5 INTRODUCTION

6
7 1. This class action arises out of Defendant's unlawful, unfair, and fraudulent business
8 practice commonly referred to as "false reference pricing." "False reference pricing" is the act of
9 misrepresenting the original or regular price of some good that is purportedly offered at a "sale
10 price," a business practice that Defendant engages in to increase sales. As alleged herein, during
11 at least the past four years, Defendant has misled consumers by advertising the false former or
12 purported "regular" prices which were fabricated, and corresponding phantom "savings" on
13 women's apparel, shoes, accessories and other items sold in its Talbots "Outlet" stores in
14 California.

15 2. California law prohibits the discounting of retail merchandise from its original
16 price for more than ninety (90) days. See California Business & Professions Code §17501.
17 Federal regulations also mandate that a retailer offer only genuine discounts from regular retail
18 prices; not false discounts from inflated original prices. See 16 C.F.R. §233.1.

19 3. Some retailers, such as Talbots, employ false reference pricing because it misleads
20 consumers into believing that they are "getting a good deal," thereby increasing sales. The United
21 States Court of Appeals for the Ninth Circuit succinctly explained: "Most consumers have, at
22 some point, purchased merchandise that was marketed as being 'on sale' because the proffered
23 discount seemed too good to pass up. Retailers, well aware of consumers' susceptibility to a
24 bargain, therefore have an incentive to lie to their customers by falsely claiming that their products
25 have previously sold at a far higher 'original' price in order to induce customers to purchase
26 merchandise at a purportedly marked-down 'sale' price. Because such practices are misleading –
27 and effective – the California Legislature has prohibited them." *Hinojos v. Kohl's Corp.*, 718 F.3d
28

1 1098, 1101 (9th Cir. 2013).

2 4. The intentional use of false and fraudulent reference pricing tactics is increasingly
 3 deceiving consumers in the market. To illustrate, on January 30, 2014, four members of Congress
 4 demanded a Federal Trade Commission ("FTC") investigation of misleading marketing practices
 5 by outlet stores across the United States. The four Members of Congress described a pricing
 6 scheme similar to the one implemented at Talbots Outlet stores and stated: "[h]owever, we are
 7 concerned that outlet store consumers are being misled into believing they are purchasing products
 8 originally intended for sale at the regular retail store. Many outlets may also be engaged in
 9 deceptive reference pricing. It is a common practice at outlet stores to advertise a retail price
 10 alongside the outlet store price – even on made-for-outlet merchandise that does not sell at regular
 11 retail locations. Since the item was never sold in the regular retail store or at the retail price, the
 12 retail price is impossible to substantiate. We believe this practice may be a violation of the FTC's
 13 Guides Against Deceptive Pricing (16 CFR 233)." See
 14 www.whitehouse.senate.gov/news/release/sens-and-rep-to-ftc-outlet-stores-may-be-misleading-
 15 consumers.

16 5. During the Class Period (defined below), Defendant continuously advertised false
 17 price discounts for merchandise sold throughout its Outlet stores in California. Defendant would
 18 offer substantial discounts from the "regular" prices listed on the original price tag. Specifically,
 19 the words "Special Value" are set forth on every price tag in the Outlet stores to indicate the
 20 "regular" price at which merchandise was purportedly offered for sale. The represented, "Special
 21 Value" prices on the price tags were also false "regular" prices. In fact, based on Plaintiff's
 22 investigation, the "Special Value" prices were artificially inflated and were never the true regular
 23 prices for merchandise sold at Talbots Outlet stores. In addition, the represented "Special Value"
 24 prices were not the prevailing market retail prices within three months next immediately preceding
 25 the publication and dissemination of the advertised former prices, as required by California law.

26 6. Defendant conveys its deceptive pricing scheme through in store signage offering
 27 steep discounts from the "Special Value" regular prices listed on the products' price tags in the
 28

1 Outlet stores. The "Special Value" regular prices listed and advertised on Defendant's price tags
2 are fake reference prices; utilized only to perpetuate Defendant's fake-discount scheme. The
3 pricing scheme is prominently displayed on virtually all items throughout the store. There are
4 typically large placard signs on top of or alongside each rack of clothing or accessories,
5 advertising a "discounted % off," or a "discounted whole-price" reduction for the item. For
6 example, a product may have a price tag with a "regular" price of \$89.50 and the related signage
7 advertising "40% Off Regular-Price Items," which is substantially less than the regular price listed
8 on the price tag. See Exhibit "A." Another example is a product having a price tag with a
9 "regular" price of \$69.50 and the related signage advertising a "sale price" of \$29.99. See Exhibit
10 "B." However, the "Special Value" regular prices listed on the price tags have never existed
11 and/or were not the prevailing market retail prices for such products within the three months next
12 immediately preceding the publication of the price tags, as required by California law. They are
13 fictional creations intentionally designed to enable Defendant's phantom markdowns.
14 Furthermore, upon check-out, Defendant provides California consumers, including Plaintiff, with
15 sales receipts continuing the misrepresentations regarding false price reductions. For example, the
16 stated *discount* from the false former "regular" price is listed for each item purchased.

17 7. Talbots knows consumers are bargain-hunters, and knows consumers are lured by
18 the prospect of a bargain at "Outlet" stores. "Outlet" stores are commonly understood by the
19 public to be selling the same merchandise that the manufacturer typically sells at its regular non-
20 outlet retail stores, but at a discount. According to Business Insider, "[t]he common assumption
21 about outlet stores is that you're getting the same goods that are in a regular store without the big
22 price tag." See <http://www.businessinsider.com/outlet-stores-arent-a-good-deal-2014-5>. However,
23 outlet stores typically sell different merchandise than their retail counterparts, without informing
24 customers that this is the situation.

25 8. In this case, Defendant offers for sale products manufactured exclusively and
26 intended solely for sale in its Outlet stores. Further exacerbating consumers' perception of deep
27 discounts is the fact that Defendant sells higher quality products at its company-operated mainline
28

1 retail stores. Defendant knows that consumers expect to receive a discount when shopping at its
2 Outlet stores, and accordingly, preys on consumer expectations by artificially marking up the
3 regular price of its products and then offering discounts off of the artificially inflated regular price
4 to induce consumers to purchase their products. The regular price exists to provide an illusory
5 discount when compared to the actual sales price offered. This tactic is called "reference pricing."
6 The regular price listed on the price tags were and are the prices chosen by Defendant to enable it
7 to engage in its phantom markdown scheme.

8 9. Defendant conveys its deceptive pricing scheme to consumers through promotional
9 materials, in-store advertising displays, and print advertisements which are uniform. Upon
10 information and belief, Defendant's false price advertising scheme has been rampant throughout
11 California as part of a massive, years-long, pervasive campaign and has been consistent across all
12 of Defendant's exclusive branded apparel and accessories sold in its Outlet stores. Indeed, most,
13 if not all products sold in Talbots Outlet stores are subject to the same fraudulent pricing scheme
14 complained of herein.

15 10. Upon information and belief, thousands of Defendant's consumers in California,
16 including Plaintiff, were victims of Defendant's deceptive, misleading, and unlawful false pricing
17 scheme. This deception will continue if Defendant is not enjoined from continuing its pricing
18 scheme.

19 11. Defendant knows or should reasonably know that its comparative price advertising
20 is false, deceptive, misleading and unlawful under California law.

21 12. Defendant has fraudulently concealed from, and intentionally failed to disclose to,
22 Plaintiff and other members of the Class, the true facts about its product prices and falsely
23 advertised price discounts from those purported "regular" prices.

24 13. At all relevant times, Defendant has been under a duty to Plaintiff and the Class to
25 disclose the truth about its former "regular" prices and false discounts.

26 14. The facts which Defendant misrepresented or failed to disclose are material facts
27 that a reasonable person would have considered material, *i.e.*, facts which would contribute to a
28

1 reasonable person's decision to purchase Defendant's merchandise. Defendant's false
2 representations of former "regular" prices and false representations of purported savings, discounts
3 and bargains are objectively material to the reasonable consumer, including Plaintiff, and therefore
4 reliance upon such representations may be presumed as a matter of law.

5 15. Plaintiff relied upon Defendant's false representations of regular prices and
6 discounts when purchasing merchandise from Talbots Outlet store. Plaintiff would not have made
7 such purchases, but for Defendant's false representations and fraudulent omissions of the regular
8 price of the items purchased, as compared with the supposedly discounted or sale price at which
9 Plaintiff purchased the items.

10 16. Plaintiff reasonably believed the truth of the represented prices attached to the price
11 tags, or in advertisements or on signage regarding, products purchased at Talbots Outlet store,
12 which expressly represented that Plaintiff was getting a substantial percentage discount or whole-
13 price reduction off the products. Plaintiff reasonably understood the price on the price tag to be a
14 valid representation of the former regular price. However, because Defendant never adopted its
15 own former regular price, its former price merely constituted a ploy to conjure the illusion of a
16 non-existent "discount" on goods that were never offered anywhere close to the higher price
17 Defendant claimed.

18 17. Plaintiff and the Class reasonably and justifiably acted and relied on the substantial
19 price differences that Defendant advertised, and made purchases believing that they were
20 receiving a substantial discount on an item of greater value than it actually was. Plaintiff and the
21 Class reasonably understood the price on the price tags to be a valid representation of a former
22 regular price. However, the price on the price tags did not represent a former price or the
23 prevailing market prices for the products. Plaintiff, like other Class members, was lured in, relied
24 on, and was damaged by these pricing schemes that Defendant carried out.

25 18. Defendant intentionally concealed and failed to disclose material facts regarding
26 the truth about its misrepresentations and false former price advertising scheme for the purpose of
27 inducing Plaintiff and Class members to purchase merchandise in its Talbots Outlet stores.
28

19. Through its false and deceptive marketing, advertising and pricing scheme, Defendant has violated, and continues to violate California law prohibiting advertising goods for sale as discounted from purported former prices which are false, and prohibiting misleading statements about the existence and amount of price reductions. Specifically, Defendant has violated, and continues to violate, California's Business & Professions Code §§ 17200, *et seq.* (the "UCL"), California's Business & Professions Code §§ 17500, *et seq.* (the "FAL"), and the California Consumers' Legal Remedies Act, California Civil Code §§ 1750, *et seq.* (the "CLRA"), and the Federal Trade Commission Act ("FTCA"), which prohibits "unfair or deceptive acts or practices in or affecting commerce" (15 U.S.C. § 45(a)(1)) and false advertisements. 15 U.S.C. § 52(a).

20. Plaintiff brings this action on behalf of herself and other similarly situated consumers who have purchased one or more items at Talbots Outlet stores in California that were deceptively represented as discounted from false former prices in order to halt the dissemination of this false, misleading, and deceptive pricing scheme, to correct the false and misleading perception it has created in the minds of consumers, and to obtain redress for those who have purchased such products. Plaintiff seeks restitution and other appropriate equitable remedies, including an injunction under the UCL and FAL; and an injunction under the CLRA.

JURISDICTION AND VENUE

21. This Court has subject matter jurisdiction over the causes of action asserted herein pursuant to California Code of Civil Procedure § 410.10 and Article VI, § 10 of the California Constitution. In the aggregate, the damages caused to the members of the Class as defined below exceed the jurisdictional minimum of this Court, but neither the Plaintiff nor any member of the Class individually has suffered damages of, at least, \$75,000.

22. This Court has personal jurisdiction over the Defendant named herein because Defendant does sufficient business in California, has sufficient minimum contacts with California and/or otherwise intentionally avails itself of the markets within California through its sales,

1 advertising and marketing to render the exercise of jurisdiction by California courts and the
 2 application of California law to the claims of the Plaintiff permissible under traditional notions of
 3 fair play and substantial justice.

4 23. Venue is proper in this Court since, as detailed below, the named Plaintiff is a
 5 resident of this County, the acts and transactions giving rise to this action occurred in this County,
 6 a substantial number of Defendant's acts occurred in this County, and Defendant received
 7 substantial compensation from sales of its products in this County by doing business here. Thus,
 8 as to the named Plaintiff and other Class members, certain obligations and liability of the
 9 Defendant arose in part in this County.

10 THE PARTIES

11 A. Plaintiff

12 24. Plaintiff Lynette Fliegelman ("Fliegelman") is a citizen and resident of Ventura
 13 County, California. It is alleged that on December 19, 2016, in reliance on Defendant's false and
 14 deceptive advertising, marketing and pricing schemes, Plaintiff purchased over \$54.00 in
 15 exclusive branded apparel at Talbots Outlet store located in Camarillo, California, and was
 16 damaged thereby.

17 B. Defendant

18 25. Defendant The Talbots, Inc. ("Talbots") is a Delaware corporation which is
 19 licensed to do, and is doing, business throughout the United States, with its principal place of
 20 business located at One Talbots Drive, Hingham, Massachusetts 02043. Defendant owns and
 21 operates Talbots Outlet stores in California, and advertises, markets, distributes, and/or sells
 22 women's apparel, shoes, accessories and other items in California and throughout the United
 23 States.

24 26. The only stores that are the subject of this Complaint are the Talbots Outlet stores
 25 located in California.
 26
 27
 28

1 C. Doe Defendants

2 27. The true names and capacities of Defendants sued in this Complaint as Does 1
3 through 100, inclusive, are currently unknown to Plaintiff, and therefore Plaintiff sues such
4 Defendants by such fictitious names. Plaintiff will amend this Complaint to reflect the true names
5 and capacities of the Defendants designated herein as Does 1 through 100, when they have been
6 ascertained, along with the appropriate charging allegations, as may be necessary.

7 28. Plaintiff is informed and believes, and on that basis alleges, that each of the
8 fictitiously named Defendants was in some manner legally responsible for the actionable and
9 unlawful actions, policies and practices as alleged herein. Plaintiff will amend this Complaint to
10 set forth the true names and capacities of said Defendants, along with the appropriate charging
11 allegations when the same have been ascertained. Each reference in this Complaint to "Talbots"
12 or "Defendant" is also a reference to all Defendants sued as Does 1 through 100.

13 D. Agency/Aiding And Abetting

14 29. Plaintiff is informed and believes, and on that basis alleges, that at all times herein
15 mentioned, Defendants, and each of them, were an agent or joint venturer of each of the other
16 Defendants, and in doing the acts alleged herein, were acting within the course and scope of such
17 agency. Each Defendant had actual and/or constructive knowledge of the acts of each of the other
18 Defendants, and ratified, approved, joined in, acquiesced and/or authorized the wrongful acts of
19 each co-defendant, and/or retained the benefits of said wrongful acts.

20 30. Plaintiff is further informed and believes, and on that basis alleges, that Defendants,
21 and each of them, aided and abetted, encouraged and rendered substantial assistance to the other
22 Defendants in breaching their obligations to Plaintiff and the Class, as alleged herein. In taking
23 action, as particularized herein, to aid and abet and substantially assist the commissions of these
24 wrongful acts and other wrongdoings complained of, each of the Defendants acted with an
25 awareness of his/her/its primary wrongdoing and realized that his/her/its conduct would
26 substantially assist the accomplishment of the wrongful conduct, wrongful goals, and wrongdoing.

1 31. Whenever reference is made in this Complaint to any act of "Talbots" or
 2 "Defendant," such shall be deemed to mean that officers, directors, agents, employees, or
 3 representatives of the Defendant named in this lawsuit committed or authorized such acts, or failed
 4 and omitted to adequately supervise or properly control or direct their employees while engaged in
 5 the management, direction, operation or control of the affairs of the Defendant and did so while
 6 acting within the scope of their employment or agency.

7
 8 **CONDUCT GIVING RISE TO THE VIOLATIONS OF THE LAW**

9 A. Plaintiff's Purchases

10 32. On December 19, 2016, Plaintiff went shopping at the Talbots Outlet store in
 11 Camarillo, California to purchase clothing and related apparel for herself. She observed an
 12 exterior window display that advertised "Up to 60% Entire Store."

13 33. Upon entering the store, Plaintiff observed prominent signage on top of or
 14 alongside each rack of clothing or accessories, advertising a "discounted % off," or a "discounted
 15 whole-price" reduction for each item offered for sale. Believing she was able to pay significantly
 16 less than what certain products were worth and normally sell for in the marketplace, Plaintiff was
 17 induced to purchase three different items, all of which were offered at prices significantly lower
 18 than their stated "regular" prices. Plaintiff purchased the items after relying on Defendant's false
 19 discounts and false "regular" former prices for such products.

20 34. Specifically, relying upon Defendant's misrepresentations and false and deceptive
 21 advertising, Plaintiff was induced to purchase the following three items: a long-sleeve crewneck
 22 tee-shirt, item number 90001632851587642117762 bearing a price tag of "\$26.00," a long-sleeve
 23 crewneck tee-shirt, item number 90001632851582042118190 bearing a price tag of "\$26.00," and
 24 a long-sleeve denim shirt, item number 90101632874340942383620 bearing a price tag of
 25 "\$74.50." See true and correct copies of price tags attached to clothing which Plaintiff purchased
 26 on December 19, 2016, attached hereto as Exhibit "C."

1 35. Plaintiff observed signage adjacent to and above these items that advertised
2 percentage discounts of "60% Off Regular-Price Items." The signs were located near the items
3 offered for sale, clearly indicating that the items were being sold at significant discounts off their
4 "regular" prices. The tee-shirts contained price tags representing them to have a regular "Special
5 Value" price of \$26.00, and the signage which represented that the tee shirts were on sale for
6 "60% Off Regular-Price," leaving a discount and savings of \$15.60, and purchase price at \$10.40.
7 The long-sleeve denim shirt contained a price tag representing it to have a regular "Special Value"
8 price of \$74.50, and the signage which represented that the denim shirt was on sale for "60% Off
9 Regular-Price," leaving a discount and savings of \$44.70, and purchase price at \$29.80.

10 36. Relying on Defendant's misrepresentations and false and deceptive advertising and
11 believing that she was receiving a significant discount by purchasing these items at 60% off the
12 "regular" price, Plaintiff decided to purchase the items and proceeded to the cash register where
13 she did in fact purchase the items. Plaintiff also believed she was purchasing merchandise that
14 was of the same like, kind and quality of that sold in the regular company-operated retail stores.
15 These purported "regular" prices and corresponding price reductions and savings were false and
16 deceptive, as the prevailing market retail price for the three shirts during the three months
17 immediately prior to Plaintiff's purchase of such items were never at the represented former
18 "regular" prices. Plaintiff would not have purchased the shirts in the absence of Defendant's
19 misrepresentations. Instead, Defendant continuously offered the subject shirts, like the majority of
20 products offered for sale at Talbots Outlet stores, for sale at discounted prices. As a result,
21 Plaintiff has been personally victimized by and suffered economic injury as a direct result of
22 Defendant's unlawful, unfair and fraudulent conduct.

23 37. Furthermore, upon check-out on December 19, 2016, Defendant provided Plaintiff
24 with a sales receipt containing the same misrepresentations regarding false price reductions off the
25 regular prices on the three shirts. The sales receipt clearly represented that Plaintiff was receiving
26 the benefit of a "60%" discount off the "Regular Price" for each item purchased and listed the
27 discount or savings amount for each item, and then the sales price after the purported discount.
28

1 See true and correct copy of Plaintiff's sales receipt, dated December 19, 2016, attached hereto as
2 Exhibit "D."

3 B. Defendant Engages In Deceptive Advertising

4 38. Subsequent to Plaintiff's purchase, an investigation conducted on behalf of Plaintiff
5 confirmed that the "regular" prices listed on the price tags for Plaintiff's purchases at Talbots
6 Outlet stores were never the prevailing market price at Talbots Outlet stores in the preceding 90
7 days before Plaintiff's purchase. Additionally, the investigation revealed that Defendant's
8 deceptive advertising practices were systematic and pervasive at Talbots Outlet stores as items
9 remain continuously discounted from their "regular" price tag price or they are not offered for sale
10 at their "regular" price tag price for any substantial period of time, and in most cases, not at all,
11 and in compliance with California law. Indeed, in most instances, *new* items appear at the Talbots
12 Outlet stores that are immediately discounted, rendering the "Special Value" regular prices
13 completely meaningless, false, and misleading. The difference between the discounted sale prices
14 and the "Special Value" regular price is a false savings percentage or whole-price reduction used
15 to lure consumers into purchasing products they believe are significantly discounted. In addition,
16 the clothing and many of the other items sold at Talbots Outlet stores are manufactured for, and
17 sold *exclusively* by, those Outlets, which means that such items were never sold – or even intended
18 to be sold – at the regular price listed on their price tags. Most, if not all, of these items were
19 never offered for sale in Talbots' non-outlet retail stores in California.

20 39. By failing to price clothing and other items at their actual regular price for a
21 substantial period of time, Defendant artificially inflated the market price or value of the clothing
22 and other items it sells, including the shirts purchased by Plaintiff. Moreover, by failing to price
23 its merchandise, including the shirts purchased by Plaintiff at their regular price for a substantial
24 period of time, and in compliance with California law, Defendant interfered with market forces,
25 driving the selling price of its products higher than they would be if Defendant had complied with
26 the law.

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

41. Plaintiff's and Class members' reliance upon Defendant's false price comparison advertising was not only reasonable, but entirely intended by Defendant. In fact, empirical marketing studies demonstrate that reference pricing actually creates an impression of higher value and an incentive for retailers to engage in this false and fraudulent behavior:

[c]omparative price advertising offers consumers a basis for comparing the relative value of the product offering by suggesting a monetary worth of the product and any potential savings [A] comparative price advertisement can be construed as deceptive if it makes any representation, or involves any practice that may materially mislead a reasonable consumer.

Comparative Price Advertising: Informative or Deceptive?, Dhruv Grewal and Larry D. Compeau, *Journal of Public Policy & Marketing*, Vol. 11, No. 1, at 52 (Spring 1992).
Furthermore:

[b]y creating an impression of savings, the presence of a higher reference price enhances subjects' perceived value and willingness to buy the product. . . . Thus, if the reference price is not truthful, a consumer may be encouraged to purchase as a result of a false sense of value.

Id. at 55, 56.

42. A retailer's "reference price," the stated price presented alongside the retailer's "on sale" price, provides consumers a reference point with which to evaluate the prospective purchase.

1 The reference price is often described with terms such as "Regular Price," "Original Price," and/or
2 "Former Price."

3 43. A retailer's reference price impacts the consumer's behavior in the marketplace.
4 As the reference price increases, so does the consumer's perception of the value of the transaction,
5 the consumer's willingness to make the purchase, and the amount of money the consumer is
6 willing to pay for the product.

7 44. When the reference price is bona fide and truthful, it helps consumers make
8 informed purchasing decisions. In contrast, consumers are harmed when merchants advertise their
9 products alongside falsely-inflated former prices, *i.e.*, "false reference prices," as consumers are
10 provided a false sense of value. In this context, the reference price is no longer informative but
11 deceptive because consumers are deprived of a full and fair opportunity to accurately evaluate the
12 specific sales offer in its relevant market. As the Ninth Circuit recognizes, "[m]isinformation
13 about a product's "normal" price is . . . significant to many consumers in the same way as a false
14 product label would be." *See Hinojos v. Kohl's Inc.* 718 F.3d at 1106.

15 45. Moreover, the hidden nature of false discounting makes it effective. Consumers,
16 like Plaintiff, unaware of the practices at issue, instead complete their purchases believing that
17 they "got a good deal." Retailers, like Defendant, make falsely-discounted sales without suspicion
18 because consumers do not have access to the comprehensive historical pricing information
19 necessary to reveal the deception.

20 46. The full extent of Defendant's false and deceptive pricing scheme can only be
21 revealed through a full examination of records exclusively in the possession of Defendant.

22 47. Plaintiff would purchase Defendant's products in the future from Talbots Outlet
23 stores, if price tags accurately reflect former "regular" prices and "sales" prices were not marketed
24 in a deceptive manner that is likely to mislead consumers like herself. Currently, however,
25 Plaintiff and other consumers have no realistic way to know which – if any – of Defendant's price
26 tags and sale prices are not false or deceptive. If the Court were to issue an injunction ordering
27 Defendant to comply with California's comparative price advertising laws, and prohibiting
28

1 Defendant's use of the deceptive practices discussed herein, Plaintiff would be able to make
 2 informed purchase decisions for Defendant's products at Talbots Outlet stores.

3 PLAINTIFF'S CLASS ACTION ALLEGATIONS

4
 5 48. Plaintiff brings this action on behalf of herself, and all others similarly situated.
 6 The proposed Class that Plaintiff seeks to represent is defined as follows:

7 All persons who, while in the State of California, during the four (4) year period
 8 preceding the filing of this Complaint through the date of final judgment in this
 9 action (the "Class Period"), purchased from Defendant one or more products at a
 10 purported discount off of the stated regular price at any one of Defendant's Outlet
 11 stores in the State of California, and who have not received a refund or credit for
 12 their purchase(s).

13 49. Excluded from the Class are Defendant; its corporate parents, subsidiaries, affiliates,
 14 and any entity in which Defendant has a controlling interest; any of its officers, directors,
 15 employees, or agents; the legal representatives, successors or assigns of any such excluded persons
 16 or entities; and the judicial officers to whom this matter is assigned as well as their court staff.
 17 Plaintiff reserves the right to expand, limit, modify, or amend this class definition, including the
 18 addition of one or more subclasses, in connection with her motion for class certification, or at any
 19 other time, based upon, *inter alia*, changing circumstances and/or new facts obtained during
 20 discovery.

21 50. The members of the Class are so numerous that joinder of all members is
 22 impracticable. While the exact number of Class members is unknown to Plaintiff at this time,
 23 Plaintiff estimates that the Class consists of thousands of members. Moreover, Plaintiff alleges
 24 that the precise number of Class members, their identities, and their locations can be ascertained
 25 though appropriate discovery and records of Defendant and its agents. Defendant keeps extensive
 26 computerized records of its customers through, *inter alia*, customer loyalty programs, co-branded
 27 credit cards and general marketing programs. Defendant has one or more databases through which
 28

1 a significant majority of Class members may be identified and ascertained, and it maintains
 2 contact information, including email and home mailing addresses, through which notice of this
 3 action could be disseminated to potential Class members in accordance with due process
 4 requirements.

5 51. There is a well-defined community of interest in the questions of law and fact
 6 affecting the parties represented in this action.

7 52. Common questions of law and fact exist as to all members of the Class. These
 8 common questions predominate over the questions affecting only individual members of the Class.

9 53. Among the questions of law and fact common to the Class are, *inter alia*:

10 a. Whether, during the Class Period, Defendant used false "regular" price tags and
 11 falsely advertised price discounts on merchandise it sold in its California Talbots Outlet stores;

12 b. Whether, during the Class Period, the "regular" prices advertised by Defendant
 13 were the prevailing market prices for the respective merchandise sold by Defendant during the
 14 three month period preceding the dissemination and/or publication of the advertised former prices;

15 c. Whether Defendant's use of false or deceptive price advertising constituted false
 16 advertising under California law;

17 d. Whether Defendant engaged in unfair, unlawful and/or fraudulent business
 18 practices under California law;

19 e. Whether Defendant misrepresented and/or failed to disclose material facts about its
 20 product pricing and discounts;

21 f. Whether Defendant has made false or misleading statements of fact concerning the
 22 reasons for, existence of, or amounts of price reductions;

23 g. Whether Defendant's conduct, as alleged herein, was intentional and knowing;

24 h. Whether Class members are entitled to damages and/or restitution; and, if so, what
 25 is the amount of revenues and/or profits Defendant received and/or was lost by Class members as
 26 a result of the conduct alleged herein;

1 i. Whether an injunction is necessary to prevent Defendant from continuing to use
2 false, misleading or illegal price comparisons; and

3 j. Whether Plaintiff and Class members are entitled to an award of reasonable
4 attorneys' fees, pre-judgment interest and costs of suit.

5 54. Plaintiff's claims are typical of, and are not antagonistic to, the claims of all Class
6 members. Plaintiff and the Class she seeks to represent have all been deceived (or were likely to
7 be deceived) by Defendant's false former price advertising scheme, as alleged herein. Plaintiff is
8 advancing the same claims and legal theories on behalf of herself and all members of the Class.

9 55. Plaintiff is an adequate representative of the Class because she is a member of the
10 Class and her interests do not conflict with the interests of the Class members she seeks to
11 represent. Plaintiff will fairly and adequately represent and protect the interest of the Class
12 because she is not antagonistic to the Class. Plaintiff has retained counsel who are competent and
13 experienced in the prosecution of consumer fraud and class action litigation.

14 56. A class action is superior to other available means for the fair and efficient
15 adjudication of Plaintiff's and Class members' claims. Because of the relatively modest size of
16 individual Class members' claims, few, if any, Class members could afford to seek legal redress of
17 the wrongs complained of herein on an individual basis. Absent the class action, Class members
18 and the general public would not likely recover, or would not likely have the chance to recover,
19 damages or restitution, and Defendant will be permitted to retain the proceeds of its unfair and
20 unlawful misdeeds.

21 57. All Class members, including Plaintiff, were exposed to one or more of
22 Defendant's misrepresentations or omissions of material fact claiming that former "regular"
23 advertised prices were in existence. Due to the scope and extent of Defendant's consistent false
24 price advertising scheme, disseminated in a massive, years-long campaign to California consumers
25 via in-store display advertising, print advertising, and the like, it can be reasonably inferred that
26 such misrepresentations or omissions of material fact were uniformly made to all members of the
27 Class. In addition, it can be reasonably presumed that all Class members, including Plaintiff,
28

1 affirmatively acted in response to the representations contained in Defendant's false advertising
2 scheme when purchasing merchandise at Defendant's Outlet stores.

3 FIRST CAUSE OF ACTION

4 Violation Of The "Unfair" Prong Of The UCL 5 (By Plaintiff and the Class Against Defendant)

6 58. Plaintiff re-alleges and incorporates by reference the allegations contained in the
7 preceding paragraphs as though fully set forth herein.

8 59. The UCL defines unfair business competition to include any "unlawful, unfair or
9 fraudulent" act or practice, as well as any "unfair, deceptive, untrue or misleading" advertising.
10 Cal. Bus. & Prof. Code § 17200.

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

14 61. A business act or practice is "unfair" under the UCL if the reasons, justifications
15 and motives of the alleged wrongdoer are outweighed by the gravity of the harm to the alleged
16 victims.

17 62. Defendant has violated and continues to violate the "unfair" prong of the UCL by
18 representing a false "regular" price and corresponding price discount for its products sold at
19 Talbots Outlet stores where Defendant, in fact, inflated the purported "regular" prices for such
20 products such that the promised discount was false, misleading and deceptive.

21 63. Defendant's acts and practices are unfair because they caused Plaintiff, and are
22 likely to cause consumers, to falsely believe that Talbots Outlet stores are offering value, discounts
23 or bargains from the prevailing market value or worth of the products sold that did not, in fact,
24 exist. As a result, purchasers, including Plaintiff, reasonably perceived that they were receiving
25 products that regularly sold in the retail marketplace at substantially higher prices (and are,
26 therefore, worth more) than what they paid. This perception has induced reasonable purchasers,
27 including Plaintiff, to buy such products, which they otherwise would not have purchased.
28

66. Through its unfair acts and practices, Defendant has improperly obtained money from Plaintiff and the Class. As such, Plaintiff requests that this Court cause Defendant to restore this money to Plaintiff and all Class members, and to enjoin Defendant from continuing to violate the UCL as discussed herein and/or from violating the UCL in the future. Otherwise, Plaintiff and the Class may be irreparably harmed and/or denied an effective and complete remedy if such an order is not granted.

Violation Of The "Fraudulent" Prong Of The UCL (By Plaintiff and the Class Against Defendant)

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

70. Defendant's price tags, marketing and advertising materials concerning false former "regular" prices were "fraudulent" within the meaning of the UCL because they deceived Plaintiff, and were likely to deceive members of the Class, into believing that Defendant was

1 offering value, discounts or bargains at Talbots Outlet stores from the prevailing market value or
2 worth of the products sold that did not, in fact, exist. As a result, purchasers, including Plaintiff,
3 reasonably perceived that they were receiving products that regularly sold in the retail marketplace
4 at substantially higher prices (and were, therefore, worth more) than what they paid. This
5 perception induced reasonable purchasers, including Plaintiff, to buy such products from
6 Defendant, which they otherwise would not have purchased.

7 71. Defendant's acts and practices as described herein have deceived Plaintiff and were
8 highly likely to deceive members of the consuming public. Specifically, in deciding to purchase
9 products from Talbots Outlet stores, Plaintiff relied on Defendant's misleading and deceptive
10 representations regarding its "Special Value" regular prices, and "sale" prices. Each of these
11 factors played a substantial role in Plaintiff's decision to purchase those products, and Plaintiff
12 would not have purchased those items in the absence of Defendant's misrepresentations.
13 Accordingly, Plaintiff suffered monetary loss as a direct result of Defendant's practices described
14 herein.

15 72. As a direct and proximate result of Defendant's acts and practices, Plaintiff and
16 Class members have suffered injury in fact and have lost money or property as a result of
17 purchasing Defendant's products.

18 73. As a result of the conduct described above, Defendant has been unjustly enriched at
19 the expense of Plaintiff and members of the proposed Class. Specifically, Defendant has been
20 unjustly enriched by obtaining revenues and profits that it would not otherwise have obtained
21 absent its false, misleading and deceptive conduct.

22 74. Through its unfair acts and practices, Defendant has improperly obtained money
23 from Plaintiff and the Class. As such, Plaintiff requests that this Court cause Defendant to restore
24 this money to Plaintiff and all Class members, and to enjoin Defendant from continuing to violate
25 the UCL as discussed herein and/or from violating the UCL in the future. Otherwise, Plaintiff and
26 the Class may be irreparably harmed and/or denied an effective and complete remedy if such an
27 order is not granted.

28

THIRD CAUSE OF ACTION

Violations Of The "Unlawful" Prong Of The UCL (By Plaintiff and the Class Against Defendant)

75. Plaintiff re-alleges and incorporates by reference the allegations contained in the preceding paragraphs as though fully set forth herein.

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

77. A business act or practice is "unlawful" under the UCL if it violates any other law or regulation.

78. The FTCA prohibits "unfair or deceptive acts or practices in or affecting commerce" (15 U.S.C. § 45(a)(1)) and specifically prohibits false advertisements. 15 U.S.C. § 52(a). The FTC has established *Guidelines that describe false former pricing schemes*, similar to Defendant's in all material respects, as deceptive practices that would violate the FTCA:

(a) One of the most commonly used forms of bargain advertising is to offer a reduction from the advertiser's own former price for an article. If the former price is the actual, bona fide price at which the article was offered to the public on a regular basis for a reasonably substantial period of time, it provides a legitimate basis for the advertising of a price comparison. Where the former price is genuine, the bargain being advertised is a true one. If, on the other hand, the former price being advertised is not bona fide but fictitious – for example, where an artificial price, inflated price was established for the purpose of enabling the subsequent offer of a large reduction – the "bargain" being advertised is a false one; the purchaser is not receiving the unusual value he expects.

(b) A former price is not necessarily fictitious merely because no sales at the advertised price were made. The advertiser should be especially careful, however, in such a case, that the price is one at which the product was openly and actively offered for sale, for a reasonably substantial period of time, in the recent, regular

1 course of her business, honestly and in good faith – and, of course, not for the
 2 purpose of establishing a fictitious higher price on which a deceptive comparison
 3 might be based.

4 16 C.F.R. § 233.1.

5 79. California statutory and regulatory law also expressly prohibits false former pricing
 6 schemes. Cal. Bus. & Prof. Code § 17501, entitled "*Value determinations: Former price*
 7 *advertisements*," states:

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

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

17 80. As detailed in Plaintiff's Fifth Cause of Action below, Cal. Civ. Code § 1770,
 18 subsection (a)(9), prohibits a business from "[a]dvertising goods or services with intent not to sell
 19 them as advertised," and subsection (a)(13) prohibits a business from "[m]aking false or
 20 misleading statements of fact concerning reasons for, existence of, or amounts of price
 21 reductions."

22 81. Defendant's use of and reference to a materially false "regular" price, or purported
 23 percentage discount or whole-price reduction in connection with its marketing and advertisements
 24 concerning the merchandise sold at Talbots Outlet stores violated and continues to violate the
 25 FTCA, 15 U.S.C. § 45(a)(1) and 15 U.S.C. § 52(a), as well as FTC Guidelines published at Title
 26 16, Code of Federal Regulations, Section 233. It also violated and continues to violate Cal. Bus.
 27 & Prof. Code § 17501, and Cal. Civ. Code § 1770, sections (a)(9) and (a)(13) by advertising false
 28

1 discounts from purported former prices that were, in fact, not the prevailing market prices within
 2 three months next preceding the publication and dissemination of advertisements containing the
 3 false former prices.

4 82. As a direct and proximate result of Defendant's acts and practices, Plaintiff and
 5 Class members have suffered injury in fact and have lost money or property as a result of
 6 purchasing Defendant's products.

7 83. As a result of the conduct described above, Defendant has been unjustly enriched at
 8 the expense of Plaintiff and members of the proposed Class. Specifically, Defendant has been
 9 unjustly enriched by obtaining revenues and profits that it would not otherwise have obtained
 10 absent its false, misleading and deceptive conduct.

11 84. Through its unfair acts and practices, Defendant has improperly obtained money
 12 from Plaintiff and the Class. As such, Plaintiff requests that this Court cause Defendant to restore
 13 this money to Plaintiff and all Class members, and to enjoin Defendant from continuing to violate
 14 the UCL as discussed herein and/or from violating the UCL in the future. Otherwise, Plaintiff and
 15 the Class may be irreparably harmed and/or denied an effective and complete remedy if such an
 16 order is not granted.

17 FOURTH CAUSE OF ACTION

18 Violation Of California False Advertising Law
 19 California Business & Professions Code Sections 17500, *et. seq.*
 20 (By Plaintiff and the Class Against Defendant)

21 85. Plaintiff re-alleges and incorporates by reference the allegations contained in the
 22 preceding paragraphs as though fully set forth herein.

23 86. The California False Advertising Law prohibits unfair, deceptive, untrue, or
 24 misleading advertising, including, but not limited to, false statements as to worth, value and
 25 former price.

26 ///

27 ///

1 87. Cal. Bus. & Prof. Code § 17500 provides that:

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

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

13 89. Similarly, Cal. Bus. & Prof. Code § 17501 provides, “no price shall be advertised
14 as a former price of any advertised thing, unless the alleged former price was the prevailing
15 market price . . . within three months next immediately preceding the publication of the
16 advertisement or unless the date when the alleged former price did prevail is clearly, exactly, and
17 conspicuously stated in the advertisement.”

18 90. Defendant’s routine practice of advertising “Special Value” regular prices on all of
19 its exclusive, made for Talbots Outlet merchandise, which were never the true prevailing prices of
20 those products was an unfair, deceptive and misleading advertising practice. This deceptive
21 marketing practice gave consumers the false impression that the products sold at Talbots Outlet
22 stores were regularly sold in the retail marketplace at substantially higher prices than they actually
23 were. Therefore, leading to the false impression that the merchandise was worth more than it
24 actually was.

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

1 99. Plaintiff relied on Defendant's false representations in deciding to purchase
 2 merchandise from Defendant. Plaintiff would not have purchased such merchandise absent
 3 Defendant's unlawful conduct. As a result of these acts and practices, Plaintiff suffered damage in
 4 that she spent money at Talbots Outlet store that she would not have otherwise spent absent
 5 Defendant's unlawful and misleading acts and practices.

6 100. Pursuant to Section 1782(a) of the CLRA, on May 17, 2017, Plaintiff's Counsel, on
 7 behalf of Plaintiff Fliegelman, served Defendant by United States certified mail, return receipt
 8 requested, with notice of Defendant's particular violations of the CLRA and requested that
 9 Defendant identify victims, notify victims and remedy its illegal conduct within 30 days.

10 101. Plaintiff has requested that Defendant timely respond to the CLRA demand notice
 11 and presently seeks only injunctive relief pursuant to the CLRA. If Defendant fails to fully,
 12 completely and timely comply with Plaintiff's demand letter, Plaintiff will amend this Complaint
 13 to seek actual and punitive damages, as appropriate, under the CLRA. Under California Civil
 14 Code §1782(d), after the commencement of an action for injunctive relief, and after compliance
 15 with the provisions of Section 1782(a), Plaintiff may amend her Complaint without leave of court
 16 to include a request for damages.

17 **PRAYER FOR RELIEF**

18
 19 WHEREFORE, Plaintiff, on behalf of herself and members of the Class, prays for relief
 20 and judgment against Defendant as follows:

21 1. For an order certifying this matter as a class action and designating Plaintiff as the
 22 Class Representative and Plaintiff's Counsel as Class Counsel;

23 2. For an order awarding restitution and disgorgement of all profits and unjust
 24 enrichment that Defendant obtained from Plaintiff and the Class members as a result of its
 25 unlawful, unfair, and fraudulent business practices described herein;

26 3. For appropriate injunctive relief as permitted by law or equity;

27 4. For an order directing Defendant to engage in a corrective advertising campaign;
 28

1 5. For an award of attorneys' fees as authorized by statute including, but not limited
2 to, the provisions of California Civil Code § 1780(e), California Code of Civil Procedure §
3 1021.5, as authorized under the "common fund" doctrine, and as authorized by the "substantial
4 benefit" doctrine;

5 6. For costs of the suit incurred herein;

6 7. For prejudgment interest at the legal rate; and

7 8. For such other and further relief as the Court may deem proper.

8
9 **DEMAND FOR JURY TRIAL**

10 Plaintiff hereby demands a trial by jury for Plaintiff and the Class as to all issues so triable.

11
12
13 Dated: May 17, 2017

LAW OFFICES OF ZEV B. ZYSMAN, APC

14
15 
16 _____
17 ZEV B. ZYSMAN
18 Attorneys for Plaintiff Lynette Fliegelman and
19 The Proposed Class
20
21
22
23
24
25
26
27
28