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**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

KRISTEN SCHERTZER, on behalf of
herself and all others similarly situated,

Plaintiff,

vs.

BARNEYS NEW YORK, INC., a
Delaware Corporation, and DOES 1- 50,
inclusive,

Defendant.

Case No. '19CV320 H LL

CLASS ACTION

COMPLAINT

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

IDEMAND FOR JURY TRIAL

1 Plaintiff Kristen Schertzer brings this action on behalf of herself and all others
2 similarly situated against Defendant BARNEYS NEW YORK, INC. (“Defendant” or
3 “BARNEYS”), and states:

4 **I. NATURE OF ACTION**

5 1. “If everyone is getting a deal, is anyone really getting a deal?”¹ This class
6 action targets Barneys’ unlawful, unfair, and fraudulent business practice of advertising
7 fictitious prices and corresponding phantom discounts on merchandise sold in its retail
8 outlet stores, Barneys Warehouse. This practice of false reference pricing occurs when a
9 retailer fabricates a fake regular, original, and/or former reference price, and then offers
10 an item for sale at a deep “discounted” price. The result is a sham price disparity that
11 misleads consumers into believing they are receiving a good deal and induces them into
12 making a purchase. Retailers drastically benefit from employing a false reference pricing
13 scheme and experience increased sales.

14 2. The California legislature and federal regulations prohibit this misleading
15 practice. The law recognizes the reality that consumers often purchase merchandise
16 marketed as being “on sale” purely because the proffered discount seemed too good to
17 pass up. Accordingly, retailers, including Defendant, have an incentive to lie to customers
18 and advertise false sales. The resulting harm is tangible- the bargain hunter’s expectations
19 about the product she purchased is that it has a higher perceived value and she may not
20 have purchased the product but for the false savings.

21 3. The net effect of the practice is that the market value of the falsely advertised
22 product is artificially inflated because the product is never subjected to true market forces
23 absent the communication of inflated value made by the false discounting. For example:
24 is a consumer more likely to purchase a jacket for \$100.00 if it is 90% off of an “original”
25 price of \$1,000.00; or are they more likely to purchase a \$100.00 jacket, advertised at its
26

27 ¹ David Streitfeld, *It’s Discounted, but is it a Deal? How List Prices Lost Their Meaning*,
28 New York Times, <https://www.nytimes.com/2016/03/06/technology/its-discounted-but-is-it-a-deal-how-list-prices-lost-their-meaning.html>, (March 6, 2016), last accessed April 28, 2017.

1 true price of \$100.00? Of course the “false reference price” of \$1,000.00 and the
2 purported 90% discount will dramatically impact consumer behavior and result in more
3 sales, which permits the retailer to recoup a higher market price for the jacket than if the
4 jacket were advertised legally, at its true market price. The delta between the true market
5 price of the product and the price at which the retailer is able to sell the produce utilizing
6 its false discounting scheme, are the consumers’ damages.

7 4. Barneys utilizes a false and misleading reference price in the marketing and
8 selling of merchandise sold in its retail outlet stores. Barneys advertises its merchandise
9 for sale by attaching a price tag to the item that sets forth a fictitious reference price, or
10 regular price. The reference price appears as a strikethrough, for example, “\$575.00
11 followed by the discounted price at which the item is being offered for sale, i.e. “\$289.00.”
12 *See e.g.* Exhibit A.

13 5. However, the reference price is total fiction. The merchandise sold at
14 Barneys outlet stores is never offered for sale, nor actually sold, at the represented
15 reference price. The reference price is used exclusively as a benchmark from which the
16 false discount and corresponding “Sale” price is derived. Barneys’ scheme has the effect
17 of tricking consumers into believing they are getting a significant deal by purchasing
18 merchandise at a steep discount, when in reality, consumers are paying for merchandise
19 at its regular retail price.

20 6. The advertised discounts are fictitious because the reference price does not
21 represent a *bona fide* price at which Barneys previously sold a substantial quantity of the
22 merchandise for a reasonable period of time as required by the Federal Trade Commission
23 (“FTC”). In addition, the represented reference price was not the prevailing market retail
24 price within the three months immediately preceding the publication of the advertised
25 former reference price, as required by California law. Further, upon information and
26 belief, Barneys’ products that are identified with “white price tags” represent items that
27 were never sold in a Barneys retail store and were made exclusively for Barneys
28 Warehouse. The deception is magnified for those products, because the representation of

1 the false reference price leads consumers to believe they are purchasing a product of
2 substantially higher quality than the products sold in the outlet and that they are
3 purchasing a product that was previously offered for sale at a Barneys retail store---at the
4 significantly higher, reference price.

5 7. Through its false and misleading marketing, advertising, and pricing scheme,
6 Barneys violated and continues to violate California and federal law prohibiting
7 advertising goods for sale as discounted from former prices that are false, and prohibiting
8 misleading statements about the existence and amount of price reductions. Specifically,
9 Barneys violated and continues to violate: California's Unfair Competition Law, Business
10 & Professions Code §§ 17200, *et seq.* (the "UCL"); California's False Advertising Law,
11 Business & Professions Code §§ 17500, *et seq.* (the "FAL"); the California Consumer
12 Legal Remedies Act, California Civil Code §§ 1750, *et seq.* (the "CLRA"); and the
13 Federal Trade Commission Act ("FTCA"), which prohibits "unfair or deceptive acts or
14 practices in or affecting commerce" (15 U.S.C. § 45(a)(1)) and false advertisements (15
15 U.S.C. § 52(a)).

16 8. Plaintiff brings this action on behalf of herself and other similarly situated
17 consumers who have purchased one or more items of clothing, shoes, accessories, jewelry,
18 makeup, cologne, perfume, bedding, home goods, or more from Barneys' retail outlet
19 store that were deceptively represented as discounted from false former reference prices
20 in order to halt the dissemination of this false, misleading, and deceptive pricing scheme,
21 to correct the false and misleading perception it has created in the minds of consumers,
22 and obtain redress for those who have purchased merchandise tainted by this deceptive
23 pricing scheme. Plaintiff seeks to obtain damages, restitution, and other appropriate relief
24 in the amount by which Barneys was unjustly enriched as a result of its sales of
25 merchandise offered a false discount.

26 9. Finally Plaintiff seeks reasonable attorneys' fees pursuant to California Code
27 of Civil Procedure § 1021.5, as this lawsuit seeks the enforcement of an important right
28 affecting the public interest and satisfies the statutory requirements for an award of

attorneys' fees.

II. JURISDICTION AND VENUE

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

11. The Southern District of California has personal jurisdiction over Barneys because Barneys is a corporation or other business entity authorized to conduct and does conduct business in the State of California. Barneys is registered with the California Secretary of State to do sufficient business with sufficient minimum contacts in California, and/or otherwise intentionally avails itself of the California market through its promotion, sales, distribution, and marketing within this State to render the exercise of jurisdiction by this Court permissible.

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

III. PARTIES

Plaintiff

13. Kristen Schertzer resides in San Diego, California. Plaintiff, in reliance on Barneys' false and deceptive price tags, purchased two garments at Barneys Warehouse in Carlsbad, California on October 18, 2018. Ms. Schertzer purchased a Hooded Faux Sherpa Knit Scarf with Fringes ("Hooded Scarf") and a Fatigue CA Camo Crew Long Sleeve Sweater ("Camo Crew"). She examined the Hooded Scarf and observed the price tag represented a reference price of \$260.00 which was electronically crossed out and replaced with a \$129.00 price; a purported 50% savings. She also examined the Camo Crew and observed the price tag represented a reference price of \$575.00 which was electronically crossed out and replaced with a \$289.00 price; nearly a 50% savings. After observing the price tags on the items and the accompanying signage, Ms. Schertzer

1 believed that she was receiving a significant discount on the two items she had chosen.
2 Because she liked both items and felt that the discounted price would likely not last, and
3 that she was getting a significant bargain on the merchandise, she proceeded to the register
4 and purchased them. She paid a total of \$450.40 on her Visa Debit Card ending in 2669.

5 14. However, neither of these products were ever offered for sale at the reference
6 price listed on the price tags and certainly not within the 90 days preceding Ms. Schertzer's
7 purchase. Plaintiff was damaged in her purchases because Defendant's false reference
8 price discounting scheme inflated the true market value of the items she purchased.
9 Plaintiff is susceptible to this reoccurring harm because she cannot be certain that Barneys
10 has corrected this deceptive pricing scheme and she desires to shop at Barneys Warehouse
11 in the future. Plaintiff does not have the resources on her own to determine whether
12 Defendant is complying with California and Federal law with respect to its retail pricing
13 practices.

14 **Defendant**

15 15. Plaintiff is informed and believes, and upon such information and belief
16 alleges, Defendant Barneys is a Delaware Corporation with its principal executive offices
17 in New York, New York. Barneys operates Barney's Warehouse, a retail outlet store, as
18 well as barneyswarehouse.com website, and advertises, markets, distributes, and/or sells
19 clothing and fashion accessories in California and throughout the United States.

20 16. Plaintiff does not know the true names or capacities of the persons or
21 entities sued herein as DOES 1-50, inclusive, and therefore sues such Defendants by such
22 fictitious names. Plaintiff is informed and believes, and upon such information and belief
23 alleges, that each of the DOE Defendants is in some manner legally responsible for the
24 damages suffered by Plaintiff and the Class members as alleged herein. Plaintiff will
25 amend this Complaint to set forth the true names and capacities of these Defendants when
26 they have been ascertained, along with appropriate charging allegations, as may be
27 necessary.
28

IV. FACTUAL BACKGROUND

The Fraudulent Sale Discounting Scheme

17. Barneys Warehouse is owned and operated by Barneys New York and offers Barneys New York's designer fashions but at a lower discounted price. Barneys Warehouse offers designer products from Versace, Melillo, Ralph Lauren, Stella McCartney, and many others. The company directly markets its merchandise to consumers in the State of California via its retail Warehouse stores, including its price tags, its online ads and e-commerce website (www.barneyswarehouse.com).

18. Barneys engages in a scheme to defraud its customers by perpetually discounting merchandise sold in its retail outlet store. Barneys consistently advertises the merchandise sold in its retail outlet stores by attaching a price tag to the item with a false reference price and a corresponding sale price immediately beneath the reference price. The reference price is printed in "strikethrough," communicating to the consumer that the reference price is a former price of the item that is now being offered at a substantial discount. The reference price conveys to the customer the purported regular price or former price of the item. The sale price conveys to the customer a deeply discounted price at which the item is presently being offered for sale. *See e.g., Exhibit A.*

19. However, at no time are the products ever offered for sale at the reference price. The reference price is merely a false reference price, which Barneys utilizes to deceptively manufacture a deeply discounted sale price on the merchandise sold online and at Barneys Warehouse retail stores during the Class period.

20. This practice is not accidental. Rather, this practice is a fraudulent scheme intended to deceive consumers into: 1) making purchases they otherwise would not have made; and/or 2) paying substantially more for merchandise consumers believed was heavily discounted and thus, worth more than its actual value.

21. Retailers, including Barneys, understand that consumers are susceptible to a good bargain, and therefore, Barneys has a substantial interest in lying in order to generate sales. A product's reference price or original market price matters to consumers because

1 it serves as a baseline upon which consumers perceive a product's value. In this case,
2 Barneys has marked the merchandise with an original or regular price which conveys to
3 consumers, including Ms. Schertzer, "the product's worth and the prestige that ownership
4 of the product conveys." *See Hinojos v. Kohl's Corp.*, 718 F.3d 1098, 1106 (9th Cir. 2013)
5 (citing Dhruv Grewal & Larry D. Compeau, Comparative Price Advertising: Informative
6 or Deceptive?, 11 J. Pub. Pol'y & Mktg. 52, 55 (Spring 1992) ("By creating an impression
7 of savings, the presence of a higher reference price enhances subjects' perceived value
8 and willingness to buy the product."); *id.* at 56 ("[E]mpirical studies indicate that as
9 discount size increases, consumers' perceptions of value and their willingness to buy the
10 product increase, while their intention to search for a lower price decreases.")).

11 22. Barneys' price advertising uniformly includes both the false reference price
12 which is crossed out and the actual sale price immediately beneath the reference price on
13 nearly all items sold at Barneys Warehouse retail stores. This uniform scheme intends to
14 and does provide misinformation to the customer. This misinformation communicates to
15 consumers, including Kristen Schertzer that the products sold at Barneys Warehouse have
16 a greater value than the advertised discounted price.

17 23. As the Ninth Circuit recognizes, "[m]isinformation about a product's
18 'normal' price is...significant to many consumers in the same way as a false product label
19 would be." *See Hinojos*, 718 F.3d at 1106.

20 **Plaintiff's Investigation**

21 24. Plaintiff's investigation of Barneys revealed that the merchandise sold at
22 Barneys Warehouse is priced uniformly. That is, the merchandise sold at Barneys
23 Warehouse bears a price tag with a false reference price and substantially discounted sale
24 price printed directly beneath the "crossed out" reference price. Plaintiff's investigation
25 confirmed that the products Ms. Schertzer purchased were priced with a false reference
26 price and corresponding discounted price in the 90-day period immediately preceding
27 Plaintiff's purchase.

28 25. Plaintiff's counsel's investigation cataloged the pricing practices at Barney's

Warehouse in San Diego County, including the store located at the Carlsbad Premium Outlets, 560 Paseo Del Norte, Carlsbad, California 92008 (“Carlsbad”), for several months prior to Ms. Schertzer’s purchases. The false reference price and corresponding discount price scheme was both uniform and identical on almost all of the merchandise sold in store at Barneys Warehouse. The fraudulent price scheme applies to all merchandise offered on sale at Barneys Warehouse, including the merchandise purchased by Ms. Schertzer on October 18, 2018.

Plaintiff and the Class are Injured by Barneys’ Deceptive Pricing Scheme

26. The reference prices listed and advertised on the products sold at Barneys Warehouse are fake reference prices, utilized only to perpetuate Barneys’ fake discount scheme.

27. Barneys knows that its comparative price advertising is false, deceptive, misleading, and unlawful under California and federal law.

28. Barneys fraudulently concealed from and intentionally failed to disclose to Plaintiff and other members of the Class the truth about its advertised discount prices and former reference prices.

29. At all relevant times, Barneys has been under a duty to Plaintiff and the Class to disclose the truth about its false discounts.

30. Plaintiff relied upon Barneys’ artificially inflated reference prices and false discounts when purchasing her products from Barneys Warehouse. Plaintiff would not have made such purchase but for Barneys’ representations regarding the false reference price and the fictitious sales price of the merchandise. Plaintiff may in the future shop at Barneys Warehouse.

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

32. Barneys intentionally concealed and failed to disclose material facts regarding the truth about false former price advertising in order to provoke Plaintiff and the Class to purchase merchandise in its retail outlet store.

V. CLASS ALLEGATIONS

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

All persons who, within the State of California, from February 14, 2015 through the present (the “Class Period”), who purchased from Barneys Warehouse one or more products from Barneys Warehouse at false discounts from the advertised reference price and who have not received a refund or credit for their purchase(s).

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

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

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

a. Whether, during the Class Period, Barneys used false reference price

labels and falsely advertised price discounts on products it sold in its retail outlet stores;

- b. Whether, during the Class Period, the reference prices advertised by Barneys were the prevailing market prices for the products during the three months period preceding the dissemination and/or publication of the advertised former prices;
- c. Whether Barneys' alleged conduct constitutes violations of the laws asserted;
- d. Whether Barneys engaged in unfair, unlawful and/or fraudulent business practices under the laws asserted;
- e. Whether Barneys engaged in false or misleading advertising;
- f. Whether Plaintiff and Class members are entitled to damages and/or restitution and the proper measure of that loss; and
- g. Whether an injunction is necessary to prevent Barneys from continuing to use false, misleading or illegal price comparison.

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

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

38. **Superiority:** The nature of this action and the nature of laws available to Plaintiff and the Class make the use of the class action format a particularly efficient and appropriate procedure to afford relief to her and the Class for the wrongs alleged. The damages or other financial detriment suffered by individual Class members is relatively modest compared to the burden and expense that would be entailed by individual litigation

1 of their claims against Barneys. It would thus be virtually impossible for Plaintiff and
 2 Class members, on an individual basis, to obtain effective redress for the wrongs done to
 3 them. Absent the class action, Class members and the general public would not likely
 4 recover, or would not likely have the chance to recover, damages or restitution, and
 5 Barneys will be permitted to retain the proceeds of its fraudulent and deceptive misdeeds.

6 39. All Class members, including Plaintiff, were exposed to one or more of
 7 Barneys' misrepresentations or omissions of material fact claiming that former "market"
 8 advertised prices were in fact *bona fide*. Due to the scope and extent of Barneys'
 9 consistent false "discount" price advertising scheme, disseminated in a years-long
 10 campaign to California consumers, it can be reasonably inferred that such
 11 misrepresentations or omissions of material fact were uniformly made to all members of
 12 the Class. In addition, it can be reasonably presumed that all Class members, including
 13 Plaintiff, affirmatively acted in response to the representations contained in Barneys' false
 14 advertising scheme when they purchased their products from Barneys Warehouse.

15 40. Barneys keeps extensive computerized records of its customers through,
 16 *inter alia*, customer loyalty programs and general marketing programs. Barneys has one
 17 or more databases through which a significant majority of Class members may be
 18 identified and ascertained, and it maintains contact information, including email and home
 19 addresses, through which notice of this action could be disseminated in accordance with
 20 due process requirements.

21 VI. CAUSES OF ACTION

22 FIRST CAUSE OF ACTION

23 Violation of California's Unfair Competition Law ("UCL") 24 California Business and Professions Code § 17200, *et seq.*

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

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

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

“Unfair” Prong

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

45. Barneys’ actions constitute “unfair” business practices because, as alleged above, Barneys engaged in misleading and deceptive price comparison advertising that represented false reference prices and corresponding deeply discounted sale prices. The reference prices were nothing more than fabricated prices leading to phantom markdowns. Barneys’ acts and practices offended an established public policy of transparency in pricing, and engaged in immoral, unethical, oppressive, and unscrupulous activities that are substantially injurious to consumers.

46. The harm to Plaintiff and Class members outweighs the utility of Barneys’ practices. There were reasonably available alternatives to further Barneys’ legitimate business interests other than the misleading and deceptive conduct described herein.

“Fraudulent” Prong

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

48. Barneys’ acts and practices alleged above constitute fraudulent business acts or practices as they have deceived Plaintiff and are highly likely to deceive members of the consuming public. Plaintiff relied on Barneys’ fraudulent and deceptive representations regarding its reference prices for products which Barneys sells at Barneys Warehouse, its retail outlet store. These misrepresentations played a substantial role in Plaintiff’s decision to purchase those products at steep discounts, and Plaintiff would not

1 have purchased those products without Barneys' misrepresentations.

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

4 ***"Unlawful" Prong***

5 50. Barneys' acts and practices alleged above constitute unlawful business acts
6 or practices as they have violated state and federal law in connection with their deceptive
7 pricing scheme. The Federal Trade Commission's Act ("FTCA") prohibits "unfair or
8 deceptive acts or practices in or affecting commerce" (15 U.S.C. § 45(a)(1)) and prohibits
9 the dissemination of any false advertisements. 15 U.S.C. § 52(a). Under the Federal Trade
10 Commission, false former pricing schemes, similar to the ones implemented by Barneys,
11 are described as deceptive practices that would violate the FTCA:

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

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

16 C.F.R. § 233.1(a) and (b) (emphasis added).

51. In addition to federal law, California law also expressly prohibits false former
pricing schemes. California's False Advertising Law, Bus. & Prof. Code §17501,

1 (“FAL”), entitled “*Worth or value; statements as to former price*,” states:

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

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

9 Cal. Bus. & Prof. Code § 17501 (emphasis added).

10
11 52. As detailed in Plaintiff’s Third Cause of Action below, the Consumer Legal
12 Remedies Act, Cal. Civ. Code § 1770(a)(9), (“CLRA”), prohibits a business from
13 “[a]dvertising goods or services with intent not to sell them as advertised,” and subsection
14 (a)(13) prohibits a business from “[m]aking false or misleading statements of fact
15 concerning reasons for, existence of, or amounts of price reductions.”

16 53. The violation of any law constitutes an “unlawful” business practice under
17 the UCL.

18 54. As detailed herein, the acts and practices alleged were intended to or did
19 result in violations of the FTCA, the FAL, and the CLRA.

20 55. Barneys’ practices, as set forth above, have misled Plaintiff, the proposed
21 Class, and the public in the past and will continue to mislead in the future. Consequently,
22 Barneys’ practices constitute an unlawful, fraudulent, and unfair business practice within
23 the meaning of the UCL.

24 56. Barneys’ violation of the UCL, through its unlawful, unfair, and fraudulent
25 business practices, are ongoing and present a continuing threat that Class members and
26 the public will be deceived into purchasing products based on price comparisons of
27 arbitrary and inflated reference prices and substantially discounted sale prices. These false
28 comparisons created phantom markdowns and lead to financial damage for consumers

1 like Plaintiff and the Class.

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

7 **SECOND CAUSE OF ACTION**
8 **Violation of California's False Advertising Law ("FAL")**
9 **California Business & Professions Code § 17500, *et seq.***

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

12 59. Cal. Bus. & Prof. Code § 17500 provides:

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

21 (Emphasis added).

22 60. The "intent" required by Section 17500 is the intent to dispose of property,
23 and not the intent to mislead the public in the disposition of such property.

24 61. Similarly, this section provides, "no price shall be advertised as a former
25 price of any advertised thing, unless the alleged former prices was the prevailing market
26 price...within three months next immediately preceding the publication of the
27 advertisement or unless the date when the alleged former price did prevail is clearly,
28 exactly, and conspicuously stated in the advertisement." Cal Bus. & Prof. Code § 17501.

62. Barneys' routine of advertising discounted prices from false reference prices,
which were never the prevailing market prices of those products and were materially

1 greater than the true prevailing prices, was an unfair, untrue, and misleading practice. This
2 deceptive marketing practice gave consumers the false impression that the products were
3 regularly sold on the market for a substantially higher price than they actually were;
4 therefore, leading to the false impression that the products sold at Barneys Warehouse
5 were worth more than they actually were.

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

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

15 **THIRD CAUSE OF ACTION**
16 **Violation of California's Consumers Legal Remedies Act ("CLRA"),**
17 **California Civil Code § 1750, *et seq.***

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

20 66. This cause of action is brought pursuant to the CLRA, Cal. Civ. Code § 1750,
21 *et seq.* Plaintiff and each member of the proposed Class are "consumers" as defined by
22 Cal. Civ. Code § 1761(d). Barneys' sale of the merchandise in its retail outlet store to
23 Plaintiff and the Class were "transactions" within the meaning of Cal. Civ. Code §
24 1761(e). The products purchased by Plaintiff and the Class are "goods" within the
25 meaning of Cal. Civ. Code § 1761(a).

26 67. Barneys violated and continues to violate the CLRA by engaging in the
27 following practices proscribed by Cal. Civ. Code § 1770(a) in transactions with Plaintiff
28 and the Class which were intended to result in, and did result in, the sale of the online
merchandise:

a. Advertising goods or services with intent not to sell them as advertised;
(a)(9);

b. Making false or misleading statements of fact concerning reasons for,
existence of, or amounts of price reductions; (a)(13).

68. Pursuant to § 1782(a) of the CLRA, on February 14, 2019 Plaintiff's counsel notified Barneys in writing by certified mail of the particular violations of § 1770 of the CLRA and demanded that it rectify the problems associated with the actions detailed above and give notice to all affected consumers of Barneys' intent to act.

69. If Barneys fails to respond to Plaintiff's letter, fails to agree to rectify the problems associated with the actions detailed above, or fails to give notice to all affected consumers within 30 days of the date of written notice, as proscribed by Section 1782, Plaintiff will move to amend his/her Complaint to pursue claims for actual, punitive, and statutory damages, as appropriate against Barneys. As to this cause of action, at this time, Plaintiff seeks only injunctive relief.

VII. PRAYER FOR RELIEF

70. Wherefore, Plaintiff, on behalf of herself and on behalf of the other members of the Class, requests that this Court award relief against Barneys as follows:

- a. An order certifying the class and designating Kristen Schertzer as the Class Representative and her counsel as Class Counsel;
- b. Awarding Plaintiff and the proposed Class members damages;
- c. Awarding restitution and disgorgement of all profits and unjust enrichment that Barneys obtained from Plaintiff and the Class members as a result of its unlawful, unfair, and fraudulent business practices described herein;
- d. Awarding declaratory and injunctive relief as permitted by law or equity, including: enjoining Barneys from continuing the unlawful practices as set forth herein, and directing Barneys to identify, with Court supervision, victims of its misconduct and pay them all money

1 they are required to pay;

2 e. Order Barneys to engage in a corrective advertising campaign;

3 f. Awarding attorneys' fees and costs; and

4 g. For such other and further relief as the Court may deem necessary or
5 appropriate.

6 **VIII. DEMAND FOR JURY TRIAL**

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

8
9 Dated: February 14, 2019

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

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11
12 /s/ Todd D. Carpenter

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

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18 *Attorneys for Plaintiff*

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

Kristen Schertzer, on behalf of herself and all others similarly situated,

(b) County of Residence of First Listed Plaintiff San Diego

(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number)

Todd D. Carpenter (CA Bar No.: 234464) 619-762-1910
1350 Columbia Street, Ste. 603
San Diego, CA 92101**DEFENDANTS**

Barneys New York, Inc.

County of Residence of First Listed Defendant Delaware

(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

'19CV320 H LL**II. BASIS OF JURISDICTION** (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff
- ☐ 2 U.S. Government Defendant
- ☐ 3 Federal Question (U.S. Government Not a Party)
- ☒ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- | | PTF | DEF | | PTF | DEF |
|---|---------------------------------------|----------------------------|---|----------------------------|---------------------------------------|
| Citizen of This State | <input checked="" type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business In This State | <input type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| Citizen of Another State | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business In Another State | <input type="checkbox"/> 5 | <input checked="" type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

IV. NATURE OF SUIT (Place an "X" in One Box Only)Click here for: [Nature of Suit Code Descriptions.](#)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excludes Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Personal Injury - Medical Malpractice PERSONAL INJURY <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 690 Other LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Management Relations <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Employee Retirement Income Security Act IMMIGRATION <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 465 Other Immigration Actions	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 835 Patent - Abbreviated New Drug Application <input type="checkbox"/> 840 Trademark SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 375 False Claims Act <input type="checkbox"/> 376 Qui Tam (31 USC 3729(a)) <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 485 Telephone Consumer Protection Act <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 850 Securities/Commodities/Exchange <input checked="" type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 896 Arbitration <input type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision <input type="checkbox"/> 950 Constitutionality of State Statutes
REAL PROPERTY <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	CIVIL RIGHTS <input type="checkbox"/> 440 Other Civil Rights <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 448 Education PRISONER PETITIONS Habeas Corpus: <input type="checkbox"/> 463 Alien Detainee <input type="checkbox"/> 510 Motions to Vacate Sentence <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty Other: <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition <input type="checkbox"/> 560 Civil Detainee - Conditions of Confinement			

V. ORIGIN (Place an "X" in One Box Only)

- ☒ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from Another District (specify) ☐ 6 Multidistrict Litigation - Transfer ☐ 8 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTIONCite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):
28 U.S.C. section 1332(d)

Brief description of cause:

1) Violation of Cal. Bus. & Prof. 17200; 2) Violation of Cal. Bus. & Prof. 17500; 3) Violation of Cal. Civ. Code 1750

VII. REQUESTED IN COMPLAINT:☒ CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P. DEMAND \$

CHECK YES only if demanded in complaint:

JURY DEMAND: ☒ Yes ☐ No**VIII. RELATED CASE(S) IF ANY**

(See instructions):

JUDGE

DOCKET NUMBER

DATE

02/14/2019

SIGNATURE OF ATTORNEY OF RECORD

/s/ Todd D. Carpenter

FOR OFFICE USE ONLY

RECEIPT #

AMOUNT

APPLYING IFP

JUDGE

MAG. JUDGE

INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS 44

Authority For Civil Cover Sheet

The JS 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

- I.(a) Plaintiffs-Defendants.** Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.
 - (b) County of Residence.** For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the location of the tract of land involved.)
 - (c) Attorneys.** Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section "(see attachment)".
- II. Jurisdiction.** The basis of jurisdiction is set forth under Rule 8(a), F.R.Cv.P., which requires that jurisdictions be shown in pleadings. Place an "X" in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.
- United States plaintiff. (1) Jurisdiction based on 28 U.S.C. 1345 and 1348. Suits by agencies and officers of the United States are included here.
- United States defendant. (2) When the plaintiff is suing the United States, its officers or agencies, place an "X" in this box.
- Federal question. (3) This refers to suits under 28 U.S.C. 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.
- Diversity of citizenship. (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below; **NOTE: federal question actions take precedence over diversity cases.**)
- III. Residence (citizenship) of Principal Parties.** This section of the JS 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.
- IV. Nature of Suit.** Place an "X" in the appropriate box. If there are multiple nature of suit codes associated with the case, pick the nature of suit code that is most applicable. Click here for: [Nature of Suit Code Descriptions](#).
- V. Origin.** Place an "X" in one of the seven boxes.
- Original Proceedings. (1) Cases which originate in the United States district courts.
- Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441.
- Remanded from Appellate Court. (3) Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.
- Reinstated or Reopened. (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.
- Transferred from Another District. (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.
- Multidistrict Litigation – Transfer. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Section 1407.
- Multidistrict Litigation – Direct File. (8) Check this box when a multidistrict case is filed in the same district as the Master MDL docket. **PLEASE NOTE THAT THERE IS NOT AN ORIGIN CODE 7.** Origin Code 7 was used for historical records and is no longer relevant due to changes in statute.
- VI. Cause of Action.** Report the civil statute directly related to the cause of action and give a brief description of the cause. **Do not cite jurisdictional statutes unless diversity.** Example: U.S. Civil Statute: 47 USC 553 Brief Description: Unauthorized reception of cable service
- VII. Requested in Complaint.** Class Action. Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P.
- Demand. In this space enter the actual dollar amount being demanded or indicate other demand, such as a preliminary injunction.
- Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.
- VIII. Related Cases.** This section of the JS 44 is used to reference related pending cases, if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases.

Date and Attorney Signature. Date and sign the civil cover sheet.

EXHIBIT A

2-PLY
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tcarpenter@carlsonlynch.com
alord@carlsonlynch.com

Attorneys for Plaintiff and Class Counsel

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

KRISTEN SCHERTZER, on behalf of
herself and all others similarly situated,
Plaintiff,

v.

BARNEYS NEW YORK, INC., a
Delaware corporation, and DOES 1-50,
inclusive,
Defendant.

Case No.: '19CV320 H LL

**DECLARATION IN SUPPORT OF
JURISDICTION**

1 I, Todd D. Carpenter, declare under penalty of perjury the following:

2 1. I am an attorney duly licensed to practice before all of the courts in the State
3 of California. I am a partner and part-owner of Carlson Lynch Sweet Kilpela & Carpenter,
4 LLP, and the counsel of record for Plaintiff in the above-entitled action.

5 2. Defendant Barneys New York, Inc. has done and is doing business in the
6 County of San Diego. Such business includes the marketing, distributing, and sale of
7 clothing and accessories at its retail outlet stores, Barneys Warehouse.

8 3. Plaintiff Kristen Schertzer purchased her two garments from a Barneys
9 Warehouse outlet store in Carlsbad, California.

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

12 Executed this 14th day of February 2019 in San Diego, California.

13
14 /s/ Todd D. Carpenter

15 Todd D. Carpenter
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