

E-FILED  
1/14/2020 1:35 AM  
Clerk of Court  
Superior Court of CA,  
County of Santa Clara  
20CV361777  
Reviewed By: Patricia Hernandez

1 Daniel M. Hattis (SBN 232141)  
HATTIS & LUKACS  
2 400 108th Avenue NE, Suite 500  
Bellevue, WA 98004  
3 Telephone: (425) 233-8650  
Facsimile: (425) 412-7171  
4 Email: dan@hattislaw.com

5 Paul Karl Lukacs (SBN 197007)  
HATTIS & LUKACS  
6 1401 Twenty-First Street, Suite 400  
Sacramento, CA 95811  
7 Telephone: (916) 292-9739  
Facsimile: (916) 444-8723  
8 Email: pkl@hattislaw.com

9 *Attorneys for Plaintiff and the Proposed Class*

10

11

**SUPERIOR COURT OF THE STATE OF CALIFORNIA**

12

**COUNTY OF SANTA CLARA**

13

**UNLIMITED CIVIL**

14

20CV361777

15 TODD SIMON,  
for Himself, as a Private Attorney  
General, and/or On Behalf Of All  
16 Others Similarly Situated,

Case No. \_\_\_\_\_

**CLASS ACTION**

**COMPLAINT FOR:**

17

Plaintiff,

18

19

v.

20

21 CARTER'S, INC.;  
THE WILLIAM CARTER COMPANY;  
and DOES 1-10, inclusive,

22

23 Defendants.

24

25

**JURY TRIAL DEMANDED**

26

27

28

CLASS ACTION COMPLAINT FOR  
DAMAGES AND INJUNCTIVE RELIEF

**HATTIS & LUKACS**  
400 108th Avenue NE, Suite 500  
Bellevue, WA 98004  
T: 425.233.8650 | F: 425.412.7171  
www.hattislaw.com

TABLE OF CONTENTS

I.	INTRODUCTION.....	- 1 -
II.	PARTIES.....	- 2 -
III.	JURISDICTION AND VENUE .....	- 3 -
IV.	FACTUAL ALLEGATIONS OF CARTER’S FALSE DISCOUNT SCHEME .....	- 4 -
A.	Carter's False Reference Prices .....	- 7 -
B.	Carter's False "Free" Offers.....	- 10 -
C.	Plaintiff's Allegations Regarding Carter's False Reference Price Advertising Scheme Are Based On A Sweeping Four-Year Investigation Of Carter's Practices By Plaintiff's Counsel .....	- 12 -
D.	Carter's Use Of The Phrase "MSRP" To Describe The List Price Is Not A Viable Defense .....	- 14 -
E.	Carter's Printing Of "DOB" On Its Product Tags Is Not A Viable Defense.....	- 19 -
V.	PLAINTIFF'S FACTUAL ALLEGATIONS.....	- 21 -
VI.	CLASS ACTION ALLEGATIONS .....	- 25 -
	CAUSES OF ACTION .....	- 27 -
	COUNT I – Violation of the Consumers Legal Remedies Act.....	- 27 -
	COUNT II – Violation of California's False Advertising Law .....	- 30 -
	COUNT III – Violation of California's Unfair Competition Law.....	- 32 -
	COUNT IV – Permanent Public Injunctive Relief .....	- 34 -
	COUNT V – Declaratory Relief .....	- 36 -
	PRAYER FOR RELIEF.....	- 37 -
	JURY DEMAND .....	- 38 -

Plaintiff TODD SIMON, individually, as a private attorney general, and/or on behalf of all others similarly situated, alleges as follows, on personal knowledge and/or on the investigation of his counsel, against Defendant Carter's, Inc., The William Carter Company (collectively, "Carter's"), and Defendants Doe 1 through Doe 10, inclusive:

# **I. INTRODUCTION**

1. Carter's is a leading retailer and manufacturer of baby and young children's clothing, with approximately 418 Carter's-branded retail stores in the U.S., including 94 in the State of California. Virtually all of the products offered in Carter's retail stores are manufactured by Carter's and bear the "Carter's" brand name. For years, Carter's has perpetrated a massive false discount advertising scheme across nearly all of its products in its retail stores, whereby Carter's advertises perpetual false discounts (typically 40%-70% off) from an inflated and fictitious reference price. Carter's intentionally and deceptively indicates by its advertising and representations that the list price stated on the product tag (i.e., the reference price) is Carter's own regular and normal price for that product, including by prominently advertising on large signs throughout its stores that its products are "XX% OFF" (but where in fact the percentage-off savings are calculated based on the inflated and fictitious list price).

2. Carter's advertised discounts and reference prices are false, because Carter's has never, or almost never, offered its products at the list price. Carter's perpetrates this illegal scheme to create the illusion of savings and to induce customers to purchase its products. Carter's marketing plan is to trick its customers into believing that its products are worth, and have a value equal to, the inflated list price, and that the lower advertised sale price represents a special bargain—when in reality and unbeknownst to the customer, the "sale" price is approximately equal to Carter's usual and normal selling price for the product.

3. Carter's advertising violates California law which prohibits false and deceptive advertising and which prohibits misleading statements about the existence and amount of price reductions.

4. Carter's fraudulent advertising scheme harms consumers, like Plaintiff Todd

1 Simon who purchased a falsely discounted product in a Carter's retail store in California, by  
 2 causing them to pay more than they otherwise would have paid and to buy more than they  
 3 otherwise would have bought. Customers do not enjoy the actual discounts Carter's represents  
 4 to them, and the products are not in fact worth the inflated amount that Carter's represents to  
 5 them (i.e., the products are not actually worth the fictitious and invented list price).

6 5. Consequently, Plaintiff brings this action individually on his own behalf as a  
 7 deceived Carter's customer; as a private attorney general seeking the imposition of public  
 8 injunctive relief against Carter's; and as a representative plaintiff on behalf of a class of  
 9 California consumers seeking, among other things, to recover damages and/or that Carter's be  
 10 ordered to disgorge all revenues it has unjustly received from the proposed Class due to  
 11 Carter's intentional and unlawful practice of using false reference prices and false discounts.

## 12 **II. PARTIES**

13 6. Plaintiff Todd Simon is a citizen of the United States of America and a citizen of  
 14 California and a natural adult person who resides in Santa Clara County, California.

15 7. Defendant Carter's, Inc., is a corporation chartered under the laws of the State of  
 16 Delaware which currently has and at all relevant times in the past has had its headquarters,  
 17 executive office, principal place of business and/or nerve center in Atlanta, Georgia. Carter's,  
 18 Inc., has at least eight U.S. subsidiaries.

19 8. Defendant The William Carter Company is a corporate subsidiary of Carter's,  
 20 Inc., and is chartered under the laws of the state of Massachusetts which currently has and at all  
 21 relevant times in the past has had its headquarters, executive office, principal place of business  
 22 and/or nerve center in Atlanta, Georgia.

23 9. Defendant Does 1 through 10 are subsidiaries of Carter's, Inc., who actively  
 24 engaged in, ratified, contributed to, aided, abetted, benefitted from, and/or are otherwise liable  
 25 for the acts or omissions pled herein. It would work an injustice under these circumstances to  
 26 maintain the corporate separateness of Carter's, Inc., and/or of any or all of the Doe  
 27 Defendants. Based on information and belief, Carter's, Inc., so dominates the operations,  
 28 strategies, revenues, and/or costs of any or all of the Doe Defendants, such that said Doe

Defendants are mere instrumentalities of Carter's, Inc. Plaintiff currently does not possess and cannot obtain the detailed company and other factual information necessary to determine which, if any, of the Doe Defendants actively engaged in, ratified, contributed to, aided, abetted, benefitted from, and/or are otherwise liable for the acts or omissions pled herein. Plaintiff will promptly engage in discovery to uncover the identity of such Doe Defendants. Upon learning the true identities of the Doe Defendants, Plaintiff anticipates either freely amending the operative complaint or requesting leave from the Court to amend the operative complaint to identify them.

10. The words "Defendants" or "Carter's" as used throughout this pleading refers to Defendant Carter's, Inc., Defendant The William Carter Company and/or any or all of the Doe Defendants unless context dictates otherwise.

### **III. JURISDICTION AND VENUE**

11. **Subject Matter Jurisdiction.** This Court has subject matter jurisdiction over this civil action pursuant to, among other bases, Section 10 of Article VI of the California Constitution.

12. **Personal Jurisdiction.** This Court has personal jurisdiction over each Defendant pursuant to, among other bases, California Code of Civil Procedure Section 410.10 because: (1) each Defendant is authorized to do business and/or regularly conducts business in California; (2) the claims alleged herein took place in California; and/or (3) each Defendant has committed tortious acts within the State of California (as alleged, without limitation, throughout this Complaint).

13. Defendants own and/or operate approximately 94 Carter's-branded retail stores in California. Defendants also operate the Carter's website, by which Carter's advertises and sells its goods.

14. **Venue.** Venue is proper in the Santa Clara County Superior Court because, without limitation, none of the defendants currently resides in the State of California and, therefore, Plaintiff designates the Santa Clara County Superior Court as the venue for this civil action. With regard to the cause of action alleged under the California Consumers Legal

Remedies Act, venue is proper in the Santa Clara County Superior Court because, among other reasons, each Defendant is doing business in Santa Clara County and the transaction at issue in this lawsuit took place in Santa Clara County.

**IV. FACTUAL ALLEGATIONS OF CARTER'S FALSE DISCOUNT SCHEME**

15. Carter's is the leading retailer and manufacturer of baby and young children's clothing in the United States with approximately 418 Carter's-branded retail stores in the U.S. including 94 in California. Carter's sells its apparel under the "Carter's" trademark, among other marks. Carter's markets its products via its company-owned retail stores, its website, Internet advertising, email campaigns, and direct mail. Carter's sales have doubled in the last decade to over \$3.5 billion in annual sales, and now account for nearly one-quarter of all baby clothes sales in the United States. Carter's has more than three times the market share of its nearest competitor, according to the NPD Group, Inc. Ninety percent of millennial parents—and 80 percent of baby boomer grandparents—have shopped at Carter's in the past year, according to market research firm Kantar.

16. In significant part, however, Carter's growth and profitability have been the product of a massive false discount advertising scheme. Carter's perpetually advertises nearly all of its products with significant discounts of 40-70% from a false reference price, in order to trick its customers into believing the advertised "sale" price represents a special bargain from Carter's usual and regular prices. In fact, unbeknownst to its customers, the Carter's discounts are never-ending, such that the "sale" prices are approximately equal to Carter's usual and normal selling price for the products. Carter's perpetrates this illegal scheme in order to induce consumers to purchase its products and to increase the amount it can charge for its products.

17. Decades of academic research has established that the use of reference prices, such as those utilized by Carter's, materially impacts consumers' behavior. A reference price affects a consumer's perception of the value of the transaction, the consumer's willingness to make the purchase, and the amount of money the consumer is willing to pay for the product.<sup>1</sup>

<sup>1</sup> See, e.g., Rajesh Chandrashekar & Dhruv Grewal, *Assimilation of Advertised Reference Prices: The Moderating Role of Involvement*, 79 J. Retailing 53 (2003); Pilsik Choi & Keith S.

18. When a reference price is bona fide and truthful, it may help consumers in making informed purchasing decisions. In contrast, consumers are harmed when retailers, such as Carter's, advertise their products with inflated false reference prices. The false reference prices deceive consumers, deprive consumers of a fair opportunity to accurately evaluate the offer, and result in purchasing decisions based on false pretenses.

19. False reference pricing such as that employed by Carter's causes consumers to pay more than they otherwise would have paid for products. False reference pricing also fraudulently increases consumer demand for products, enabling retailers to charge higher prices than they otherwise could have charged.

20. Beyond the adverse impact upon consumers' welfare, the practice of employing false reference pricing also negatively affects the integrity of competition in retail markets. A retailer's use of false reference prices constitutes an unfair method of competition, injuring honest competitors that sell the same or similar products, or otherwise compete in the same market, using valid and accurate reference prices. Businesses who play by the rules—and the investors in those businesses—are penalized if the unlawful advertising practices of their competitors go unchecked.

21. California law, as well as federal regulations, prohibit false reference pricing practices such as those perpetrated by Carter's. California's Unfair Competition Law and False Advertising Law generally forbid unfair business practices and false advertising (i.e., Cal. Bus.

---

Coulter, *It's Not All Relative: The Effects of Mental and Physical Positioning of Comparative Prices on Absolute Versus Relative Discount Assessment*, 88 J. Retailing 512 (2012); Larry D. Compeau & Dhruv Grewal, *Comparative Price Advertising: An Integrative Review*, 17 J. Pub. Pol'y & Mktg. 257 (1998); Larry D. Compeau, Dhruv Grewal & Rajesh Chandrashekar, *Comparative Price Advertising: Believe It or Not*, 36 J. Consumer Aff. 284 (2002); David Friedman, *Reconsidering Fictitious Pricing*, 100 Minn. L. Rev. 921 (2016); Dhruv Grewal & Larry D. Compeau, *Consumer Responses to Price and its Contextual Information Cues: A Synthesis of Past Research, a Conceptual Framework, and Avenues for Further Research*, in 3 Rev. of Mktg. Res. 109 (Naresh K. Malhotra ed., 2007); Daniel J. Howard & Roger A. Kerin, *Broadening the Scope of Reference Price Advertising Research: A Field Study of Consumer Shopping Involvement*, 70 J. Mktg. 185 (2006); Aradhna Krishna, Richard Briesch, Donald R. Lehmann & Hong Yuan, *A Meta-Analysis of the Impact of Price Presentation on Perceived Savings*, 78 J. Retailing 101 (2002); Balaji C. Krishnan, Sujay Dutta & Subhash Jha, *Effectiveness of Exaggerated Advertised Reference Prices: The Role of Decision Time Pressure*, 89 J. Retailing 105 (2013); and Tridib Mazumdar, S. P. Raj & Indrahit Sinha, *Reference Price Research: Review and Propositions*, 69 J. Mktg. 84 (2005).



1 and Prof. Code §§ 17200 *et seq.* and 17500 *et seq.*). Regarding sales to consumers for  
 2 household purposes, the California Consumers Legal Remedies Act prohibits “[m]aking false  
 3 or misleading statements of fact concerning reasons for, existence of, or amounts of, price  
 4 reductions.” Cal. Civ. Code § 1770(a)(13).

5 22. The United States Court of Appeals for the Ninth Circuit has recognized the  
 6 abuses that flow from false reference pricing practices: “Most consumers have, at some point,  
 7 purchased merchandise that was marketed as being ‘on sale’ because the proffered discount  
 8 seemed too good to pass up. Retailers, well aware of consumers’ susceptibility to a bargain,  
 9 therefore have an incentive to lie to their customers by falsely claiming that their products have  
 10 previously sold at a far higher ‘original’ price in order to induce customers to purchase  
 11 merchandise at a purportedly marked-down ‘sale’ price. Because such practices are  
 12 misleading—and effective—the California legislature has prohibited them.” *Hinojos v. Kohl’s*  
 13 *Corp.*, 718 F.3d 1098, 1101 (9th Cir. 2013).

14 23. The California Court of Appeal has likewise recognized the importance of  
 15 California’s false reference price advertising statutes in protecting consumers: “Our Legislature  
 16 has adopted multiple statutes that specifically prohibit the use of deceptive former price  
 17 information and misleading statements regarding the amount of a price reduction. ... These  
 18 statutes make clear that ... our Legislature has concluded ‘reasonable people can and do attach  
 19 importance to [a product’s former price] in their purchasing decisions.’ (alterations in original)  
 20 (quoting *Kwikset Corp. v. Superior Court*, 246 P.3d 877, 892 (Cal. 2011)).” *Hansen v.*  
 21 *Newegg.com Americas, Inc.*, 25 Cal.App.5th 714, 730 (2018).

22 24. The Federal Trade Commission (“FTC”) has also described what constitutes  
 23 false reference pricing practices:

24 (a) One of the most commonly used forms of bargain advertising is to  
 25 offer a reduction from the advertiser’s own former price for an article.  
 26 If the former price is the actual, bona fide price at which the article  
 27 was offered to the public on a regular basis for a reasonably substantial  
 28 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, inflated price was established for the purpose of enabling the



1 subsequent offer of a large reduction -- the “bargain” being advertised  
2 is a false one; the purchaser is not receiving the unusual value he  
3 expects. In such cases, the “reduced price” is, in reality, probably just  
4 the seller’s regular price.

5 16 C.F.R § 233.1.

6 25. Carter’s false discounting scheme is similar in all material respects to the  
7 deceptive practices described and prohibited by these false reference pricing laws and  
8 regulations.

9 **A. Carter’s False Reference Prices.**

10 26. Carter’s intentionally and deceptively indicates to consumers that the advertised  
11 “sale” prices in its retail stores represent significant discounts from Carter’s own regular and  
12 normal prices for its products. Carter’s regular practice is to post large signs throughout its  
13 retail stores advertising that virtually all of its products are “XX% OFF” (but where in fact the  
14 percentage-off savings is calculated based on the inflated and fictitious reference price listed on  
15 the product tags). For example, see the photographs below:

## Percentage-Off Discount Advertising

Carter's Retail Store on April 5, 2019



Carter's Retail Store on November 12, 2019



27. Advertised discounts such as these, where Carter's advertises "XX% OFF," are viewed both under the law and by the reasonable consumer to refer to discounts from Carter's

1 own normal sales prices for those products. *See* 16 C.F.R. § 233.1; *see also* 4 Cal. Code Reg. §  
2 1301.

3 28. But in fact, Carter's deceptively applies the percentage-off discounts to Carter's  
4 fictitious and inflated reference prices which Carter's prints on its product tags. For example,  
5 below is a photo of the product tag for the Reindeer Jersey Tutu Dress ("Reindeer Dress"),  
6 which is the same red dress in the bottom-right photo above. The photo was taken on the same  
7 day, November 12, 2019.



18 29. Carter's applies the advertised "50% OFF" against the \$34.00 price listed on the  
19 tag, which Carter's has labeled as the "MSRP," resulting in a "sale" price of \$17.00. The  
20 reasonable consumer understands, and Carter's intends and indicates, that the \$34.00 price  
21 listed on the tag represents Carter's normal and usual price for the Reindeer Dress. Carter's is  
22 itself the manufacturer and sets the Manufacturer's Suggested Retail Price itself. A reasonable  
23 consumer would expect Carter's to usually follow Carter's own "Suggested Retail Price."

24 30. However, Carter's advertised discounts and reference prices are false, because  
25 Carter's has never, or almost never, offered its products at the represented list price in its retail  
26 stores. For example, from the very first day Carter's offered the Reindeer Dress in its stores  
27 through to the present day, Carter has *never* offered the Reindeer Dress for sale at the \$34.00  
28 list price. Rather, consistent with Carter's false discounting scheme, Carter's has *always*

1 advertised the dress at a significant discount of between “40% OFF” and “60% OFF” the fake  
 2 list price of \$34.00. On the very first day Carter’s offered the Reindeer Dress for sale in its  
 3 stores—October 1, 2019—Carter’s advertised the dress at a false discount of “40% OFF.”  
 4 Carter’s continued to advertise the dress as “40% OFF” through October 6. From October 7  
 5 through October 15, Carter’s advertised the dress as “50% OFF.” From October 16 through  
 6 October 31, Carter’s advertised the dress as “40% OFF.” From November 1 through November  
 7 15, Carter’s advertised the dress as “50% OFF.” On November 16, Carter’s advertised the dress  
 8 as “60% OFF.” From November 17 through November 26, Carter’s advertised the dress as  
 9 “50% OFF.” From November 27 through December 2, Carter’s advertised the dress as “60%  
 10 OFF.”

11 **B. Carter’s False “Free” Offers.**

12 31. Another related practice by Carter’s is to advertise “BUY 1, GET 1 FREE”  
 13 offers for its products. For example, see the photo below, taken at a Carter’s retail store on  
 14 April 5, 2019:



27 32. However, in all cases, Carter’s promise of “BUY 1, GET 1 FREE” is false and  
 28 deceptive. Whenever Carter’s makes such a purported “BUY 1, GET 1 FREE” offer, Carter’s

1 first inflates the selling price of the product to the (never otherwise charged) price listed on the  
 2 tag. Given Carter's perpetual "discount" pricing of 40-60% off the list price, this means  
 3 Carter's is directly recovering the cost of the second "free" product by first doubling the first of  
 4 the first product, such that the customer is in fact not getting any deal at all.

5 33. The Federal Trade Commission warns sellers advertising "Free" offers that  
 6 "Where the seller, in making such an offer, increases his regular price of the article required to  
 7 be bought, or decreases the quantity and quality of that article, or otherwise attaches strings  
 8 (other than the basic condition that the article be purchased in order for the purchaser to be  
 9 entitled to the 'free' or '1¢' additional merchandise) to the offer, the consumer may be  
 10 deceived." 16 C.F.R. § 233.4. "In other words, when the purchaser is told that an article is  
 11 'Free' to him if another article is purchased, the word 'Free' indicates that he is paying nothing  
 12 for that article and no more than the regular price for the other. *Thus, a purchaser has a right to*  
 13 *believe that the merchant will not directly and immediately recover, in whole or in part, the*  
 14 *cost of the free merchandise or service by marking up the price of the article which must be*  
 15 *purchased. . . .*" 16 C.F.R. § 251.1 (emphasis added).

16 34. Carter's engages in this precise deceptive and unlawful practice when it recovers  
 17 the cost of the second supposedly "free" product by doubling the price of the first product.  
 18 Thus Carter's "free" offer representations are false, and the customer is not in fact getting the  
 19 bargain that Carter is falsely advertising.

20 35. Carter's also engages in slight variations of this deceptive "free" offer practice  
 21 (besides BUY 1, GET 1 FREE), including where Carter's raises the price of the product in the  
 22 approximate amount of the purportedly "free" offer and/or raises the price of the product to the  
 23 otherwise never-charged list price.

24 36. Meanwhile, these "free" offer days, on which Carter's increases the price of the  
 25 initial product to the list price, do not constitute bona fide offers to sell the product at the list  
 26 price because the product is *only* offered at the list price when accompanied by a supposedly  
 27 "free" offer. Thus Carter's cannot credibly claim to "establish" its list prices via this deceptive  
 28 free offer scheme, which is itself an independent unlawful act and practice.

C. **Plaintiff's Allegations Regarding Carter's False Reference Price Advertising Scheme Are Based On A Sweeping Four-Year Investigation Of Carter's Practices By Plaintiff's Counsel.**

37. Plaintiff's allegations concerning Carter's false discount advertising scheme are based on a comprehensive investigation by Plaintiff's counsel of Carter's pricing practices for a period of over four years. Plaintiff's counsel has been monitoring and scraping Carter's website on an automated daily basis with a proprietary software program since October 15, 2015. Plaintiff's counsel has compiled and extracted daily pricing and marketing data from the website for nearly all of the products Carter's has offered during this time. In total, Plaintiff's counsel has assembled and analyzed a comprehensive historical database of daily prices and time-stamped screenshots of over 7 million daily offerings for over 80 thousand products over this more than four-year period.

38. Plaintiff's counsel has also investigated brick-and-mortar Carter's retail stores and has found that Carter's false discount practices and product pricing are substantially the same both online and in-store. Virtually all products that Carter's offers in its brick-and-mortar retail stores are also available and advertised on the Carter's website. Based on the investigation of Plaintiff's counsel, Carter's offers and advertises these products with identical list prices and at substantially the same sale prices both on the Carter's website and in Carter's brick-and-mortar stores in California and throughout the nation. Thus, Plaintiff's counsel's comprehensive evidence, statistics, and analysis which establishes the falsity of Carter's discount advertising online, is equally applicable to establishing the falsity of Carter's discount advertising in its brick-and-mortar retail stores.

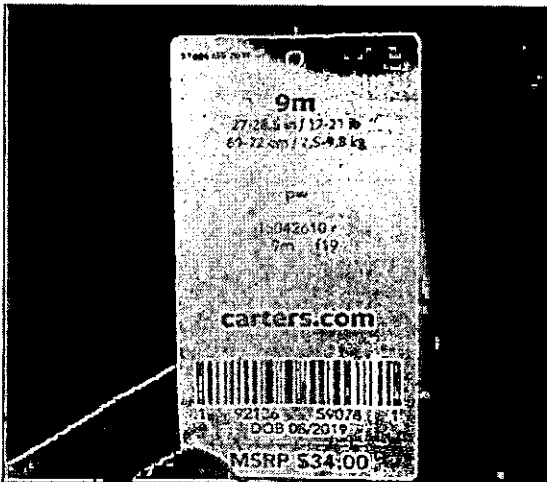
39. For example, the images below demonstrate how Carter's list prices, sales prices, and advertised purported discounts are substantially the same both online and in-store:



**Carter's Retail Store**  
November 12, 2019

**Reindeer Jersey Tutu Dress**  
"50% OFF"

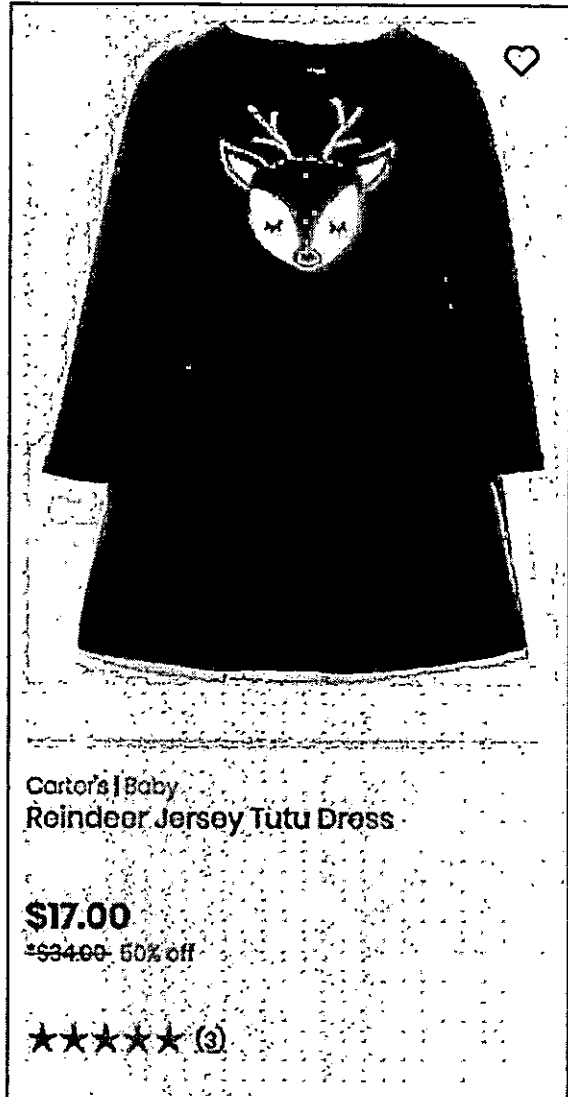
Sales Price: \$17.00; List Price \$34.00



**Carter's Website**  
November 12, 2019

**Reindeer Jersey Tutu Dress**  
"50% off"

Sales Price: \$17.00; Strike-Through Price \$34.00



40. The photographs on the left were taken at a Carter's retail store on November 12, 2019. The top photograph shows "50% OFF" signage to the left of the Reindeer Jersey Tutu Dress, and the bottom photograph shows the list price of \$34.00 on the product tag for the dress. The right screenshot was taken the same day on Carter's website of the identical Reindeer Jersey Tutu Dress. On the website, Carter's advertised the same \$34.00 price (here represented with a strike-through indicating it is the higher normal price), alongside red text



1 proclaiming “50% off.” The sales price was the identical \$17.00, after applying the 50%  
2 “discount.”

3 41. Plaintiff’s counsel’s exhaustive big-data analysis of millions of data points over  
4 a four-year period for more than 80,000 products shows that Carter’s advertises perpetual  
5 discounts for nearly all of its products. The percentage-off and other discounts are *always* false,  
6 and Carter’s list prices (i.e., reference prices) from which the discounts are calculated are false  
7 and inflated. In fact, for nearly all of the products that Carter’s advertises with a discount,  
8 Carters has *never* offered the product at the list price in its stores.

9 **D. Carter’s Use Of The Phrase “MSRP” To Describe The List Price Is Not A**  
10 **Viable Defense.**

11 42. Plaintiff expects Carter’s will argue that its printing of “MSRP” in fine print  
12 disclosures and on its product tags gets it off the hook for the alleged false discount scheme.  
13 Carter’s will argue that this self-created Manufacturer’s Suggested Retail Price is a market  
14 price, and that the advertised discounts need not be discounts from its *own* former prices in its  
15 stores but instead may be discounts from the price that *other* sellers are selling Carter’s  
16 products for. (In additional to directly selling its products in its own retail stores, Carter’s also  
17 sells many products at wholesale to major retailers such as Macy’s, Kohl’s, and J.C. Penney.)

18 43. This defense is unavailing, for numerous reasons. First, Carter’s primary way of  
19 advertising its perpetual discounts in its stores is with prominent and ubiquitous “XX% OFF”  
20 signs. These signs are posted on store windows, are hung from store ceilings and are posted on  
21 nearly every clothing rack. The reasonable consumer, and the law, views such “XX% OFF”  
22 language to mean discounts based on *that retailer’s own* normal and regular prices. Carter’s  
23 may argue that it makes disclosures on the signage that the discount is calculated from  
24 “MSRP,” but in fact, as the store photos above demonstrate, those disclaimers about MSRP are  
25 microscopic in comparison to the giant “XX% OFF” lettering and would not be viewed by the  
26 reasonable consumer.

27 44. Second, even if a consumer viewed the tiny “MSRP” disclaimer text and/or  
28 understood that the claimed discount was calculated from MSRP, the reasonable consumer

1 would understand and expect that MSRP (i.e., the Manufacturer's Suggested Retail Price)  
 2 stands for Carter's own normal and regular prices for its products. After all, Carter's is the  
 3 "Manufacturer." A reasonable consumer would expect Carter's to usually follow its own  
 4 suggested prices.

5 45. Third, based on the investigation of Plaintiff's counsel, none of the major  
 6 resellers of Carter's products regularly offer Carter's products at Carter's self-created—and  
 7 inflated and bogus—MSRP.

8 46. The FTC states the following guideline regarding advertising a product as  
 9 discounted from a suggested retail price (e.g., from an "MSRP" price):

10 (a) Many members of the purchasing public believe that a manufacturer's list  
 11 price, or suggested retail price, is the price at which an article is generally sold.  
 12 Therefore, if a reduction from this price is advertised, many people will believe  
 13 that they are being offered a genuine bargain. *To the extent that list or suggested  
 retail prices do not in fact correspond to prices at which a substantial number of  
 sales of the article in question are made, the advertisement of a reduction may  
 mislead the consumer.*

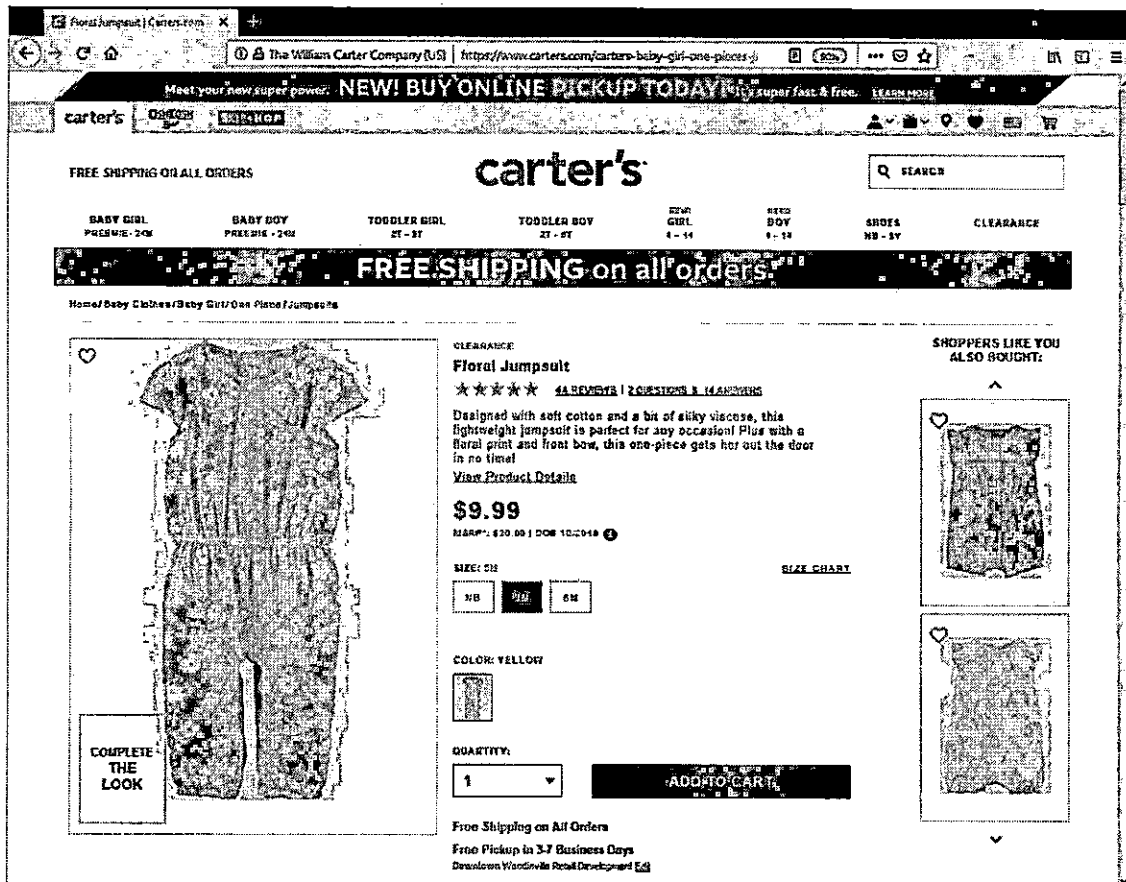
14 16 C.F.R. § 233.3 (emphasis added).

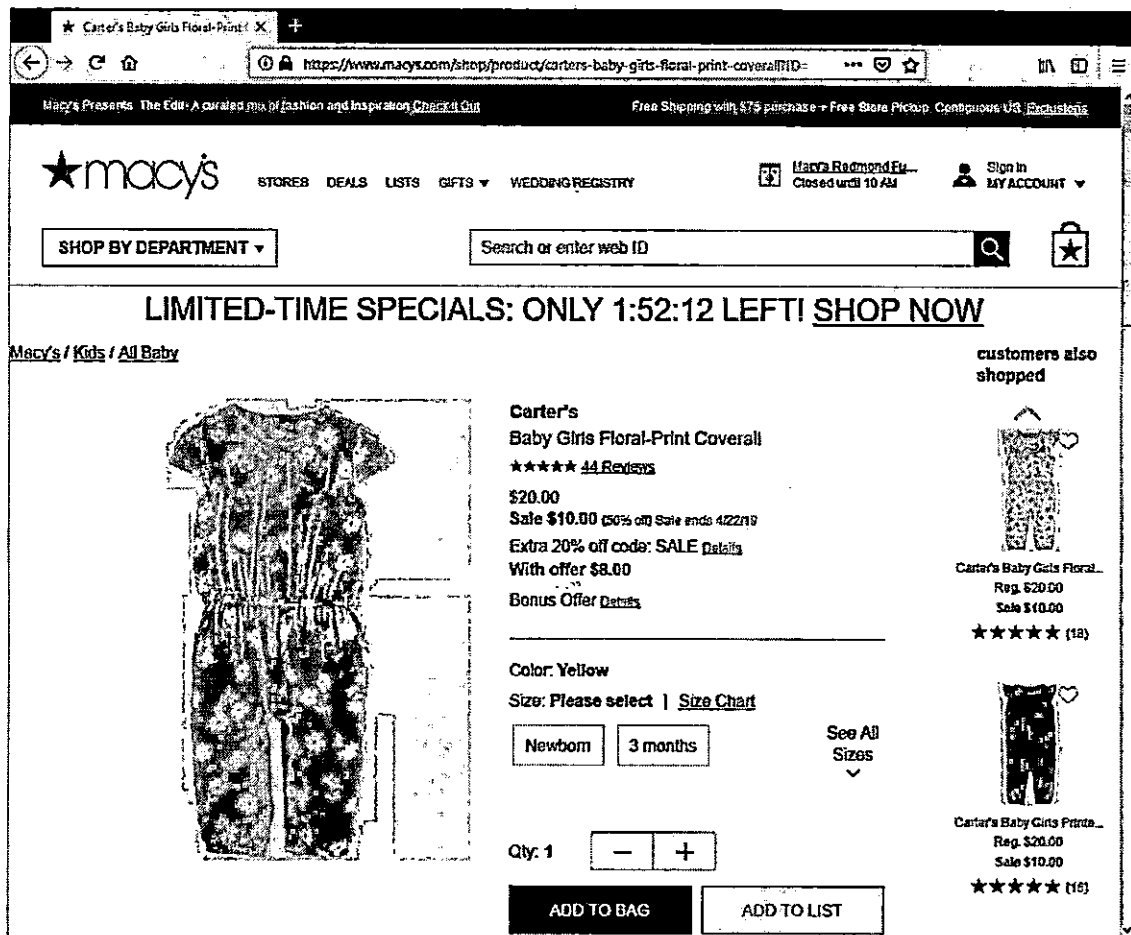
15 47. Counsel's investigation shows that Carter's MSRP prices are deceptive because  
 16 not only do they not correspond to Carter's own former prices, they also do not correspond to  
 17 the prices at which resellers offer these Carter's-branded products. In addition to scraping and  
 18 monitoring the prices of products on Carter's own website, Plaintiff's counsel has also scraped  
 19 and monitored the prices of thousands of Carter's-branded products on the websites of some of  
 20 Carter's largest resellers, specifically Macy's, Kohl's, and J.C. Penney. Counsel's investigation  
 21 and analysis shows that these resellers rarely if ever offer Carter's products at the Carter's-  
 22 created MSRP.

23 48. The conduct of the Carter's resellers is logical; if its resellers offered in good  
 24 faith the Carter's-branded products at the Carter's-provided MSRP, then the resellers would be  
 25 perpetually undercut and would lose sales to Carter's own competing 418 retail stores and  
 26 website, which have a policy and practice of consistently offering the products for more than  
 27 35% below the bogus MSRP. The California Court of Appeal recently agreed that such an  
 28 inference that the market price will generally not vary significantly from a seller's price "is, in

1 fact, reasonable because in competitive markets, the actual prices offered by vendors selling the  
 2 same item tend to converge on the market price. (*Knapp v. Art.com, Inc.* (N.D.Cal. 2016), 2016  
 3 WL 3268995, \*\*2–3, 2016 U.S. Dist. LEXIS 78128, \*6 [plaintiff adequately stated ... claim on  
 4 basis of similar factual allegations supporting same inference]; see *In re High Fructose Corn*  
 5 *Syrup Antitrust Litigation*, *supra*, 295 F.3d at pp. 657–658 [when sellers of identical item  
 6 compete, no seller can generally set its own price above or below the market price, absent  
 7 special circumstances].)” *People v. Superior Court (J.C. Penney Corp., Inc.)*, 34 Cal.App.5th  
 8 376, 418 (2019). In the case of Carter’s, this logical presumption is *confirmed* by the evidence  
 9 collected in the investigation by Plaintiff’s counsel. Neither Carter’s itself, nor any significant  
 10 reseller of Carter’s products, regularly offers Carter’s products at Carter’s self-created—and  
 11 intentionally inflated—MSRP price.

12         49. Below is an example which demonstrates how Carter’s products are typically  
 13 offered in the consumer marketplace, by both Carter’s itself, and by Carter’s resellers, at a  
 14 similar large false discount to the inflated and fictional MSRP. The screenshots below were  
 15 taken on April 22, 2019, of the identical Carter’s-branded Floral Jumpsuit/Coverall  
 16 (“Jumpsuit”) available direct from Carter’s (see the first screenshot), and also from Carter’s  
 17 resellers Kohl’s (see the second screenshot) and Macy’s (see the third screenshot):





50. The MSRP or reference price was \$20.00 at all three retailers (Carter's, Kohl's, and Macy's), which reflects Carter's policy, as the manufacturer, to give each product a price tag with an MSRP which is the same regardless of whether the product is offered direct by Carter's in its stores or website, or by its resellers.

51. All three retailers offered the Jumpsuit for between \$8.00 and \$9.99 on this day (April 22, 2019), at a supposed "discount" of at least 50% from the MSRP or reference price.

52. Based on investigation of Plaintiff's counsel, all three retailers used and continue to use the Carter's-provided MSRP as the advertised reference price for virtually all Carter's-branded products in-store and online, and all three retailers consistently offer Carter's-branded products at a perpetual "discount" of between 40% to 70% from Carter's inflated and fictional MSRP both in-store and online.

53. Carter's is fully aware, expects, and/or intends that its resellers virtually never

offer Carter's products at MSRP, and that its resellers instead perpetually offer Carter's products at a "discount" of 40% to 70% from the inflated and fictional MSRP—just like Carter's itself does in its own retail stores for those very same products.

54. In sum, any MSRP disclosure by Carter's is not a defense. Carter's MSRP is created by Carter's in bad faith, and this MSRP price is not treated by Carter's, nor by its resellers, as a real, bona fide price.

**E. Carter's Printing Of "DOB" On Its Product Tags Is Not A Viable Defense.**

55. Carter's is fully aware that the facts will show that a defense based on its use of the phrase "MSRP" will not hold water. On information and belief, Carter's, realizing that it still faced legal exposure despite its use of the phrase "MSRP," searched for a new way to attempt to exculpate itself from legal liability for its massive advertising fraud. In 2017 Carter's invented what it thought was a clever solution: Carter's began a process of printing the phrase "DOB mm/yyyy" on all of its product tags (where "mm" represents a month and "yyyy" represents a year). For example, see the below photo of the product tag for the Reindeer Jersey Tutu Dress, taken in a Carter's store on November 12, 2019 (the "DOB 08/2019" is squeezed below the barcode printed numbers):



56. Based on the investigation of Plaintiff's counsel, this "DOB" month and year appears to often correspond to the month and year that the product was first listed on the



1 Carter's website (but during which time it was *not yet available in Carter's brick-and-mortar*  
 2 *retail stores*). During this initial period, Carter's may offer the product at the list price (i.e, the  
 3 MSRP price) on its website—and *only* on its website—for at most a couple of weeks, while  
 4 cleverly ensuring that few if any such products are ever viewed or purchased by website  
 5 customers at the list price, as further explained below.

6 57. This "DOB" scheme is neither a safe harbor nor a defense to Carter's fraudulent  
 7 advertising, for several reasons. First, the reasonable consumer would not notice or be aware of  
 8 the "DOB mm/yyyy" language printed on the product tag. The printed text is the *opposite* of  
 9 clear and conspicuous. For example, on the photo of the price tag above, the DOB text is  
 10 immediately below the bar code numbers and in text of similar size and font, and thus would  
 11 likely be ignored as part of the (irrelevant to the consumer) product number or bar code  
 12 scanning information. It is set off from and is in much smaller text than the "MSRP \$34.00" on  
 13 the tag. Also, this printing of "DOB mm/yyyy" is not a common practice at other retailers, and  
 14 consumers would not be aware of it or that they should be searching for it.

15 58. Second, even if a consumer viewed the tiny "DOB mm/yyyy" text on the tag, a  
 16 reasonable consumer would have no idea what it meant. It is not even obvious that "DOB"  
 17 stands for date of birth. And even if a consumer guessed that it stood for date of birth, the  
 18 "birth" date could reasonably be interpreted to mean to any number of things, including: (a)  
 19 when that particular product specimen attached to the tag was manufactured; (b) when the  
 20 product was initially designed; or (c) when the product was first offered on store shelves. Based  
 21 on the investigation of Plaintiff's counsel, DOB does not mean *any* of these things. There is no  
 22 reason whatsoever that a consumer would even venture to think that DOB has any special  
 23 relationship or meaning related to the list price—let alone that the DOB was somehow  
 24 informing the consumer that the product was previously offered at the list price *only* on that  
 25 "mm/yyyy" date, for at most a couple of weeks, and *only* via Carter's online channel (and *never*  
 26 in Carter's retail store channel where the customer is shopping).

27 59. Third, even if Carter's did offer many of its products at the list price online-only  
 28 during a short initial period, it is not a defense because Carter's did so in bad faith solely to



1 artificially “establish” the list price for the sole purpose of attempting to exculpate itself from  
2 legal liability for its pricing fraud.

3         60. The indicia of bad faith regarding Carter’s DOB list price scheme include,  
4 without limitation, that: (1) Carter’s only, if ever, offers an item at the list price on its website  
5 (and *only* on its website) for at most a couple of weeks during an initial period; (2) Carter’s has  
6 a policy to never or virtually never offer an item at the list price in its retail stores (where over  
7 70% of Carter’s direct sales occur); (3) if and when Carter’s offers an item at the list price  
8 (only) on its website during such an initial period, Carter’s intentionally hides and buries the  
9 product on its website during this time, purposefully making it very difficult for the ordinary  
10 website user to discover or find any such products; (4) even if a customer still manages to find  
11 such list-price products on the website, Carter’s discourages customers from buying the  
12 products by labeling them as “Sneak Peek” and by ensuring that those products are the *only*  
13 products offered on the entire website without a 40-70% discount such that those list price  
14 products will appear to the reasonable consumer to be obviously overpriced compared to  
15 everything else including similar products appearing adjacent on the same webpage; (5) as a  
16 result of these practices, Carter’s knows and expects that website customers will purchase few  
17 if any of its products at the list price; and/or (6) in fact website customers purchase few if any  
18 products from Carter’s at the list price—as *discovery in this lawsuit will confirm*.

19         61. In sum, Carter’s printing DOB on its product tags and its related bad-faith  
20 offering of its products at the list price, online-only, for an initial short period, is nothing more  
21 than a cynical ploy cooked up by Carter’s to escape legal liability for its unlawful practices.  
22 Such practices are not a defense or safe harbor to Carter’s false discounting scheme and are  
23 simply another example of Carter’s being too clever by half.

#### 24 **V. PLAINTIFF’S FACTUAL ALLEGATIONS**

25         62. Plaintiff Todd Simon is, and at all relevant times has been, a California resident  
26 and citizen.

27         63. On November 25, 2017 (the day after Black Friday), Mr. Simon visited the  
28 Carter’s store located at 550 Showers Drive in Mountain View, California.

64. Mr. Simon saw prominent signs on the store's windows and posted throughout the store that advertised large percentage-off discounts and huge savings. Mr. Simon reasonably believed that Carter's was having a huge and special store-wide sale and that the advertised discounts and promised savings were genuine. While at the store, Mr. Simon browsed for clothing that he could buy for his infant daughter.

65. Mr. Simon saw a Carter's-branded purple Fleece Zip-Up Hoodie ("Hoodie"), Item No. 190795850888. Mr. Simon viewed signage which stated the Hoodie was among the Black Friday "Doorbuster" specials and that the Hoodie was on sale for more than 70% off, at a selling price of \$6.00.

66. Mr. Simon viewed the product tag attached to the Hoodie, which showed a list price, or "MSRP," of \$22.00. See the photos of the Hoodie and its product tag attached hereto as **Exhibit A**. Mr. Simon reasonably believed that Carter's list prices represented Carter's usual and normal selling prices for the Carter's-branded products in its stores.

67. Relying on Carter's representations, Mr. Simon reasonably believed that the Hoodie was normally offered and sold by Carter's at the \$22.00 list price. Mr. Simon reasonably believed that the Hoodie was thereby worth and had a value of \$22.00. Mr. Simon reasonably believed that the advertised sale price of \$6.00 represented a huge special discount of over 70% off Carter's normal selling price for the Hoodie.

68. Mr. Simon does not recall viewing the "DOB 08/2017" text printed on the product tag at the time of purchase. But even if he had noticed it, Mr. Simon would not have known what it meant or represented except that the "08/2017" date corresponded to the date of birth of his infant daughter (August 2017) for whom he was purchasing the Hoodie.

69. Relying on Carter's discount representations, Mr. Simon purchased the Hoodie.

70. However, Carter's \$22.00 list price and advertised discount of over 70% off were false and deceptive. In reality, and unbeknownst to Mr. Simon, Carter's had *never* offered the Hoodie at the purported regular price of \$22.00 since it first offered the Hoodie in its brick-and-mortar stores on or around August 28, 2017. In fact, *on the very first day* Carter's offered the Hoodie for sale in its stores, Carter's offered it at a purported discount of 50% off the

1 \$22.00 list price. Simply put, no Carter's customer *ever* paid the list price for the Hoodie at a  
2 brick-and-mortar Carter's store.

3 71. Based on the investigation of Plaintiff's counsel, Carter's also never previously  
4 offered the Hoodie for sale in good faith on its website at the \$22.00 list price. Instead, Carter's  
5 offered the Hoodie online-only, in bad faith, at the \$22.00 list price for a period of a couple of  
6 weeks starting July 27, 2017 (*prior* to offering the Hoodie in its retail stores). During this  
7 short—and the only—list price period, Carter's intentionally took efforts to prevent and  
8 discourage website customers from finding the Hoodie or purchasing it (see Paragraphs 58-60  
9 above regarding Carter's scheme). Carter's primary intent with this scheme was to artificially  
10 "establish" the list price on its website in a bad-faith attempt to exculpate itself from legal  
11 liability for its pricing fraud. Carter's knew and expected that website customers would  
12 purchase few if any Hoodies at the list price—and in fact, website customers purchased zero, or  
13 close to zero, Hoodies at the list price.

14 72. Carter's had fooled Mr. Simon. The Hoodie was not in fact worth the \$22.00  
15 price that Carter's had led him to believe. Rather, Carter's typically offered the Hoodie for  
16 between \$5.00 and \$11.00, both in-store and online.

17 73. Carter's advertised false reference prices and advertised false discounts were  
18 material misrepresentations and inducements to Mr. Simon's purchase.

19 74. Mr. Simon reasonably relied on Carter's material misrepresentations. If Mr.  
20 Simon had known the truth, he would have acted differently and/or would not have purchased  
21 the Hoodie from Carter's.

22 75. These misrepresentations by Carter's are material misrepresentations, in that  
23 they are the type of representations on which an ordinary prudent person would rely upon in  
24 conducting his or her affairs.

25 76. As a direct and proximate result of Carter's acts and omissions, Mr. Simon was  
26 harmed, suffered an injury-in-fact, and lost money or property.

27 77. Carter's false advertising harmed Mr. Simon by causing him to pay more than  
28 he otherwise would have paid and to buy more than he otherwise would have bought. Mr.

1 Simon did not enjoy the stated discounts from the purported regular price that Carter's  
2 represented to him (i.e., the list price), and the Hoodie was not, in fact, worth as much as  
3 Carter's represented it to be worth (i.e., the Hoodie was not worth the inflated and fictitious list  
4 price).

5 78. Mr. Simon has a legal right to rely now, and in the future, on the truthfulness  
6 and accuracy of Carter's representations regarding its advertised reference prices and discounts.

7 79. Mr. Simon would shop at Carter's again if he could have confidence regarding  
8 the truth of Carter's prices and the value of its products.

9 80. Mr. Simon will be harmed if, in the future, he is left to guess as to whether  
10 Carter's is providing a legitimate sale or not, and whether its products are actually worth the  
11 amount that Carter's is representing.

12 81. If Mr. Simon were to purchase again from Carter's without Carter's having  
13 changed its unlawful and deceptive conduct alleged herein, Mr. Simon would be harmed on an  
14 ongoing basis and/or would be harmed once or more in the future.

15 82. The deceptive practices and policies alleged herein, and experienced directly by  
16 Plaintiff Simon, are not limited to any single product or group of products. Rather, Carter's  
17 deceptive advertising and sales practices were, and continue to be, systematic and pervasive  
18 across nearly all of Carter's products across all of Carter's sales channels nationwide, including  
19 in Carter's retail stores in California.

20 83. Carter's is primarily engaged in the business of selling or leasing goods or  
21 services. Each cause of action brought by Plaintiff and/or the Class against Carter's in this  
22 pleading arises from and is limited to statements or conduct by Carter's that consist of  
23 representations of fact about Carter's or a business competitor's business operations, goods or  
24 services that is made for the purpose of obtaining approval for, promoting, or securing sales or  
25 leases of, or commercial transactions in, Carter's goods or services or the statement or conduct  
26 was made in the course of delivering Carter's goods or services. Each cause of action brought  
27 by Plaintiff and/or the Class against Carter's in this pleading arises from and is limited to  
28 statements or conduct by Carter's for which the intended audience is an actual or potential

1 buyer or customer, or a person likely to repeat the statements to, or otherwise influence, an  
2 actual or potential buyer or customer.

3 **VI. CLASS ACTION ALLEGATIONS**

4 84. Plaintiff brings this class-action lawsuit on behalf of himself and the members of  
5 the following class (the "Class"):

6 **All residents of the State of California who, within the applicable**  
7 **limitations period, purchased from a Carter's-branded brick-and-**  
8 **mortar store located in California one or more products which**  
**was advertised or promoted by displaying or disseminating a**  
**reference price or discount.**

9 85. Specifically excluded from the Class are the Defendants, any entity in which a  
10 Defendant has a controlling interest or which has a controlling interest in a Defendant, each  
11 Defendant's agents and employees and attorneys, the bench officers to whom this civil action is  
12 assigned, and the members of each bench officer's staff and immediate family.

13 86. ***Numerosity.*** Plaintiff does not know the exact number of Class members but is  
14 informed and believe that the Class easily comprises hundreds of thousands of individuals. As  
15 such, Class members are so numerous that joinder of all members is impracticable.

16 87. ***Commonality and Predominance.*** Well-defined, nearly identical legal or factual  
17 questions affect the members of the Class. These questions predominate over questions that  
18 might affect individual Class members. These common questions include, but are not limited  
19 to, the following:

- 20 a. Carter's policies and actions regarding its advertising;
- 21 b. The accuracy of Carter's advertised reference prices and discounts;
- 22 c. Whether the alleged conduct of Carter's violates California Civil Code §  
23 1750 *et seq.*, California Business & Professions Code § 17500 *et seq.*, and/or California  
24 Business & Professions Code § 17200 *et seq.*;
- 25 d. Whether the alleged conduct of Carter's violates the FTC Guides Against  
26 Deceptive Pricing, 16 C.F.R. § 233.1 *et seq.* and § 251.1;
- 27 e. Whether Plaintiff and the Class have suffered injury and have lost money  
28 or property as a result of such false or misleading discounts and reference prices;

f. Whether Defendants should be ordered to disgorge their unjust enrichment;

g. Whether Carter's should be enjoined from further engaging in the misconduct alleged herein;

h. Whether Carter's use of the phrase "MSRP" is an independently misleading advertising practice and/or is not a viable defense or safe harbor to the unlawful conduct alleged herein;

i. Whether Carter's practice of printing "DOB" on its product tags is not a viable defense or safe harbor to the unlawful conduct alleged herein; and

j. Whether Carter's practice of offering of products at the list price, online-only, for an initial short period, where few if any products are sold at the list price, is not a viable defense or safe harbor to the unlawful conduct alleged herein.

88. The prosecution of separate actions by individual members of the Class would create a risk of inconsistent or varying adjudications with respect to individual members of the Class which would establish incompatible standards of conduct for the party opposing the Class.

89. The party opposing the Class has acted or refused to act on grounds generally applicable to the Class, thereby making appropriate final injunctive relief with respect to the Class as a whole.

90. **Typicality.** Plaintiff's claims are typical of Class members' claims. Plaintiff and Class members all sustained injury as a result of Defendants' practices and schemes.

91. **Adequacy.** Plaintiff will fairly and adequately protect Class members' interests. Plaintiff has no interests antagonistic to Class members' interests. Plaintiff has retained counsel who have considerable experience and success in prosecuting complex class action and consumer protection cases.

92. Further, a class action is superior to all other available methods for fairly and efficiently adjudicating this controversy. Each Class member's interests are small compared to the burden and expense required to litigate each of their claims individually, so it would be

1 impractical and would not make economic sense for Class members to seek individual redress  
 2 for Carter's conduct. Individual litigation would add administrative burden on the courts,  
 3 increasing the delay and expense to all parties and to the court system. Individual litigation  
 4 would also create the potential for inconsistent or contradictory judgments regarding the same  
 5 uniform conduct. A single adjudication would create economies of scale and comprehensive  
 6 supervision by a single judge. Moreover, Plaintiff does not anticipate any difficulties in  
 7 managing a class action trial.

8 93. By its conduct and omissions alleged herein, Carter's has acted and refused to  
 9 act on grounds that apply generally to the Class, such that final injunctive relief and/or  
 10 declaratory relief is appropriate respecting the Class as a whole.

11 94. The nature of Carter's misconduct is non-obvious and/or obscured from public  
 12 view, and neither Plaintiff nor the members of the Class could have, through the use of  
 13 reasonable diligence, learned of the accrual of their claims against Carter's at an earlier time.  
 14 This Court should, at the appropriate time, apply the discovery rule to extend any applicable  
 15 limitations period (and the corresponding class period) to the date on which Carter's first began  
 16 perpetrating the false reference price and false discount advertising scheme alleged herein.

## 17 CAUSES OF ACTION

### 18 COUNT I

#### 19 **Violation of the Consumers Legal Remedies Act California Civil Code § 1750 *et seq.***

20 95. Plaintiff realleges and incorporates by reference all paragraphs alleged  
 21 hereinbefore.

22 96. Plaintiff brings this claim in his individual capacity, in his capacity as a private  
 23 attorney general seeking the imposition of public injunctive relief, and/or as a representative of  
 24 a putative class.

25 97. Defendant Carter's, Inc., Defendant The William Carter Company, and each  
 26 Doe defendant is a "person," as defined by California Civil Code § 1761(c).

27 98. Plaintiff Todd Simon is a "consumer," as defined by California Civil Code §  
 28 1761(d).



99. The Hoodie purchased by Plaintiff from Carter's is a "goods" as defined by California Civil Code § 1761(a).

100. Plaintiff's purchase from Carter's constitutes a "transaction," as defined by California Civil Code § 1761(e).

101. The unlawful methods, acts or practices alleged herein to have been undertaken by Carter's were all committed intentionally. The unlawful methods, acts or practices alleged herein to have been undertaken by Carter's did not result from a bona fide error notwithstanding the use of reasonable procedures adopted to avoid such error.

102. With regard to this count of the pleading which alleges one or more violations of the CLRA, venue is proper in the Santa Clara County Superior Court because, without limitation, Carter's is doing business in Santa Clara County via its brick-and-mortar retail stores and via the Carter's website, and the transaction at issue in this lawsuit took place in a Carter's store located in Santa Clara County. A declaration establishing that this Court has proper venue for this count is attached hereto as **Exhibit B**.

103. Carter's methods, acts and/or practices, including Carter's misrepresentations, active concealment, and/or failures to disclose, violated and continue to violate the CLRA in ways including, but not limited to, the following:

1. Carter's misrepresented that its products had characteristics, benefits, or uses that they did not have (Cal. Civ. Code § 1770(a)(5));

2. Carter's advertised its products with an intent not to sell them as advertised (Cal. Civ. Code § 1770(a)(9));

3. Carter's made false or misleading statements of fact concerning reasons for, existence of, or amounts of, price reductions. (Cal. Civ. Code § 1770(a)(13)); and/or

4. Carter's represented that its products were supplied in accordance with previous representations when they were not (Cal. Civ. Code § 1770(a)(16)).

104. With respect to omissions, Carter's at all relevant times had a duty to disclose the information in question because, *inter alia*: (a) Carter's had exclusive knowledge of material information that was not known to Plaintiff and the Class; (b) Carter's concealed

1 material information from Plaintiff and the Class; and/or (c) Carter's made partial  
2 representations which were false and misleading absent the omitted information.

3 105. Carter's misrepresentations and nondisclosures deceive and have a tendency to  
4 deceive the general public.

5 106. Carter's misrepresentations and nondisclosures are material, in that a reasonable  
6 person would attach importance to the information and would be induced to act on the  
7 information in making purchase decisions.

8 107. As a direct and proximate result of these violations, Plaintiff and the Class  
9 suffered injury-in-fact and lost money.

10 108. Carter's actions and omissions as pled herein were conducted with malice, fraud  
11 and/or oppression.

12 109. Plaintiff and the Class paid more than they otherwise would have paid for the  
13 products they purchased from Carter's and they bought more than they otherwise would have  
14 bought from Carter's.

15 110. Plaintiff and the Class did not enjoy the actual discounts Carter's represented to  
16 them, and the products were not in fact worth the inflated amount that Carter's represented to  
17 them (i.e., the products were not actually worth the fictitious and invented list price).

18 111. Carter's false advertising scheme has harmed all of its customers by fraudulently  
19 increasing demand for its products, thereby shifting the demand curve and enabling Carter's to  
20 charge its customers more than it otherwise could have charged and to generate more sales than  
21 it otherwise would have generated.

22 112. Carter's conduct alleged herein caused substantial injury to Plaintiff, the Class,  
23 and the public. Carter's conduct is ongoing and is likely to continue and recur absent a  
24 permanent injunction. Accordingly, Plaintiff seeks an order enjoining Carter's from committing  
25 such practices. Plaintiff also seeks attorneys' fees and costs.

26 113. Plaintiff individually seeks public injunctive relief, under the CLRA, to protect  
27 the general public from Carter's false discount advertising and omissions.

28 114. In accordance with California Civil Code § 1782(a), on November 29, 2019,

1 Plaintiff's counsel served Carter's with notice of its CLRA violations, attached hereto as  
 2 **Exhibit C**. Carter's sent a letter dated January 2, 2020, in response, attached hereto as **Exhibit**  
 3 **D**. On January 13, 2020, Plaintiff's counsel served Carter's with a revised notice of its CLRA  
 4 violations by certified mail, return receipt requested, attached hereto as **Exhibit E**. If Carter's  
 5 fails to provide appropriate relief for its CLRA violations within 30 days of receipt of  
 6 Plaintiff's January 13, 2020, notification letter, Plaintiff will amend this complaint to seek  
 7 compensatory and exemplary damages as permitted by Cal. Civ. Code §§ 1780 and 1782(b).

8 115. The balance of the equities favors the entry of permanent injunctive relief  
 9 against Carter's. Plaintiff and the general public will be irreparably harmed absent the entry of  
 10 permanent injunctive relief against Carter's. Plaintiff and the general public lack an adequate  
 11 remedy at law. A permanent injunction against Carter's is in the public interest. Carter's  
 12 unlawful behavior is capable of repetition or re-occurrence absent the entry of a permanent  
 13 injunction.

14 **COUNT II**  
 15 **Violation of California's False Advertising Law**  
**California Business and Professions Code § 17500 et seq.**

16 116. Plaintiff realleges and incorporates by reference all paragraphs alleged  
 17 hereinbefore.

18 117. Plaintiff brings this claim in his individual capacity, in his capacity as a private  
 19 attorney general seeking the imposition of public injunctive relief, and/or as a representative of  
 20 a putative class.

21 118. Carter's has engaged in false or misleading advertising in violation of  
 22 California's statutory False Advertising Law ("FAL").

23 119. Carter's has advertised reference prices and corresponding discounts that are  
 24 false, misleading, and/or have a capacity, likelihood or tendency to deceive reasonable  
 25 consumers. *See, e.g., Kasky*, 27 Cal.4th at 951 (UCL and FAL prohibit "not only advertising  
 26 which is false, but also advertising which, although true, is either actually misleading or which  
 27 has a capacity, likelihood or tendency to deceive or confuse the public" (citation omitted));

28 *Hansen v. Newegg.com Americas, Inc.*, 25 Cal.App. 5th 714, 722 (2018) (same);

1 *Overstock.com, Inc.*, 2014 WL 657516, at \*23 (same).

2 120. Carter's, with intent directly or indirectly to dispose of personal property or to  
3 perform services, or to induce the public to enter into any obligation relating thereto, makes,  
4 disseminates, has made or disseminated, causes to be made or disseminated, and/or has caused  
5 to be made or disseminated, before the public in the State of California and/or throughout the  
6 United States, in any newspaper or other publication, or any advertising device, or by public  
7 outcry or by proclamation, or in any other manner or means, statements concerning that  
8 personal property or those services, and/or concerning any circumstance or matter of fact  
9 connected with the proposed performance or disposition thereof, which are untrue or  
10 misleading and which are known (or which by the exercise of reasonable care should be  
11 known) to be untrue or misleading.

12 121. Independently, Carter's has made or disseminated or caused to be so made or  
13 disseminated any such statement as part of a plan or scheme with the intent not to sell that  
14 personal property or those services, professional or otherwise, so advertised at the price stated  
15 therein, or as so advertised.

16 122. With respect to omissions, Carter's at all relevant times had a duty to disclose  
17 the information in question because, *inter alia*: (a) Carter's had exclusive knowledge of  
18 material information that was not known to Plaintiff and the Class; (b) Carter's concealed  
19 material information from Plaintiff and the Class; and/or (c) Carter's made partial  
20 representations which were false and misleading absent the omitted information.

21 123. Carter's committed such violations of the False Advertising Law with actual  
22 knowledge that its advertising was untrue or misleading, or Carter's, in the exercise of  
23 reasonable care, should have known that its advertising was untrue or misleading.

24 124. Plaintiff and the Class reasonably relied on Carter's representations and/or  
25 omissions made in violation of the False Advertising Law.

26 125. As a direct and proximate result of these violations, Plaintiff and the Class  
27 suffered injury-in-fact and lost money.

28 126. Carter's should be ordered to disgorge or make restitution of all monies

1 improperly accepted, received or retained.

2 127. Carter's conduct has caused substantial injury to Plaintiff, the Class, and the  
3 public. Carter's conduct is ongoing and is likely to continue and recur absent a permanent  
4 injunction. Accordingly, Plaintiff seeks an order enjoining Carter's from committing such  
5 violations of the FAL. Plaintiff further seeks an order granting restitution to Plaintiff and the  
6 Class in an amount to be proven at trial. Plaintiff further seeks an award of attorneys' fees and  
7 costs under Cal. Code Civ. Proc. § 1021.5.

8 128. Absent injunctive relief, Carter's will continue to injure Plaintiff and the Class.  
9 Carter's misrepresentations and omissions are ongoing. Even if such conduct were to cease, it  
10 is behavior that is capable of repetition or reoccurrence by Carter's.

11 129. Plaintiff individually seeks public injunctive relief, under the FAL, to protect the  
12 general public from Carter's false discount advertising and omissions.

13 130. The balance of the equities favors the entry of permanent injunctive relief  
14 against Carter's. Plaintiff and the general public will be irreparably harmed absent the entry of  
15 permanent injunctive relief against Carter's. Plaintiff and the general public lack an adequate  
16 remedy at law. A permanent injunction against Carter's is in the public interest. Carter's  
17 unlawful behavior is capable of repetition or re-occurrence absent the entry of a permanent  
18 injunction.

19 **COUNT III**  
20 **Violation of California's Unfair Competition Law**  
**California Business and Professions Code § 17200 *et seq.***

21 131. Plaintiff realleges and incorporates by reference all paragraphs alleged  
22 hereinbefore.

23 132. Plaintiff brings this claim in his individual capacity, in his capacity as a private  
24 attorney general seeking the imposition of public injunctive relief, and/or as a representative of  
25 a putative class.

26 133. Defendant Carter's acts and omissions alleged herein constitute unfair  
27 competition and/or unlawful, unfair, or fraudulent business practices in violation of California  
28 Business and Professions Code § 17200 *et seq.* (the "Unfair Competition Law" or "UCL").

1           134. Carter's conduct and omissions alleged herein are immoral, unethical,  
 2           oppressive, unscrupulous, unconscionable, and/or substantially injurious to Plaintiff and the  
 3           Class. There is no utility to Carter's conduct, and even if there were any utility, it would be  
 4           significantly outweighed by the gravity of the harm to consumers caused by Carter's conduct  
 5           alleged herein.

6           135. Carter's conduct and omissions alleged herein also violate California public  
 7           policy, including as such policy is reflected in Cal. Civ. Code § 1750 *et seq.* and Cal. Civ. Code  
 8           §§ 1709-1710.

9           136. By its conduct and omissions alleged herein, Carter's has violated the  
 10          "unlawful" prong of the UCL, including by making material misrepresentations and omissions  
 11          in violation of Cal. Bus. & Prof. Code § 17500 *et seq.* and Cal. Civ. Code § 1750, *et seq.*;  
 12          engaging in deceit in violation of Cal Civ. Code §§ 1709-1710; and employing deceptive  
 13          advertisements as identified by 16 C.F.R § 233.1 *et seq.* and § 251.1.

14          137. Carter's has violated the "fraudulent" prong of the UCL by advertising its  
 15          products with a false and inflated reference price and with a false discount.

16          138. With respect to omissions, Carter's at all relevant times had a duty to disclose  
 17          the information in question because, *inter alia*: (a) Carter's had exclusive knowledge of  
 18          material information that was not known to Plaintiff and the Class; (b) Carter's concealed  
 19          material information from Plaintiff and the Class; and/or (c) Carter's made partial  
 20          representations which were false and misleading absent the omitted information.

21          139. Carter's material misrepresentations and nondisclosures were likely to mislead  
 22          reasonable consumers, existing and potential customers, and the public.

23          140. Carter's misrepresentations and nondisclosures deceive and have a tendency to  
 24          deceive the general public and reasonable consumers.

25          141. Carter's misrepresentations and nondisclosures are material, such that a  
 26          reasonable person would attach importance to the information and would be induced to act on  
 27          the information in making purchase decisions.

28          142. Plaintiff and the Class reasonably relied on Carter's material misrepresentations

1 and nondisclosures, and would have acted differently if they had known the truth.

2 143. By its conduct and omissions alleged herein, Carter's received more money  
3 from Plaintiff and the Class than it should have received, and that money is subject to  
4 restitution.

5 144. As a direct and proximate result of Carter's unfair, unlawful, and fraudulent  
6 conduct, Plaintiff and the Class lost money.

7 145. Carter's conduct has caused substantial injury to Plaintiff, Class members, and  
8 the public. Carter's conduct is ongoing and is likely to continue and recur absent a permanent  
9 injunction. Accordingly, Plaintiff seeks an order enjoining Carter's from committing such  
10 unlawful, unfair, and fraudulent business practices. Plaintiff further seeks an order granting  
11 restitution to Plaintiff and the Class in an amount to be proven at trial. Plaintiff further seeks an  
12 award of attorneys' fees and costs under Cal. Code Civ. Proc. § 1021.5.

13 146. Absent injunctive relief, Carter's will continue to injure Plaintiff and the Class.  
14 Carter's misrepresentations and omissions are ongoing. Even if such conduct were to cease, it  
15 is behavior that is capable of repetition or reoccurrence by Carter's.

16 147. Plaintiff individually seeks public injunctive relief, under the UCL, to protect  
17 the general public from Carter's false discount advertising and omissions.

18 148. The balance of the equities favors the entry of permanent injunctive relief  
19 against Carter's. Plaintiff and the general public will be irreparably harmed absent the entry of  
20 permanent injunctive relief against Carter's. Plaintiff and the general public lack an adequate  
21 remedy at law. A permanent injunction against Carter's is in the public interest. Carter's  
22 unlawful behavior is capable of repetition or re-occurrence absent the entry of a permanent  
23 injunction.

24 **COUNT IV**  
25 **Permanent Public Injunctive Relief**  
**All Statutory, Inherent and Other Authority**  
**(Individually)**

26 149. Plaintiff realleges and incorporates by reference all paragraphs alleged  
27 hereinbefore.

28 150. Plaintiff brings this claim in his individual capacity.



1           151. Public injunctive relief is a remedy which is authorized and recognized by the  
 2 laws of California. Public injunctive relief is defined as an injunction which seeks “not to  
 3 resolve a private dispute but to remedy a public wrong.” *Broughton v. Cigna Healthplans of*  
 4 *California*, 21 Cal. 4th 1066, 1080 (1999). “Whatever the individual motive of the party  
 5 requesting injunctive relief, the benefits of granting injunctive relief by and large do not accrue  
 6 to that party, but to the general public in danger of being victimized by the same deceptive  
 7 practices as the plaintiff suffered. . . . In other words, the plaintiff in a CLRA damages action  
 8 is playing the role of a bona fide private attorney general.” *Ibid*.

9           152. Three of Plaintiff’s claims are brought under California statutes which empower  
 10 the Court to craft wide-ranging injunctions to benefit consumers at large. “In previous  
 11 decisions, this court has said that the statutory remedies available for a violation of the  
 12 Consumers Legal Remedies Act (CLRA; Civ. Code, § 1750 *et seq.*), the unfair competition law  
 13 (UCL; Bus. & Prof. Code, § 17200 *et seq.*), and the false advertising law (*id.*, § 17500 *et seq.*)  
 14 include public injunctive relief, i.e., injunctive relief that has the primary purpose and effect of  
 15 prohibiting unlawful acts that threaten future injury to the general public.” *McGill v. Citibank,*  
 16 *N.A.*, 2 Cal. 5th 945, 951 (2017).

17           153. If not enjoined by order of this Court, Carter’s is free to resume its unlawful  
 18 behavior and injure Plaintiff and California consumers through the misconduct alleged herein  
 19 once more. Carter’s has a duty to speak truthfully or in a non-misleading manner.

20           154. Plaintiff would shop at Carter’s again if he could have confidence regarding the  
 21 truth of Carter’s prices and the value of its products.

22           155. Plaintiff will be harmed if, in the future, he is left to guess as to whether Carter’s  
 23 is providing a legitimate sale or not, and whether products are actually worth the amount that  
 24 Carter’s is representing.

25           156. If Plaintiff were to purchase again from Carter’s without Carter’s having  
 26 changed its unlawful and deceptive conduct alleged herein, Plaintiff would be harmed on an  
 27 ongoing basis and/or would be harmed once or more in the future.

28           157. The balance of the equities favors the entry of permanent injunctive relief

1 against Carter's. Plaintiff and the general public will be irreparably harmed absent the entry of  
2 permanent injunctive relief against Carter's. Plaintiff and the general public lack an adequate  
3 remedy at law. A permanent injunction against Carter's is in the public interest. Carter's  
4 unlawful behavior is capable of repetition or re-occurrence absent the entry of a permanent  
5 injunction.

6 **COUNT V**  
7 **Declaratory Relief**  
**California Code of Civil Procedure § 1060**

8 158. Plaintiff realleges and incorporates by reference all paragraphs alleged  
9 hereinbefore.

10 159. Plaintiff brings this claim in his individual capacity, in his capacity as a private  
11 attorney general, and/or as a representative of a putative class.

12 160. Plaintiff and the members of the Class and the general public are persons  
13 interested under a written instrument or under a contract and/or are persons who desire a  
14 declaration of his or her or their rights or duties with respect to another, or in respect to, in, over  
15 or upon property, in this case of actual controversy relating to the legal rights and duties of the  
16 respective parties who are, on the one hand, Plaintiff and the members of the Class and the  
17 general public, and who are, on the other hand, Carter's.

18 161. Consequently, Plaintiff and the members of the Class bring this Count as an  
19 original action in the Superior Court of California for a declaration of his or her or their rights  
20 and duties in the premises, including a determination of any question of construction or validity  
21 arising under an instrument or contract.

22 162. The "written instrument" in question is each and every product tag or other  
23 written instrument containing a "DOB" notation as exemplified by the product tags pled herein  
24 in Paragraphs 27, 38, 54, and at **Exhibit A**.

25 163. Plaintiff contends that Carter's practice of printing "DOB" on its product tags or  
26 other written instruments is not a defense or safe harbor to the unlawful conduct alleged herein.  
27 In contrast, Carter's contends that Carter's practice of printing "DOB" on its product tags or  
28 other written instruments is a defense or safe harbor to the unlawful conduct alleged by

1 Plaintiff.

2 164. Plaintiff therefore respectfully requests that the Court declare that Carter's  
3 practice of printing "DOB" on its product tags or other written instruments is not a defense or  
4 safe harbor to the unlawful conduct alleged herein.

5 165. Plaintiff contends that Carter's practice of offering products at the list price,  
6 online-only, for an initial short period, where few if any products are sold at the list price, is not  
7 a defense or safe harbor to the unlawful conduct alleged herein. In contrast, Carter's contends  
8 that Carter's practice of offering products at the list price, online-only, for an initial short  
9 period, where few if any products are sold at the list price, is a defense or safe harbor to the  
10 unlawful conduct alleged by Plaintiff.

11 166. Plaintiff therefore respectfully requests that the Court declare that Carter's  
12 practice of offering products at the list price, online-only, for an initial short period, where few  
13 if any products are sold at the list price, is not a defense or safe harbor to the unlawful conduct  
14 alleged herein.

15 **PRAYER FOR RELIEF**

16 1. In order to prevent injury to the general public, Plaintiff Todd Simon  
17 individually requests that the Court enter a public injunction enjoining Defendants from  
18 advertising false reference prices and false discounts as alleged herein;

19 2. Further, on behalf of himself and the proposed Class, Plaintiff requests that the  
20 Court order relief and enter judgment against Defendants as follows:

21 a. Declare this action to be a proper class action, certify the Class, and  
22 appoint Plaintiff and his counsel to represent the Class;

23 b. Order disgorgement or restitution, including, without limitation,  
24 disgorgement of all revenues, profits and/or unjust enrichment that each Defendant obtained,  
25 directly or indirectly, from Plaintiff and each members of the Class or otherwise as a result of  
26 the unlawful conduct alleged herein;

27 c. Permanently enjoin each Defendant from the unlawful conduct alleged  
28 herein;

d. Declare that Carter's practice of printing "DOB" on its product tags or other written instruments is not a defense or safe harbor to the unlawful conduct alleged herein;

e. Declare that Carter's practice of offering products at the list price, online-only, for an initial short period, where few if any products are sold at the list price, is not a defense or safe harbor to the unlawful conduct alleged herein;

f. Order each Defendant to pay damages to Plaintiff and the Class in an amount to be proven at trial;

g. Order each Defendant to pay punitive and exemplary damages to the extent allowed by law;

h. Order each Defendant to pay attorneys' fees, costs, and pre-judgment and post-judgment interest to the extent allowed by law;

i. Retain jurisdiction to monitor Defendants' compliance with the permanent injunctive relief; and/or

j. Provide all other relief to which Plaintiff and the Class may show themselves justly entitled.

**JURY DEMAND**

Plaintiff TODD SIMON, on behalf of himself and on behalf of the Class, demand a trial by jury on all issues so triable.

DATED this 13th day of January, 2020.

Presented by:

HATTIS & LUKACS

By: 

Daniel M. Hattis (SBN 232141)  
HATTIS & LUKACS  
400 108<sup>th</sup> Avenue NE, Suite 500  
Bellevue, WA 98004  
Telephone: (425) 233-8650  
Facsimile: (425) 412-7171  
Email: dan@hattislaw.com

Paul Karl Lukacs (SBN 197007)  
HATTIS & LUKACS

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

1401 Twenty-First Street, Suite 400  
Sacramento, California 95811  
Telephone: (916) 292-9739  
Facsimile: (916) 444-8723  
Email: [pk1@hattislaw.com](mailto:pk1@hattislaw.com)