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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**

10 CHRISTINA CALCAGNO, on behalf of
herself and all others similarly situated,

11 Plaintiff,

12 vs.

13 KIPLING APPAREL CORP., a
14 Delaware Corporation, and DOES 1-50,
inclusive,

15 Defendants.
16
17

CLASS ACTION COMPLAINT

Violations of: '23CV2247 BAS BLM

1. **California's Unfair Competition Laws ("UCL"), CAL. BUS. & PROF. CODE §§ 17200, et seq.;**
2. **California's False Advertising Laws ("FAL"), CAL. BUS. & PROF. CODE §§ 17500, et seq.;**
3. **California Consumer Legal Remedies Act ("CLRA"), CAL. BUS. & PROF. CODE §§ 17200, et seq.;**

DEMAND FOR JURY TRIAL

1 Plaintiff Christina Calcagno (“Plaintiff”) brings this action, on behalf of herself and
2 all others similarly situated, against Defendant Kipling Apparel Corp. (“Kipling” or
3 “Defendant”), and states:

4 I. NATURE OF ACTION

5 1. Prices a perceived value to consumers.¹ False advertising of prices can be used
6 to manipulate consumers’ value perception of products and cause consumers to overpay for
7 them. Aware of the intertwined connection between consumers’ buying decision processes
8 and price, retailers like Defendant lure consumers with advertised discounts that promise
9 huge savings and high value. But the promised savings are false, and the product’s value
10 reflected in its price is incorrect when the retailer inflates its prices due to advertised
11 discounts off of some higher, made-up “original” price that no one ever pays. Defendant
12 has continually advertised false price discounts for merchandise sold throughout its Kipling
13 Outlet stores. This class action seeks monetary damages, restitution, and declaratory and
14 injunctive relief from Defendant arising from its deceptive business practice of advertising
15 fictitious “original” prices and corresponding phantom discounts on handbags, backpacks,
16 luggage, apparel, accessories, and other items sold in its Kipling Outlet stores .

17 2. False reference pricing occurs when a seller fabricates a false “original” price
18 for a product and then offers that product at a substantially lower price under the guise of a
19 discount. The resulting artificial price disparity misleads consumers into believing the
20 product they are buying has a higher market value, and it induces them into purchasing the
21 product. This practice artificially inflates the true market price for these products by raising
22 consumers’ internal reference price and in turn the perceived value consumers ascribe to
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25 ¹ “[P]rice is materially utilized in the formation of perceptions of the product’s value and
26 influences the decision to purchase the product or to continue to search for a lower price.”
27 Dhruv Grewal & Larry D. Compeau, *Comparative Price Advertising: Informative or*
28 *Deceptive?*, 11 J. PUB. POL’Y & MKTG. 52, 55 (1992); “[R]eference to a retailer’s normal
or regular price in retail sale price advertising provides the consumer with information used
to determine perceived value” Patrick J. Kaufmann, N. Craig Smith, & Gwendolyn K.
Ortmeyer, *Deception in Retailer High-Low Pricing: A “Rule of Reason” Approach*, 70 J.
RETAILING 115, 118 (1994).

1 these products (i.e., demand).² Consequently, false reference pricing schemes enable
2 retailers, like Defendant, to sell products above their true market price and value—and
3 consumers are left to pay the inflated price. Consumers are thus damaged by not receiving
4 the promised discounts for products advertised with false reference pricing.

5 3. The following example of a hypothetical DVD seller, which is parallel to
6 Defendant’s deceptive business practice, illustrates the illegal false reference pricing
7 scheme and its attendant harm to consumers. A seller knows it can sell a particular DVD at
8 \$5.00, which represents both the market price and the price at which the seller could
9 regularly offer the DVD and make a profit. Instead, however, the seller creates a “original”
10 price for the DVD of \$100.00 and advertises the DVD as “on sale” at **90% off** rendering the
11 “**sale**” price of the DVD \$10.00. When a consumer purchases the DVD, he presumes he
12 got a “good deal” on a DVD previously sold—i.e., valued by others in the market—at an
13 “original” price of \$100.00. The consumer’s presumption and purchase stem directly from
14 the seller’s purposeful deception. For example, if the seller tried to sell that same DVD for
15 \$10.00 **without** referencing a false original price of \$100.00, and the attendant 90% off
16 discount, that seller would not be able to sell any DVDs at \$10.00 because the true, original
17 market price of the DVD is \$5.00. In contrast, by presenting consumers with a false
18 “original” price of \$100.00, consumers will purchase the DVD at \$10.00; the seller thus has
19 fabricated an increase in demand for the DVD through the **perceived value** of both the DVD
20 itself and the substantial discount of \$90.00. Consumers’ increased willingness and demand
21 to pay \$10.00 for the DVD will in turn impact the overall market price of the DVD.
22 Therefore, the seller can create a false market price for the DVD at \$10.00 by advertising a
23 false “original” price and a corresponding phantom discount of 90% off. Plaintiff’s case
24 seeks to remedy this deception, its attendant harm to consumers, and that disparity—the

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27 ² Dhruv Grewal & Larry D. Compeau, Comparative Price Advertising: Informative or
28 Deceptive?, 11 J. Pub. Pol’y & Mktg. 52, 55 (Spring 1992) (“By creating an impression of
savings, the presence of a higher reference price enhances subjects’ perceived value and
willingness to buy the product.”).

1 inflated market price through Defendant’s application of an illegal discounting scheme
2 compared to the lower, more accurate market price without any false reference pricing.

3 4. Through its false and misleading marketing, advertising, and pricing scheme
4 alleged herein, Defendant violated, and continues to violate, California and federal law.
5 Specifically, Defendant violated and continues to violate: California’s Unfair Competition
6 Law, CAL. BUS. & PROF. CODE §§ 17200, *et seq.* (the “UCL”); California’s False
7 Advertising Law, CAL. BUS. & PROF. CODE §§ 17500, *et seq.* (the “FAL”); California’s
8 Consumers Legal Remedies Act, CAL. CIV. CODE §§ 1750, *et seq.* (the “CLRA”); and the
9 Federal Trade Commission (“FTC”) Act (“FTCA”), which prohibits “unfair or deceptive
10 acts or practices in or affecting commerce” (15 U.S.C. § 45(a)(1)) and false advertisements
11 (15 U.S.C. § 52(a)).

12 5. Plaintiff brings this action on behalf of herself and other similarly situated
13 consumers who have purchased one or more handbags, backpacks, luggage, apparel,
14 accessories, and other items at Defendant’s Kipling Outlet stores that were deceptively
15 represented as discounted from a false advertised reference price. Plaintiff seeks to halt the
16 dissemination of this false, misleading, and deceptive pricing scheme, to correct the false
17 and misleading perception it has created in the minds of consumers, and to obtain redress
18 for those who have overpaid for merchandise tainted by this deceptive pricing scheme.
19 Plaintiff also seeks to enjoin Defendant from using false and misleading misrepresentations
20 regarding former price comparisons in its labeling and advertising permanently. Further,
21 Plaintiff seeks to obtain damages, restitution, reasonable costs and attorney’s fees, and other
22 appropriate relief in the amount by which Defendant was unjustly enriched as a result of its
23 sales of merchandise offered a false discount.

24 II. JURISDICTION AND VENUE

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

1 11. Defendant’s deceptive advertised reference prices are thus incorporated into
 2 consumers’ decision process. First, a product’s “price is also used as an indicator of product
 3 quality.”⁵ In other words, consumers view Defendant’s deceptive advertised reference
 4 prices as a proxy for product quality. Second, reference prices “appeal[] to consumers’
 5 desire for bargains or deals.”⁶ Academic researchers note how consumers “sometimes
 6 expend more time and energy to get a discount than seems reasonable given the financial
 7 gain involved,” and “often derive more satisfaction from finding a sale price than might be
 8 expected on the basis of the amount of money they actually save.”⁷ Under this concept,
 9 coined as “transaction utility” by Noble Prize-winning economist Richard Thaler,
 10 consumers place some value on the psychological experience of obtaining a product at a
 11 perceived bargain.⁸

12 12. Research in marketing and economics has long recognized that consumer
 13 demand can be influenced by “internal” and “external” reference prices.⁹ Internal reference
 14 prices are “prices stored in memory” (e.g., a consumer’s price expectations adapted from
 15 past experience) while external reference prices are “provided by observed stimuli in the
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18 ⁵ Grewal, Dhruv, and Larry D. Compeau. “Comparative price advertising: Informative or
 19 deceptive?” *Journal of Public Policy & Marketing* (1992): 52-62, p. 54. Also see Thaler,
 20 Richard. “Mental Accounting and Consumer Choice.” *Marketing Science* 4, no. 3 (1985):
 21 199-214, p. 212 (“The [reference price] will be more successful as a reference price the less
 22 often the good is purchased. The [reference price] is most likely to serve as a proxy for quality
 23 when the consumer has trouble determining quality in other ways (such as by inspection)”).

24 ⁶ Grewal, Dhruv, and Larry D. Compeau. “Comparative price advertising: Informative or
 25 deceptive?” *Journal of Public Policy & Marketing* (1992): 52-62, p. 52.

26 ⁷ Darke, Peter and Darren Dahl. “Fairness and Discounts: The Subjective Value of a
 27 Bargain.” *Journal of Consumer Psychology* 13, no 3 (2003): 328-338, p. 328.

28 ⁸ “To incorporate ... the psychology of buying into the model, two kinds of utility are
 postulated: *acquisition utility* and *transaction utility*. The former depends on the value of
 the good received compared to the outlay, the latter depends solely on the perceived merits
 of the ‘deal’”. Thaler, Richard. “Mental Accounting and Consumer Choice.” *Marketing
 Science* 4, no. 3 (1985): 199-214, p. 205.

⁹ Empirical results “suggest that internal reference prices are a significant factor in purchase
 decisions. The results also add empirical evidence that external reference prices
 significantly enter the brand-choice decision.” Mayhew, Glenn E. and Russell S. Winer.
 “An Empirical Analysis of Internal and External Reference Prices using Scanner Data.”
Journal of Consumer Research 19, no. 1 (1992): 62-70, p. 68.

1 purchase environment” (e.g., a “suggested retail price,” or other comparative sale price).¹⁰
 2 Researchers report that consumer’s internal reference prices adjust toward external
 3 reference prices when valuing a product.¹¹ For infrequently purchased products, external
 4 reference prices can be particularly influential because these consumers have little or no
 5 prior internal reference.¹² In other words, “[t]he deceptive potential of such advertised
 6 reference prices are likely to be considerably higher for buyers with less experience or
 7 knowledge of the product and product category.”¹³ Academic literature further reports that
 8 “there is ample evidence that consumers use reference prices in making brand choices”¹⁴
 9 and publications have summarized the empirical data as follows:

10 Inflated reference prices can have multiple effects on consumers. They can
 11 increase consumers’ value perceptions (transaction value and acquisition
 12 value), reduce their search intentions for lower prices, increase their purchase
 13 intentions, and reduce their purchase intentions for competing products ...
 14 Inflated and/or false advertised reference prices enhance consumers’ internal
 15 reference price estimates and, ultimately, increase their perceptions of value
 16 and likelihood to purchase[.]¹⁵

15 ¹⁰ Mayhew, Glenn E. and Russell S. Winer. “An Empirical Analysis of Internal and External
 16 Reference Prices using Scanner Data.” *Journal of Consumer Research* 19, no. 1 (1992): 62-
 17 70, p. 62.

17 ¹¹ “Buyers’ internal reference prices adapt to the stimuli prices presented in the
 18 advertisement. That is, buyers either adjust their internal reference price or accept the
 19 advertised reference price to make judgments about the product’s value and the value of the
 20 deal.” Grewal, Dhruv, Kent B. Monroe, and Ramayya Krishnan. “The Effects of Price-
 21 Comparison Advertising on Buyers’ Perceptions of Acquisition Value, Transaction Value,
 22 and Behavioral Intentions.” *The Journal of Marketing* 62 (1998): 46-59, p. 48.

20 ¹² As Thalen notes, “the [suggested retail price] will be more successful as a reference price
 21 the less often the good is purchased.” Thaler, Richard. “Mental Accounting and Consumer
 22 Choice.” *Marketing Science* 4, no. 3 (1985): 199-214, p. 212.

22 ¹³ Grewal, Dhruv, and Larry D. Compeau. “Pricing and public policy: A research agenda
 23 and an overview of the special issue.” *Journal of Public Policy & Marketing* 18, no. 1
 24 (1999): 3-10, p. 7.

23 ¹⁴ Kalyanaram, Gurusurthy, and Russell S. Winer. “Empirical Generalizations from
 24 Reference Price Research.” *Marketing Science* 14, no. 3 (1995): G161-G169, p. G161. *See*
 25 *also* Gotlieb, Jerry B. and Cyndy Thomas Fitzgerald. “An Investigation into the Effects of
 26 Advertised Reference Prices on the Price Consumers are Willing to Pay for the Product.”
 27 *Journal of Applied Business Research* 6, no. 1 (1990): 59-69, at pp. 65-66. (“The results of
 28 this research provide support for the position that [external] reference prices are important
 cues consumers use when making the decision concerning how much they are willing to
 pay for the product.”).

28 ¹⁵ Grewal, Dhruv, and Larry D. Compeau. “Pricing and public policy: A research agenda
 and an overview of the special issue.” *Journal of Public Policy & Marketing* 18, no. 1
 (1999): 3-10, p. 7.

1 13. Retailers, including Defendant, understand that consumers are susceptible to a
2 perceived bargain, and therefore, they have a substantial financial interest in making
3 consumers believe they are receiving a bargain, even if they are not. Contrary to the illusions
4 of bargains in Defendant’s advertisements, consumers are actually overpaying for
5 Defendant’s products and not receiving any promised discounts due to the relationship
6 between Defendant’s deceptive price comparisons, consumer purchase decisions, and the
7 economic principles of demand and price.

8 **B. Defendant’s Fraudulent Price Discounting Scheme Violates California**
9 **State Law and Federal Regulations.**

10 14. Defendant has continually engaged in a false reference pricing scheme
11 injurious to consumers by advertising handbags, backpacks, luggage, apparel, accessories,
12 and other items at discounted, “sale” prices. Defendant marketed the “sale” prices as
13 discounts from the “original” prices set forth on the products’ price tags for merchandise
14 sold at Defendant’s Kipling Outlet stores. However, the advertised discounts are nothing
15 more than phantom markdowns because (1) the represented “original” prices, *i.e.*, the prices
16 listed on the price tags for the merchandise, are artificially inflated; (2) the products are
17 never offered for sale at the full original price for any substantial period of time (if at all);
18 and (3) the original prices are never the true market price for the products Defendant sells.

19 15. Defendant marks each item with a price tag that sets forth the “original” price
20 at which the item was purportedly offered for sale. Some price tags simply list a reference
21 price. Other products sold at the outlet contain a “Value” price on the price tag. Both
22 variations indicate to customers the former price at which the item was sold. Defendant then
23 displays large sale-discount signage on top of or alongside its products, advertising a “__%
24 OFF” (e.g., “40% OFF”), which is substantially less than the original price listed on the
25 price tag. The products were never sold at the “original” or “value” prices. In fact,
26 Defendant even admits that they are *made up* on its website:

27 OUTLET PRICING POLICY

28 Kipling is committed to providing our customers with great products at great
prices wherever they may shop. Some terrific deals can be found at our Outlet

1 stores, which are located around the United States. **At those outlets, we are**
 2 **making sure that we provide our customers with information so they can**
 3 **understand how we price items, including items that may be exclusive to**
 4 **our outlet stores. For many ticketed items, we have included a “Valued**
 5 **at” price reference that we think can be helpful for consumers to evaluate**
 6 **the value that they are getting when they purchase Kipling® products.**

7 So, here’s our explanation for “Valued at” pricing: We make great product –
 8 whether it’s made for our specialty retail stores or our outlets. **To come up**
 9 **with our “Valued at” price, we compare a similar product from our full-**
 10 **price store with its outlet equivalent. If there are differences between the**
 11 **products, we will adjust the specialty retail price of the item to take into**
 12 **account differences in the features, benefits and materials between the**
 13 **specialty and outlet products. This adjusted price becomes the “Valued at”**
 14 **price. We then work to provide customers with a discounted sales price**
 15 **that provides them with the value they have come to know and love from**
 16 **our outlet products, whether it is our everyday value price or a special**
 17 **sales promotion.** If you have any questions about our “Valued at” pricing,
 18 please ask one of our knowledgeable outlet store associates.

19 <https://www.kipling-usa.com/outlet-pricing-policy/outlet-pricing-policy.html> (emphasis added).

20 16. Not only does Defendant’s “Outlet Pricing Policy” admit that Defendant’s Outlet
 21 price tag prices are fabricated (“we will adjust the specialty retail price of the item to take into
 22 account differences in the features”), but it also even admits that the purportedly discounted
 23 sales prices—shown storewide as “__% OFF”—***are often the “everyday value price” of the***
 24 ***item.*** This is precisely the type of deception that California and federal pricing regulations are
 25 designed to prevent. *See, e.g.,* CAL BUS. & PROF. CODE § 17501; 16 C.F.R. § 233.1, *et seq.*

26 17. Thus, the percentage-off discount signs advertised in Defendant’s Kipling Outlet
 27 stores promise to consumers that the if they purchase certain items, then they will receive a
 28 specific percentage-off discount of those items, which are represented as being valued at their
 higher advertised “original” price. In actuality, the percentage-off discounts are not true
 discounts as they are applied to an advertised “original” price that was fabricated by Defendant
 and that does not represent a price at which Defendant regularly sold the item in the normal
 course of business. Consequently, consumers do not receive the discount they were promised
 by Defendant when they purchase items from Defendant at a purportedly discounted price.

18 18. The products sold at Kipling Outlet stores are either (1) made exclusively for sale
 19 at its Outlet stores, or (2) regular Kipling retail merchandise that has been discontinued or is

1 otherwise substantially outdated.¹⁶ The reason why the original price is either false or
 2 misleading is because Defendant either: (1) has never offered the outlet goods for sale at the
 3 original price (in the case of its made-for-outlet merchandise) or (2) has offered the goods for
 4 sale at their original price at some time period in the distant past—in violation of the 90 day
 5 time period afforded it to discount merchandise under California law and the federal regulation
 6 requiring the discount to be presented from a recent, regularly offered, original price.

7 19. Defendant conveys its deceptive pricing scheme to consumers through
 8 promotional materials, in-store displays, and print advertisements. For example, in
 9 Defendant’s Kipling Outlet stores, the pricing scheme is prominently displayed, advertising
 10 deep discounts on various items throughout the store. Specifically, the represented
 11 discounts are advertised on placards placed at, on, or above the particular products being
 12 discounted. They are printed on white card stock with black print offering the advertised
 13 “_ % off”. The placards appear as follows:



26 ¹⁶ According to Defendant’s parent company, VF Corp, Kipling Outlet stores “carry
 27 merchandise that is *specifically designed for sale in our outlet stores* ... [as well as] excess,
 28 discontinued and out-of-season products.” V.F. Corporation Form 10-K for Fiscal Year
 ended April 1, 2023, and filed with the SEC on May 25, 2023, at p. 3 (emphasis added).
 Plaintiff is informed and believes that the vast majority of merchandise sold at Kipling
 Outlet stores is designed and manufactured to be sold specifically in the Outlets.

1 20. Additional in-store photographs from Kipling Outlet stores demonstrating the
2 extent of discount signage on display throughout the Outlet stores are attached as
3 **Exhibit A.**

4 21. Nowhere in Defendant’s Kipling Outlet stores does Defendant disclose (1) that
5 its reference prices used are not recent, regularly offered, former prices; (2) how it derives
6 the “original” reference prices; or (3) any date on which the purported original prices were
7 offered. Plaintiff is further informed and believes that Defendant does not prominently
8 display the “Outlet Pricing Policy” shown above in any of its physical outlet stores (not that
9 doing so would cure Defendant’s deception or render its actions compliant with California
10 or federal pricing regulations). These failures, coupled with Defendant’s use of fictitious
11 advertised reference prices, render Defendant’s pricing inherently misleading to reasonable
12 consumers, including Plaintiff.

13 22. In short, the advertised reference prices are false and induce consumers into
14 believing that Kipling Outlet merchandise was once sold at the reference price, in the near
15 term, and will be again if the consumer does not make a purchase at the “bargain” price.
16 Defendant engages in this practice knowing full well that the advertised products are never
17 actually offered or sold at the advertised reference prices.

18 23. Furthermore, Defendant advertises the false reference prices to induce
19 consumers into believing that Kipling Outlet merchandise is worth the inflated, false
20 reference price such that the lower “sale” price represents a limited time discount.
21 Customers, however, do not enjoy any such advertised discount when they purchase items
22 from Defendant’s Kipling Outlet stores.

23 24. Defendant advertises constant discounts in its Kipling Outlet stores for nearly
24 all items they offer for sale, and Defendant’s employment of perpetual false discounts
25 deprives consumers of a fair opportunity to fully evaluate the offers and to make purchase
26 decisions based on accurate information. Consumers have no way of discerning that
27 Defendant’s pricing and discount representations throughout its Kipling Outlet stores are
28 false and misleading.

1 25. Defendant’s systematic and pervasive pricing policy and conduct as described
2 herein is in direct violation of federal and California pricing regulations. Under California
3 law, for instance, a seller may only discount an item from its own *original price* for up to
4 90 days; or in the alternative, it may offer a discount from the original price of an item being
5 offered by a competitor, within the relevant market, for up to 90 days. In either scenario, a
6 seller can only offer a “sale” from an original price for 90 days. At that point, on day 91,
7 the seller has two options: the product must either return to its full original price, or the
8 seller may continue to sell the product at the discounted price, as long as it discloses to the
9 consumer the date on which the product was last offered for sale at its alleged former
10 price. See BUS. & PROF. CODE § 17501. Under California law, a seller cannot use an old,
11 outdated, “original price” as the basis for a sale or discount, unless it discloses to the
12 consumer the date on which the prior original price was offered in the market. *Id.*

13 26. Moreover, Defendant’s advertised discounts were fictitious because the
14 reference prices did not represent a *bona fide* price at which Defendant previously sold or
15 offered to sell the products, on a regular basis, for a reasonably substantial period of time,
16 as required by the FTC. See 16 C.F.R. § 233.1, *et seq.*

17 27. Defendant’s perpetual discounting of its Kipling Outlet merchandise
18 constitutes false, fraudulent, and deceptive advertising because the “original” reference
19 price listed is substantially higher than those prices actually offered by Defendant. The
20 reference prices are a total fiction used exclusively as a benchmark from which the false
21 discount and corresponding “sale” price is derived. Defendant’s scheme has the effect of
22 tricking consumers into believing they are getting a significant deal by Kipling Outlet
23 merchandise at a steep discount, when in reality, consumers are now overpaying for Kipling
24 Outlet merchandise. Defendant’s deceptive pricing scheme has artificially raised the prices
25 actually paid by consumers by creating the false impression of a bargain.

26 28. The process of how Defendant’s false reference pricing scheme injures
27 consumers proceeds as follows. Defendant advertised its merchandise with false reference
28 prices, which then caused consumers to be deceived into overvaluing those products. As a

1 result, consumers’ demand for the Kipling Outlet merchandise has artificially increased.
2 This artificial, illusory increase in consumers’ demand further resulted in an increase in the
3 price of Defendant’s Kipling Outlet merchandise. This resultant price increase has been
4 reflected in the “discounted sale” price at which consumers, including Plaintiff, paid for the
5 Kipling Outlet merchandise. Consumers thus unknowingly purchased the Kipling Outlet
6 merchandise at inflated prices all caused by Defendant’s deceptive false reference pricing
7 scheme. The Kipling Outlet merchandise is worth less than the inflated prices at which they
8 are offered as a “discount.” Without the false reference pricing scheme, the Kipling Outlet
9 merchandise would *not* command the higher, inflated prices. Consumers like Plaintiff have
10 therefore overpaid for Kipling Outlet merchandise—which, to circle back, was caused by
11 Defendant’s deception.

12 29. Thus, Defendant’s scheme intends to and does provide harmful
13 misinformation to customers. This misinformation communicates to consumers, including
14 Plaintiff, that the products sold in Defendant’s Kipling Outlet stores have a greater value
15 than the advertised discounted price.

16 **C. Defendant’s Fraudulent Price Discounting Scheme Harms All Consumers**

17 30. All consumers are harmed by Defendant’s conduct as alleged herein. The
18 impact of Defendant’s conduct pervades the entire market for its Kipling Outlet
19 merchandise irrespective of individual consumer’s beliefs or purchasing decision processes
20 because, as explained below, the artificially increased demand generated by Defendant’s
21 false reference pricing scheme results in increased actual sales prices beyond the prices
22 Defendant could command in the absence of the false reference pricing scheme.
23 Accordingly, consumers’ subjective beliefs about the value of Kipling Outlet merchandise
24 are inconsequential to the injury they face when purchasing said merchandise. To be harmed
25 by Defendant, it matters not whether consumers believe they will receive a discount on
26 Kipling Outlet merchandise when they purchase it, nor does it matter why consumers
27 purchased Kipling Outlet merchandise. Likewise, consumers need not have any certain
28 perceptions about Defendant’s pricing nor need any insight into the true market prices for

1 bags and other related items to have been harmed by Defendant's false discount pricing
2 scheme.

3 31. When consumers purchase Kipling Outlet products, they will all overpay, and
4 they will all not receive the benefit of the promised discounts. The process of how
5 Defendant's false reference pricing scheme injures consumers demonstrates how all
6 consumers are harmed. In short, Defendant's false reference pricing caused an illusory,
7 artificial increase in the demand and attendant price for Kipling Outlet merchandise
8 resulting in all consumers, including Plaintiff, having no choice but to overpay for said
9 merchandise at the resultant inflated prices. When consumers like Plaintiff now purchase
10 Kipling Outlet merchandise, the merchandise is worth less than the inflated price at which
11 it is purchased.

12 32. A product's reference price matters to consumers because it serves as a
13 baseline upon which consumers perceive a product's value.¹⁷ Empirical studies thus
14 "suggest that consumers are likely to be misled into a willingness to pay a higher price for
15 a product simply because the product has a higher reference price."¹⁸ As to Defendant's
16 products, consumers are misled and incorrectly overvalue them due to Defendant's false
17 price comparisons. The price at which consumers purchase Defendant's products reflects
18 consumers' overvaluation of the products as Defendant can get away with commanding an
19 inflated price due to this overvaluation. Academic researchers have documented this
20 relationship between reference prices, and consumers' attendant behaviors and the harm
21 inflicted on them by deceptive retailers as follows:

22 [A]dvertised reference prices in these deal-oriented advertisements can
23 enhance buyers' internal reference prices These enhanced internal
24 reference prices, when compared with the lower selling price, result in higher
transaction value perceptions. The increase in perceived transaction value

25 ¹⁷ Thaler, Richard, "Mental Accounting and Consumer Choice," *Marketing Science* 4, no.
3 (1985): 199-214, at p. 212.

26 ¹⁸ Gotlieb, Jerry B. and Cyndy Thomas Fitzgerald. "An Investigation into the Effects of
27 Advertised Reference Prices on the Price Consumers are Willing to Pay for the Product."
28 *Journal of Applied Business Research* 6, no. 1 (1990): 59-69, at p. 66. Moreover, "if a higher
reference price encourages consumers to pay a higher price for a product than the consumer
was willing to pay for the identical product with a lower reference price, then the practice
of using high reference prices would be deceptive." *Id.* at p. 60.

1 enhances purchases and reduces search behavior for lower prices. If sellers
2 intentionally increase the advertised reference prices above normal retail
3 prices, this is, inflate advertised reference prices, the resulting inflated
4 perceptions of transaction value would be deceptive. Harm to both buyers and
5 competitors could result from the effect of the inflated transaction value on
6 buyers' search and purchase behaviors.¹⁹

7 33. To further explain, the false pricing information in Defendant's
8 advertisements, in-store displays, and promotional materials first caused consumers to
9 perceive they were receiving a bargain on Kipling Outlet merchandise when purchased at
10 its "sale" price. This consumer perception resulted in these consumers gaining an additional
11 "transaction value"²⁰ for their Kipling Outlet purchases, which they would not have
12 otherwise gained absent Defendant's false reference pricing scheme. Consumers' valuation
13 of Kipling Outlet merchandise thus increased. This increase in consumers' perceived
14 valuation of Kipling Outlet merchandise then caused an artificial increase in the aggregate
15 demand of said merchandise. This artificial increase in the aggregate demand then caused
16 an attendant illusory increase in the price of Kipling Outlet merchandise. Defendant's false
17 reference pricing scheme has thus disrupted the natural market for its Kipling Outlet
18 merchandise, and Defendant has been able to charge all consumers inflated prices, as
19 reflected in both the "sale" and "original" prices. Everyone is now forced to pay above-
20 market prices for Kipling Outlet merchandise should they decide to make a purchase at any
21 of Defendant's retail or outlet stores. All consumers will thus pay an inflated price for
22 Kipling Outlet products regardless of the reason for their purchase.

23 ¹⁹ Grewal, Dhruv, Kent B. Monroe, and Ramayya Krishnan. "The Effects of Price-
24 Comparison Advertising on Buyers' Perceptions of Acquisition Value, Transaction Value,
25 and Behavioral Intentions." *The Journal of Marketing* 62 (1998): 46-59, at p.46.

26 ²⁰ "To incorporate ... the psychology of buying into the model, two kinds of utility are
27 postulated: acquisition utility and transaction utility. The former depends on the value of
28 the good received compared to the outlay, the latter depends solely on the perceived merits
of the 'deal.'" Thaler, Richard. "Mental Accounting and Consumer Choice." *Marketing
Science* 4, no. 3 (1985): 199-214, p. 205; Dhruv Grewal & Larry D. Compeau, *Comparative
Price Advertising: Informative or Deceptive?*, 11 *J. Pub. Pol'y & Mktg.* 52, 55 (Spring
1992) ("By creating an impression of savings, the presence of a higher reference price
enhances subjects' perceived value and willingness to buy the product."); Grewal, Dhruv,
and Larry D. Compeau. "Pricing and public policy: A research agenda and an overview of
the special issue." *Journal of Public Policy & Marketing* 18, no. 1 (1999): 3-10, p. 7.

1 34. Fundamental economics concepts and principles provide a foundation upon
2 which the uniform harm of Defendant’s false reference pricing scheme is based. One such
3 principle is that cost and demand conditions determine market prices all consumers pay for
4 products.²¹ The aggregate demand curve for a product, including those sold by Defendant,
5 represents consumers’ valuation of the product, and as consumers’ valuation increases, the
6 demand curve shifts outward. When the aggregate demand curve of a product shifts
7 outward, the market price for the product will increase. A specific individual’s willingness
8 to pay for a product will not negate how market prices, as determined by aggregate demand,
9 dictate what all consumers purchasing a given product will pay.

10 35. Therefore, Defendant’s conduct alleged herein has impacted the market prices
11 of its Kipling Outlet products, and any one individual consumer’s subjective beliefs or
12 idiosyncratic rationales will not isolate them from the resultant inflation in Kipling Outlet
13 prices. Economic theory ensures that as the aggregate demand curve for Kipling Outlet
14 merchandise moved outward, all consumers must pay a higher price for Kipling Outlet
15 products than they would have paid absent Defendant’s false reference pricing scheme.
16 Plaintiff and members of the proposed Class thus suffered a common impact from
17 Defendant’s ability to sell Kipling Outlet merchandise at inflated prices and it was
18 Defendant who caused the inflation and chose to sell its Kipling Outlet products at the
19 inflated prices—and who continue to sell Kipling Outlet products at inflated prices to the
20 detriment of all purchasers.

21 **D. Investigation**

22 36. Plaintiff’s counsel has conducted a large-scale, comprehensive investigation
23 into the Defendant’s pricing practice at Kipling Outlet stores across California. Plaintiff’s
24 counsel first tracked items in Defendant’s Outlet stores beginning in September of 2021 and
25 concluding in December of 2021. Every product observed in Defendant’s Kipling Outlet

26 _____
27 ²¹ “[P]rice and quantity are determined by all buyers and sellers as they interact in the
28 marketplace” (Mankiw, N. *Essentials of Economics*. Eighth Edition. Boston, MA: Cengage
Learning, 2015, at p. 66). *See also*, Varian, Hal R. *Microeconomics Analysis*. Third Edition.
New York, NY: W. W. Norton & Company, 1992, at pp. 23-38, 144-157, 233-353, and
285-312.

1 stores remained on sale for the duration of this tracking period, discounted against a false
2 reference price. The 2021 investigation revealed that the prices on Defendant’s products
3 were uniform at every location. Plaintiff’s counsel again initiated a similar investigation
4 beginning in February of 2022 and concluding in September of 2022. That investigation
5 revealed the same results—every product observed at every location was continuously
6 discounted against a false reference price. *See Exhibit B*, list of exemplar products tracked.

7 37. In sum, Plaintiff’s counsel’s investigation also revealed that the “original” or
8 “price tag” price of the items Plaintiff purchased were never the true market price at Kipling
9 Outlet preceding Plaintiff’s purchase. Instead, Defendant continuously offered the items for
10 sale at the falsely “discounted” prices, including the products purchased by Plaintiff.
11 Plaintiff’s counsel’s investigation revealed that this was a pervasive practice at the Kipling
12 Outlet stores, as hundreds of items remained continuously discounted from their “original”
13 or “price tag” price and they were not offered for sale at their original price. Defendant
14 engages in a systematic scheme to continuously “discount” its merchandise without ever
15 offering the merchandise for sale at their “original” or “price tag” prices.

16 38. To reiterate, Plaintiff’s counsel’s investigation of Defendant’s Kipling Outlet
17 stores revealed that its merchandise is priced uniformly. That is, merchandise sold at
18 Defendant’s Kipling Outlet stores bear a price tag with a false original price and a
19 substantially discounted “___% Off,” sale price. Plaintiff’s counsel’s investigation
20 confirmed that the merchandise purchased by Plaintiff was priced with a false reference
21 price and a corresponding discounted price, which was in fact an inflated price.

22 39. Therefore, the “original” prices on the merchandise sold at Kipling Outlet
23 stores are either false original prices or severely outdated prices that have never been offered
24 in the relevant market.

25 40. Despite Plaintiff’s counsel’s best efforts at investigation, the full extent of
26 Defendant’s false and deceptive pricing scheme can only be revealed through a full
27 examination of records exclusively in the possession of Defendant.

28

IV. PARTIES

Plaintiff

41. Chistina Calcagno resides in San Diego, California. On January 18, 2022, Plaintiff went shopping at the Kipling Outlet store located at 4155 Camino de la Plaza, Suite #440, San Diego, CA 92173 (the “Las Americas Outlets”). In reliance on Defendant’s false and deceptive advertising, marketing and discount pricing scheme, Plaintiff purchased the following items from the Las America Outlets on January 18, 2022:

No.	Item:	False Reference Price:	Purchase Price:
1	BP4046 008 9999 MATTA (SKU: 00882256436402)	\$109.00	\$54.50
2	KI1936 008 9999 NICOLLE (SKU: 00882256500738)	\$54.00	\$32.40

42. Plaintiff examined several items at the Las Americas Outlets before deciding on what item to purchase. During her time at the Las Americas Outlets on January 18, 2022, Plaintiff noticed numerous signs within the Kipling Outlet store advertising “40% and 50% Off” discounts on various items throughout the store. After observing the original prices of the items and the accompanying sale price, Plaintiff believed she was receiving a significant discount on the items she had chosen. Because she liked the items, felt that the discounted price would likely not last, and believed she was getting a significant bargain on the merchandise, she made the purchases. Plaintiff made two separate purchases on January 18, 2022: one at approximately 3:45 p.m. and another at 4:30 p.m. For each purchase, the discount was a material representation to Plaintiff, and she relied upon it in making her purchase decision. She paid a combined pre-tax total of \$86.90 for the products she purchased at the Kipling Outlet store. However, Plaintiff did not receive the benefit of her bargain.

43. Plaintiff would not have made her purchases without the misrepresentations made by Defendant. As a result, Plaintiff has suffered economic injury as a direct result of Defendant’s unlawful, unfair, and fraudulent conduct.

1 **Plaintiff's Damages**

2 44. Plaintiff has been injured and incurred quantifiable actual damages as a result
3 of Defendant's fraudulent pricing scheme, which can be calculated through the use of
4 regression analysis.

5 45. Plaintiff overpaid for the products she purchased as described herein. And it
6 was Defendant's false reference pricing scheme and attendant deception that caused
7 Plaintiff to overpay. Despite Plaintiff's original belief that the products she purchased were
8 discounted, and, thus, that its value was significantly greater than the sale price at which it
9 was purchased, Plaintiff in actuality paid an *inflated* price for the products she purchased.

10 46. Specifically, each of the following prices were inflated for the items Plaintiff
11 purchased: (1) \$109.00 ("original" price) and \$54.50 ("sale" price) for the "BP4046 008
12 9999 MATTA" item; (2) \$54.00 ("original" price) and \$32.40 ("sale" price) for the
13 "KI1936 008 9999 NICOLLE" item. The items Plaintiff purchased were all worth less than
14 the amount Plaintiff paid for each of them. If Defendant had not employed the falsely
15 advertised "original" prices for the two items Plaintiff purchased, then those two items
16 would not have commanded such a high, inflated price.

17 47. Plaintiff was damaged in her purchases because Defendant's false reference
18 price discounting scheme inflated the final selling price of the items she purchased, such
19 that Defendant's false reference price discounting scheme caused Plaintiff to pay a price
20 premium. Defendant's false reference price discounting scheme artificially inflated
21 consumer demand, such that each consumer who purchased the corresponding product paid
22 higher prices when compared to what they would have paid had Defendant not engaged in
23 a false reference pricing scheme. Plaintiff would not have purchased the merchandise, or
24 would have paid less for it, but for Defendant's representations regarding the false reference
25 prices and purported discounts of the merchandise. Plaintiff was misled into believing that
26 she was receiving substantial savings on the purchases of Defendant's products which was
27 implied by the falsely advertised reference prices.

28

1 48. Objective measures demonstrate that Plaintiff overpaid for the Kipling Outlet
2 merchandise she purchased. The difference between the sale price paid by Plaintiff due to
3 the artificially increased demand for the products—caused by Defendant’s false reference
4 pricing scheme—and the market sale price that the products would have commanded
5 without Defendant’s deception provides an objective measure by which Plaintiff was
6 overcharged and injured by Defendant. The amount of inflation of the prices for the Kipling
7 Outlet merchandise Plaintiff purchased caused by Defendant’s deception thus measures
8 how much Plaintiff overpaid. This amount can be quantified using regression analysis based
9 on Defendant’s historic pricing data.

10 49. Plaintiff is susceptible to this reoccurring harm because she cannot be certain
11 that Defendant have corrected this deceptive pricing scheme, and she desires to shop at
12 Defendant’s Kipling Outlet stores in the future. Plaintiff would like to shop at the Kipling
13 Outlet stores in the future because they offer unique Kipling-branded handbags, luggage,
14 backpacks, totes, and accessories Plaintiff may desire to purchase. Due to the enormous,
15 fluctuating variety of styles and sizes of merchandise offered at Kipling Outlet stores,
16 Plaintiff will be unable to parse what prices are inflated and untrue, and what prices are not.

17 50. Plaintiff would like to purchase different Kipling Outlet handbags or other bag
18 items in the future other than the items she purchased as described herein; however, Plaintiff
19 does not know if Defendant will accurately or inaccurately represent the true prices for the
20 distinct apparel items she would like to buy in the future. Plaintiff is not knowledgeable
21 about Defendant’s pricing practices with regards to its apparel items that have not yet been
22 offered for sale at Defendant’s Kipling Outlet stores. Therefore, Plaintiff cannot be certain
23 of the veracity or falsity of Defendant’s advertised bargains for the wide selection of
24 handbags, backpacks, luggage, apparel, accessories, and other items at Defendant’s Kipling
25 Outlet stores.²² Plaintiff may again purchase a falsely discounted product at one of the
26 Kipling Outlet stores under the reasonable impression that the advertised reference price

27 _____
28 ²² These include, for instance, crossbody bags, shoulder bags, tote bags, fanny packs, gym
bags, diaper bags, as well as a wide assortment of backpack and luggage styles, and
accessories that include wallets, wristlets, keychains, and small pouches.

1 represented a *bona fide* former price at which the item was previously offered for sale by
2 Defendant.

3 51. Plaintiff's case is substantially predicated on Defendant's violation of CAL.
4 BUS. & PROF. CODE § 17501, an equitable claim, as Plaintiff's counsel's investigation
5 revolved around ensuring that Defendant did not sell products at the indicated reference
6 price within the 90 days preceding Plaintiffs' purchases and, likewise, that Defendant failed
7 to disclose to consumers the date on which products were last offered at their advertised
8 reference price. This claim and test of liability go to the heart of Plaintiff's case and the
9 same test is not available under a CLRA legal claim for damages. Thus, Plaintiff does not
10 have an adequate remedy at law because the CLRA does not provide the same metric of
11 liability as CAL. BUS. & PROF. CODE § 17501, which is integral not only to Plaintiff's prayer
12 for restitution, but also to Plaintiff's very theory of liability at trial.

13 52. Absent an equitable injunction enjoining Defendant from continuing in the
14 unlawful course of conduct alleged herein, Plaintiff, members of the Class, and the public
15 will be irreparably harmed and denied an effective and complete remedy because they face
16 a real and tangible threat of future harm emanating from Defendant's ongoing conduct that
17 cannot be remedied with monetary damages. Accordingly, Plaintiff, members of the Class,
18 and the general public lack an adequate remedy at law and an injunction is the only form of
19 relief which will guarantee Plaintiff and other consumers the appropriate assurances.

20 53. Moreover, Plaintiff lacks an adequate remedy at law with respect to her claim
21 for equitable restitution because she has not yet retained an expert to determine whether an
22 award of damages can or will adequately remedy their monetary losses caused by
23 Defendant. Particularly, as legal damages focus on remedying the loss to the Plaintiff and
24 equitable restitution focuses wholly distinctly on restoring monies wrongly acquired by the
25 defendant, legal damages are inadequate to remedy Plaintiff's losses because Plaintiff does
26 not know at this juncture, and is certainly not required to set forth evidence, whether a model
27 for legal damages (as opposed to equitable restitution) will be viable or will adequately
28 compensate Plaintiff's losses.

1 **Defendant**

2 54. Plaintiff is informed and believes, and upon such information and belief
3 alleges, Defendant Kipling Apparel Corp. is a Delaware corporation with its principal
4 executive offices in Denver, Colorado. Plaintiff is informed and believes that Defendant
5 owns and operates Kipling Outlet stores in California, and advertises, markets, distributes,
6 and/or sells handbags, backpacks, luggage, apparel, accessories, and other items clothing
7 and accessories in California and throughout the United States.

8 55. Plaintiff does not know the true names or capacities of the persons or entities
9 sued herein as Does 1-50, inclusive, and therefore sues such defendants by such fictitious
10 names. Plaintiff is informed and believes, and upon such information and belief alleges,
11 that each of the Doe defendants is, in some manner, legally responsible for the damages
12 suffered by Plaintiff and members of the proposed the Class, as alleged herein. Plaintiff will
13 amend this Complaint to set forth the true names and capacities of these defendants when
14 they have been ascertained, along with appropriate charging allegations, as may be
15 necessary.

16 56. The reference prices listed and advertised on products sold at Defendant's
17 Kipling Outlet stores are false reference prices, utilized only to perpetuate Defendant's false
18 discount scheme.

19 57. Defendant knows that its reference price advertising is false, deceptive,
20 misleading, unconscionable, and unlawful under California and federal law.

21 58. Defendant fraudulently concealed from and intentionally failed to disclose to
22 Plaintiff and other members of the proposed Class the truth about its advertised discount
23 prices and former reference prices. Defendant concealed from consumers the true nature
24 and quality of the products sold at its Kipling Outlet stores.

25 59. Defendant intentionally concealed and failed to disclose material facts
26 regarding the truth about false former price advertising in order to provoke Plaintiff and the
27 proposed Class to purchase Kipling Outlet products in its stores.

28

1 hundreds of thousands of individuals who have been damaged by Defendant's conduct as
2 alleged herein. The precise number of Class members is unknown to Plaintiff.

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

7 a. whether, during the Class Period, Defendant used falsely advertised
8 reference prices on its Kipling Outlet product labels and falsely advertised price
9 discounts on merchandise sold in its outlet stores;

10 b. whether Defendant ever offered items for sale or sold items at their
11 advertised reference price;

12 c. whether, during the Class Period, the original price advertised by
13 Defendant was the prevailing market price for the products in question during the
14 three months preceding the dissemination and/or publication of the advertised former
15 prices;

16 d. whether Defendant's purported sale prices advertised in its Kipling
17 Outlet stores reflected any actual discounts or savings;

18 e. whether Defendant's purported percentage-off discounts advertised in
19 its Kipling Outlet stores reflected any actual discounts or savings;

20 f. whether Defendant's alleged conduct constitutes violations of the laws
21 asserted;

22 g. whether Defendant's alleged conduct constitutes violations of federal
23 and/or California pricing regulations;

24 h. whether Defendant engaged in an unconscionable commercial practice,
25 and/or employed deception or misrepresentation under the laws asserted;

26 i. whether Plaintiff and Class members are entitled to damages and the
27 proper measure of that loss; and
28

1 j. whether an injunction is necessary to prevent Defendant from
2 continuing to use false, misleading or illegal price comparison.

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

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

11 67. **Superiority:** The nature of this action and the nature of laws available to
12 Plaintiff and the Class make the use of the class action format a particularly efficient and
13 appropriate procedure to afford relief to them and the Class for the wrongs alleged. The
14 damages or other financial detriment suffered by individual Class members is relatively
15 modest compared to the burden and expense that would be entailed by individual litigation
16 of their claims against Defendant. It would thus be virtually impossible for Plaintiff and
17 Class members, on an individual basis, to obtain effective redress for the wrongs done to
18 them. Absent the class action, Class members and the general public would not likely
19 recover, or would not likely have the chance to recover, damages or restitution, and
20 Defendant will be permitted to retain the proceeds of its fraudulent and deceptive misdeeds.

21 68. All Class members, including Plaintiff, were exposed to one or more of
22 Defendant's misrepresentations or omissions of material fact claiming that former reference
23 prices advertised prices were legitimate. Due to the scope and extent of Defendant's
24 consistent false sale prices, advertising scheme, disseminated in a years-long campaign to
25 California consumers, it can be reasonably inferred that such misrepresentations or
26 omissions of material fact were uniformly made to all members of the Class. In addition, it
27 can be reasonably presumed that all Class members, including Plaintiff, affirmatively acted
28

1 in response to the representations contained in Defendant’s false advertising scheme when
2 purchasing merchandise sold at Kipling Outlet stores.

3 69. Plaintiff is informed that Defendant keeps extensive computerized records of
4 its Kipling Outlet customers through, *inter alia*, customer loyalty programs and general
5 marketing programs. Defendant has one or more databases through which a significant
6 majority of Class members may be identified and ascertained, and they maintain contact
7 information, including email and home addresses, through which notice of this action could
8 be disseminated in accordance with due process requirements.

9 **V. CAUSES OF ACTION**

10 **FIRST CAUSE OF ACTION**

11 **Violation of California’s Unfair Competition Law (“UCL”)**
12 **CAL. BUS. & PROF. CODE §§ 17200, *et seq.***

13 70. Plaintiff repeats and re-alleges the allegations contained in every preceding
14 paragraph as if fully set forth herein.

15 71. Plaintiff brings this claim individually and on behalf of the members of the
16 proposed Class against Defendant for violations of California’s UCL, CAL. BUS. & PROF.
17 CODE §§ 17200, *et seq.*

18 72. The UCL defines “unfair business competition” to include any “unlawful,
19 unfair or fraudulent” act or practice, as well as any “unfair, deceptive, untrue or misleading”
20 advertising. CAL. BUS. PROF. CODE § 17200.

21 73. The UCL imposes strict liability. Plaintiff and members of the proposed Class
22 need not prove that Defendant intentionally or negligently engaged in unlawful, unfair, or
23 fraudulent business practices—but only that such practices occurred.

24 **“Unfair” Prong**

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

1 75. Defendant’s actions constitute “unfair” business practices because, as alleged
2 above, Defendant engaged in misleading and deceptive price comparison advertising that
3 represented false reference prices and corresponding deeply discounted phantom “sale”
4 prices. Defendant’s acts and practices offended an established public policy of transparency
5 in pricing, and constituted immoral, unethical, oppressive, and unscrupulous activities that
6 are substantially injurious to consumers.

7 76. The harm to Plaintiff and members of the proposed Class outweighs the utility
8 of Defendant’s practices because Defendant’s practice of advertising false discounts
9 provides no utility. There were reasonably available alternatives to further Defendant’s
10 legitimate business interests other than the misleading and deceptive conduct described
11 herein.

12 ***“Fraudulent” Prong***

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

15 78. Defendant’s acts and practices alleged above constitute fraudulent business
16 acts or practices as they have deceived Plaintiff and members of the proposed Class and are
17 highly likely to deceive members of the consuming public. Plaintiff and members of the
18 proposed Class relied on Defendant’s fraudulent and deceptive representations regarding
19 its false or outdated “original prices” for products sold by Defendant at its Kipling Outlet
20 stores. These misrepresentations played a substantial role in Plaintiff’s and members of the
21 proposed Class’s decision to purchase the product at a purportedly steep discount, and
22 Plaintiff and members of the proposed Class would not have purchased the product without
23 Defendant’s misrepresentations.

24 ***“Unlawful” Prong***

25 79. A business act or practice is “unlawful” under the UCL if it violates any other
26 law or regulation.

27 80. Defendant’s act and practices alleged above constitute unlawful business acts
28 or practices as they have violated state and federal law in connection with its deceptive

1 pricing scheme. The FTCA prohibits “unfair or deceptive acts or practices in or affecting
2 commerce” (15 U.S.C. § 45(a)(1)) and prohibits the dissemination of any false
3 advertisements. 15 U.S.C. § 52(a). Under the FTC, false former pricing schemes, like
4 Defendant’s, are described as deceptive practices that would violate the FTCA:

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

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

17 16 C.F.R. § 233.1(a) and (b) (emphasis added).

18 81. In addition to federal law, California law also expressly prohibits false former
19 pricing schemes. The FAL, CAL. BUS. & PROF. CODE § 17501, entitled “*Worth or value;
20 statements as to former price,*” states:

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

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

27 CAL. BUS. & PROF. CODE § 17501 (emphasis added).

1 82. As detailed in Plaintiff’s Third Cause of Action below, the CLRA, CAL. CIV.
2 CODE § 1770(a)(9), prohibits a business from “[a]dvertising goods or services with intent
3 not to sell them as advertised,” and subsection (a)(13) prohibits a business from “[m]aking
4 false or misleading statements of fact concerning reasons for, existence of, or amounts of
5 price reductions.”

6 83. As detailed herein, the acts and practices alleged were intended to or did result
7 in violations of the FTCA, the FAL, and the CLRA.

8 84. Defendant’s practices, as set forth above, misled Plaintiff, the proposed Class,
9 and the public in the past and will continue to mislead in the future. Consequently,
10 Defendant’s practices constitute an unlawful, fraudulent, and unfair business practice within
11 the meaning of the UCL.

12 85. Defendant’s violations of the UCL, through its unlawful, unfair, and fraudulent
13 business practices, are ongoing and present a continuing threat that members of the
14 proposed Class and the public will be deceived into purchasing products based on price
15 comparisons of arbitrary and inflated “reference” prices and substantially discounted “sale”
16 prices. These false comparisons created phantom markdowns and lead to financial damage
17 for consumers like Plaintiff and the members of the proposed Class.

18 86. Pursuant to the UCL, Plaintiff and members of the proposed Class are entitled
19 to preliminary and permanent injunctive relief enjoining Defendant from further
20 engagement in this unfair competition, as well as disgorgement and restitution to Plaintiff
21 and the proposed Class of all Defendant’s revenues wrongfully obtained from them as a
22 result of Defendant’s unfair competition, or such portion of those revenues as the Court
23 may find equitable.

24 **SECOND CAUSE OF ACTION**

25 **Violation of California’s False Advertising Law (“FAL”)**
26 **CAL. BUS. & PROF. CODE §§ 17500, *et seq.***

27 87. Plaintiff repeats and re-alleges the allegations contained in every preceding
28 paragraph as if fully set forth herein.

1 88. Plaintiff brings this claim individually and on behalf of the members of the
2 proposed Class against Defendant for violations of California’s FAL, CAL. BUS. & PROF.
3 CODE §§ 17500, *et seq.*

4 89. CAL. BUS. & PROF. CODE § 17500 provides:

5 It is unlawful for any . . . corporation . . . with intent directly or indirectly to
6 dispose of . . . personal property or to perform services, professional or
7 otherwise, or anything of any nature whatsoever or to induce the public to
8 enter into any obligation relating thereto, to make or disseminate or cause to
9 be made or disseminated . . . from this state before the public in any state, in
10 any newspaper or other publication, or any advertising device, or by public
11 outcry or proclamation, or in any other manner or means whatever, including
12 over the Internet, any statement, concerning that . . . personal property or those
13 services . . . which is ***untrue or misleading***, and which is known, or which by
14 the exercise of reasonable care should be known, to be untrue or misleading .

..

11 (Emphasis added).

12 90. The “intent” required by section 17500 is the intent to make or disseminate
13 personal property (or cause such personal property to be made or disseminated), and not the
14 intent to mislead the public in the making or dissemination of such property.

15 91. Similarly, this section provides, “no price shall be advertised as a former price
16 of any advertised thing, unless the alleged former price was the prevailing market price ...
17 within three months next immediately preceding the publication of the advertisement or
18 unless the date when the alleged former price did prevail is clearly, exactly, and
19 conspicuously stated in the advertisement.” CAL BUS. & PROF. CODE § 17501.

20 92. Defendant’s routine of advertising discounted prices from false “reference”
21 prices, which were never the prevailing market prices of those products and were materially
22 greater than the true prevailing prices (i.e., Defendant’s actual sale price), constitutes an
23 unfair, untrue, and misleading practice. This deceptive marketing practice gave consumers
24 the false impression that the products were regularly sold on the market for a substantially
25 higher price than they actually were; therefore, leading to the false impression that the
26 products sold at Defendant’s Kipling Outlet stores were worth more than they actually were.

27 93. Defendant misled consumers by making untrue and misleading statements and
28 failing to disclose what is required as stated in the Code alleged above.

1 94. As a direct and proximate result of Defendant’s misleading and false
2 advertisements, as well as Defendant’s deceptive and unfair acts and practices made during
3 the course of Defendant’s business, Plaintiff and members of the proposed Class suffered
4 ascertainable loss and actual damages.

5 95. Plaintiff and members of the proposed Class request that this Court order
6 Defendant to restore this money to Plaintiff and the proposed Class, and to enjoin Defendant
7 from continuing these unfair practices in violation of the FAL in the future. Otherwise,
8 Plaintiff, members of the proposed Class, and the broader general public, will be irreparably
9 harmed and/or denied an effective and complete remedy.

10 **THIRD CAUSE OF ACTION**

11 **Violation of California’s Consumers Legal Remedies Act (“CLRA”)**
12 **CAL. CIV. CODE § 1750, *et seq.***

13 96. Plaintiff repeats and re-alleges the allegations contained in every preceding
14 paragraph as if fully set forth herein.

15 97. Plaintiff brings this claim individually and on behalf of the members of the
16 proposed Class against Defendant for violations of the CLRA, CAL. CIV. CODE § 1750, *et*
17 *seq.*

18 98. Plaintiff and each member of the proposed Class are “consumers” as defined
19 by CAL. CIV. CODE § 1761(d). Defendant’s sale of products at its Kipling Outlet stores were
20 “transactions” within the meaning of CAL. CIV. CODE § 1761(e). The products purchased
21 by Plaintiff and members of the proposed Class are “goods” or “services” within the
22 meaning of CAL. CIV. CODE §§ 1761(a) - (b).

23 99. Defendant violated and continues to violate the CLRA by engaging in the
24 following practices proscribed by CAL. CIV. CODE § 1770(a) in transactions with Plaintiff
25 and members of the proposed Class which were intended to result in, and did result in, the
26 sale of products sold at its Kipling Outlet stores :

- 27 a. advertising goods or services with intent not to sell them as
28 advertised; § 1770(a)(9); and

