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Attorneys for Plaintiff

SUPERIOR COURT FOR THE STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

THOMAS PURCELLEY, individually and
on behalf of all others similarly situated,

Plaintiff,

v.

EKSTER INC., a Delaware corporation; and
DOES 1 to 10, inclusive,

Defendants.

CASE NO. **23STCV19245**

CLASS ACTION COMPLAINT FOR:

1. Violation of California's Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200, *et seq.*;
2. Violation of California's False Advertising Law, Cal. Bus. & Prof. Code §§ 17500, *et seq.*
3. Violation of the California Consumer Legal Remedies Act, Cal. Civ. Code §§ 1750, *et seq.*; and
4. Fraudulent Concealment.

[Plaintiff's CLRA Venue Affidavit filed
concurrently herewith]

1
2 Plaintiff Thomas Purcelley (“Plaintiff”), individually and on behalf of all others similarly
3 situated, complains and alleges as follows based upon personal knowledge as to himself, on the
4 investigation of his counsel, and on information and belief as to all other matters. Plaintiff
5 believes that substantial evidentiary support will exist for the allegations set forth in this
6 complaint after a reasonable opportunity for discovery.

7 **NATURE OF ACTION**

8 1. This class action is brought against Ekster Inc. (“Defendant”) for its unlawful,
9 unfair, and fraudulent business practice of advertising fictitious prices and corresponding
10 phantom discounts on its wallets and many other items sold through its website,
11 <https://www.ekster.com/> (the “Website”). This practice of false reference pricing occurs when a
12 retailer fabricates a fake regular, original, and/or former reference price, and then offers an item
13 for sale at a “discounted” price. The result is a sham price disparity that misleads consumers
14 into believing they are receiving a good deal and induces them into making a purchase.
15 Companies like Defendant drastically benefit from employing a false reference pricing scheme
16 and experience increased sales.

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

23 3. The advertised discounts are fictitious because the reference price does not
24 represent a *bona fide* price at which Defendant previously sold a substantial quantity of the
25 merchandise for a reasonable period of time (or at all) as required by the Federal Trade
26 Commission (“FTC”). In addition, the represented reference price was not the prevailing market
27 retail price within the three months immediately preceding the publication of the advertised
28 former reference price, as required by California law. The deception is magnified for these
products because the representation of the false reference price leads consumers like Plaintiff to

1 believe they are purchasing a product of substantially higher quality and that they are purchasing
2 a product that was previously offered for sale at the significantly higher reference price.

3 4. Through its false and misleading marketing, advertising, and pricing scheme,
4 Defendant violated and continues to violate California law, which prohibits (1) advertising goods
5 for sale as discounted from former prices that are false, and (2) misleading statements about the
6 existence and amount of price reductions. Specifically, Defendant violated and continues to
7 violate: California’s Unfair Competition Law, Business & Professions Code §§ 17200, *et seq.*
8 (the “UCL”); California’s False Advertising Law, Business & Professions Code §§ 17500, *et*
9 *seq.* (the “FAL”); the California Consumer Legal Remedies Act, California Civil Code §§ 1750,
10 *et seq.* (the “CLRA”); and the Federal Trade Commission Act (“FTCA”), 15 U.S.C. §§ 45, 52.

11 5. Plaintiff brings this action on behalf of himself and other similarly situated
12 California consumers who have purchased one or more wallets, card holders, and/or other items,
13 from Defendant’s Website that were deceptively represented as discounted from false former
14 reference prices in order to halt the dissemination of this false, misleading, and deceptive pricing
15 scheme, to correct the false and misleading perception it has created in the minds of consumers,
16 and obtain redress for those who have purchased merchandise tainted by this deceptive pricing
17 scheme. Plaintiff seeks to obtain damages, injunctive relief, and other appropriate relief as a result
18 of Defendant’s sales of merchandise offered at a false discount.

19 6. Finally, Plaintiff seeks reasonable attorneys’ fees pursuant to California Code of
20 Civil Procedure § 1021.5, as this lawsuit seeks the enforcement of an important right affecting
21 the public interest and satisfies the statutory requirements for an award of attorneys’ fees.

22 **THE PARTIES**

23 7. Plaintiff is a citizen of the State of California and resident of the County of Los
24 Angeles. Plaintiff, in reliance on Defendant’s false and deceptive pricing, purchased Defendant’s
25 “Aluminum Card Holder” in August 2023 from Defendant’s Website for \$80.00.¹

26 8. Plaintiff is informed and believes, and upon such information and belief
27 alleges, that Defendant is a Delaware corporation with its principal place of business in

28 _____
¹ Plaintiff’s total purchase price was \$88.20, which included tax.

1 New York, New York.

2 9. Plaintiff does not know the true names or capacities of the persons or entities
3 sued as DOES 1 to 10, inclusive, and therefore sues such Defendants by such fictitious names.
4 Plaintiff is informed and believes, and upon such information and belief alleges, that each of the
5 DOE Defendants is in some manner legally responsible for the damages suffered by Plaintiff
6 and the Class members as alleged in this Complaint. Defendants shall together be referred to
7 as “Defendant.”

8 **JURISDICTION AND VENUE**

9 10. This Court has jurisdiction over all causes of action asserted herein.

10 11. Venue is proper in this County in accordance with California Civil Code section
11 1780(d) because Plaintiff purchased Defendant’s product while located in Los Angeles County.

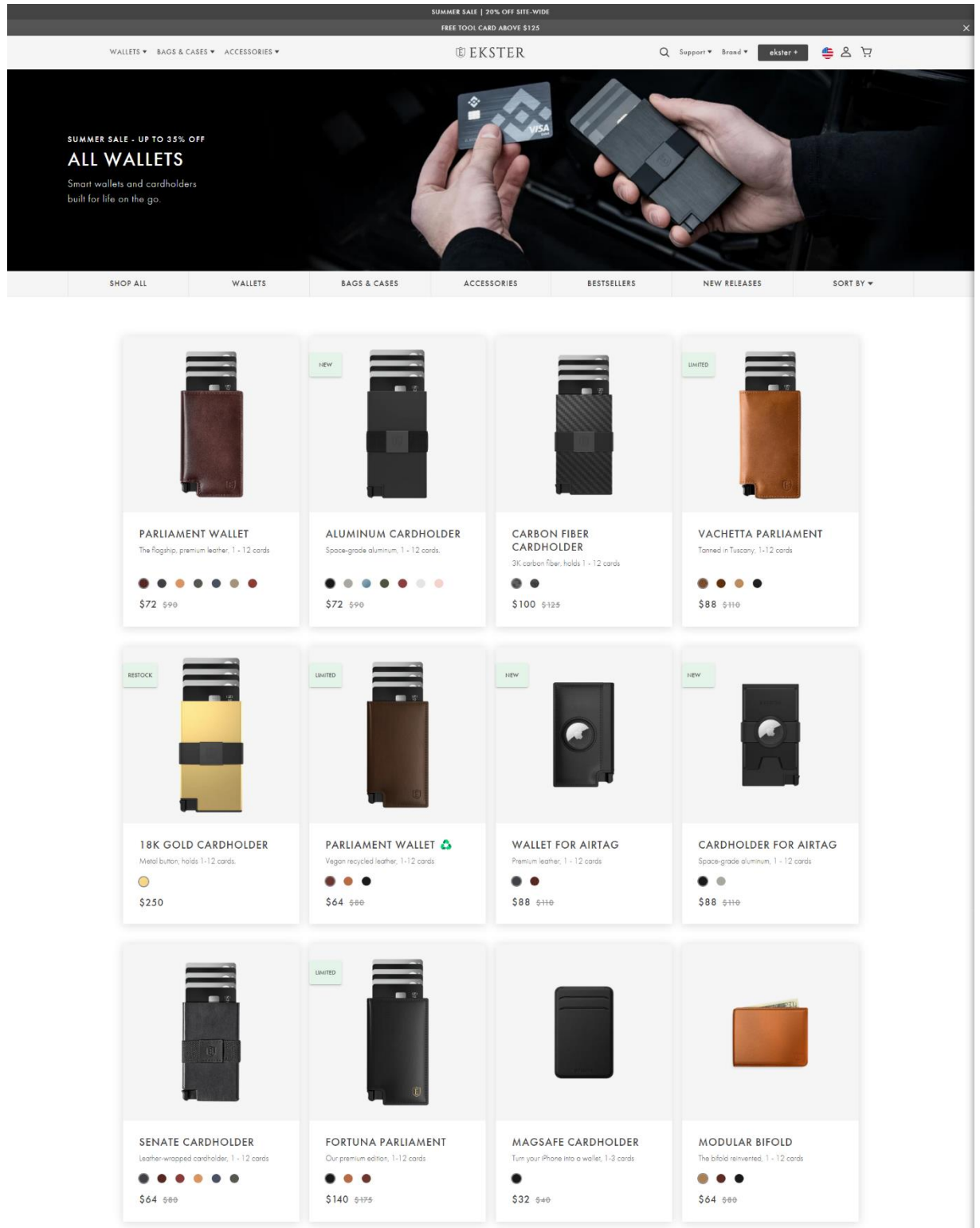
12 12. Defendant is subject to jurisdiction under California’s “long-arm” statute found at
13 California Code of Civil Procedure section 410.10 because the exercise of jurisdiction over
14 Defendant is not “inconsistent with the Constitution of this state or the United States.” Indeed,
15 Plaintiff believes that Defendant generates a minimum of eight percent of its national Website
16 sales to Californians, such that the website “is the equivalent of a physical store in California.”
17 Since this case involves false representations made on Defendant’s Website, and Plaintiff’s
18 purchase was made through the Website from within Los Angeles County, California, California
19 courts can “properly exercise personal jurisdiction” over the Defendant in accordance with the
20 Court of Appeal opinion in *Thurston v. Fairfield Collectibles of Georgia*, 53 Cal.App.5th 1231
21 (2020).

22 **GENERAL ALLEGATIONS**

23 13. Defendant, through its Website, offers a number of wallets, card holders, bags,
24 accessories, and related items, to California consumers. *See* <https://www.ekster.com/> (last visited
25 Aug. 10, 2023).

26 14. Unfortunately, Defendant’s business model relies upon deceiving customers with
27 fake sales. On a typical day, Defendant prominently displays on pages of the Website some form
28 of a sale where all products are supposedly marked down by approximately 20% - 30%. All or

1 nearly all of Defendant’s products on the Website are represented as being significantly marked
 2 down from a substantially higher original or reference price, which is prominently displayed to
 3 the customer as being the supposed original price (the “Reference Price”), as shown in the
 4 following:

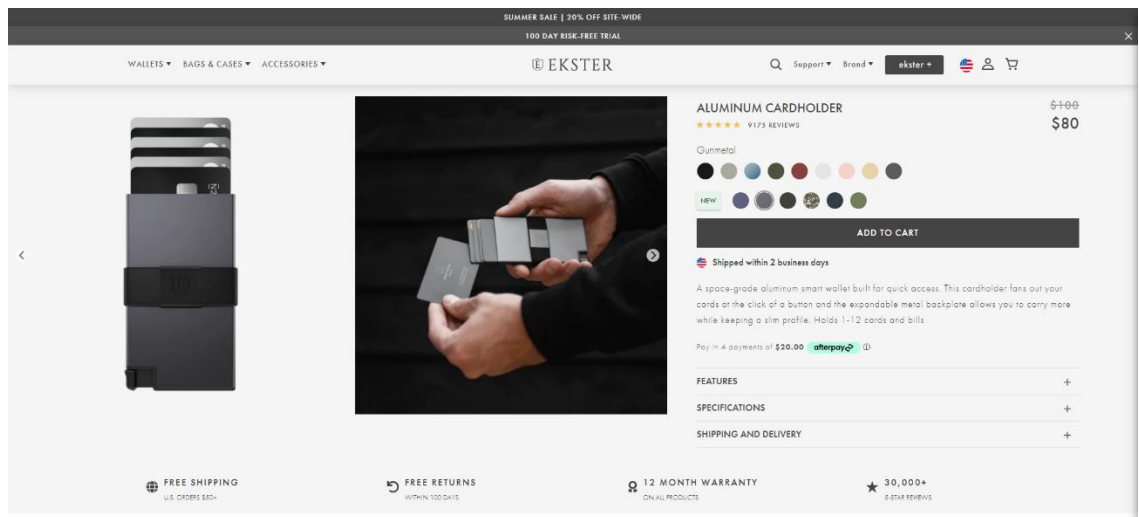


1 See <https://www.ekster.com/collections/all-wallets> (last visited Aug. 10, 2023).

2 15. By doing this, Defendant conveys to customers that the products had previously
3 sold in the recent past at the Reference Price, but are being sold to the customer at a substantial
4 discount.

5 16. However, this Reference Price in the “sale” is almost always—if not always—a
6 falsely inflated price because Defendant rarely, if ever, sells its items at the Reference Price. The
7 only purpose of the Reference Price is to mislead customers into believing that the displayed
8 Reference Price is an original, regular, or retail price at which Defendant usually sells the item
9 or previously sold the item in the recent past. As a result, Defendant falsely conveys to customers
10 that they are receiving a substantial markdown or discount, when in reality, the alleged discount
11 is false and fraudulent.

12 17. For example, on the individual product pages of all (or nearly all) of Defendant’s
13 products offered on the Website, each product is represented as being marked down and included
14 this representation beside the crossed-out fake Reference Price. For example, the “Aluminum
15 Cardholder” in gunmetal grey (the exact Product Plaintiff purchased) is being offered for \$80
16 with a stricken price of \$100 (the Reference Price):



28 See <https://www.ekster.com/products/aluminum-cardholder?variant=40126524031039> (last

1 visited Aug. 10, 2023).²

2 18. These pricing and advertising practices reflecting high-pressure fake sales are
3 patently deceptive. They are intended to mislead customers into believing that they are getting a
4 bargain by buying products from Defendant on sale and at a substantial and deep discount. The
5 truth is that Defendant rarely, if ever, sells any of its products at the Reference Price. The
6 Reference Price is, therefore, an artificially inflated price. In turn, the advertised discounts are
7 nothing more than phantom markdowns.

8 **A. Plaintiff’s Purchase of the Falsely Advertised Card Holder.**

9 19. Plaintiff fell victim to Defendant’s false advertising and deceptive pricing
10 practices. In August 2023, Plaintiff visited Defendant’s Website to shop for a card holder.
11 Plaintiff visited the Website while in Los Angeles County. Plaintiff browsed the Website and
12 observed that all of Defendant’s products had a Reference Price that was crossed out and a sale
13 price included. He found the “Aluminum Cardholder” in gunmetal grey that was listed as:

14 ~~\$100~~

15 **\$80**

16 20. In other words, Plaintiff saw that Defendant represented the card holder as
17 supposedly being on sale at a markdown from a Reference Price. The Reference Price was
18 displayed as a substantially higher price containing a strikethrough.

19 21. Plaintiff purchased the card holder, but before doing so, relied on the
20 representation that the product listed above had in fact been offered for sale, or previously sold,
21 in the recent past at the stated Reference Price. Plaintiff relied on Defendant’s representation that
22 the card holder was truly on sale and being sold at a substantial markdown and discount, and
23 thereby fell victim to the deception intended by Defendant.

24 22. Plaintiff paid \$80.00 for the card holder, excluding tax.

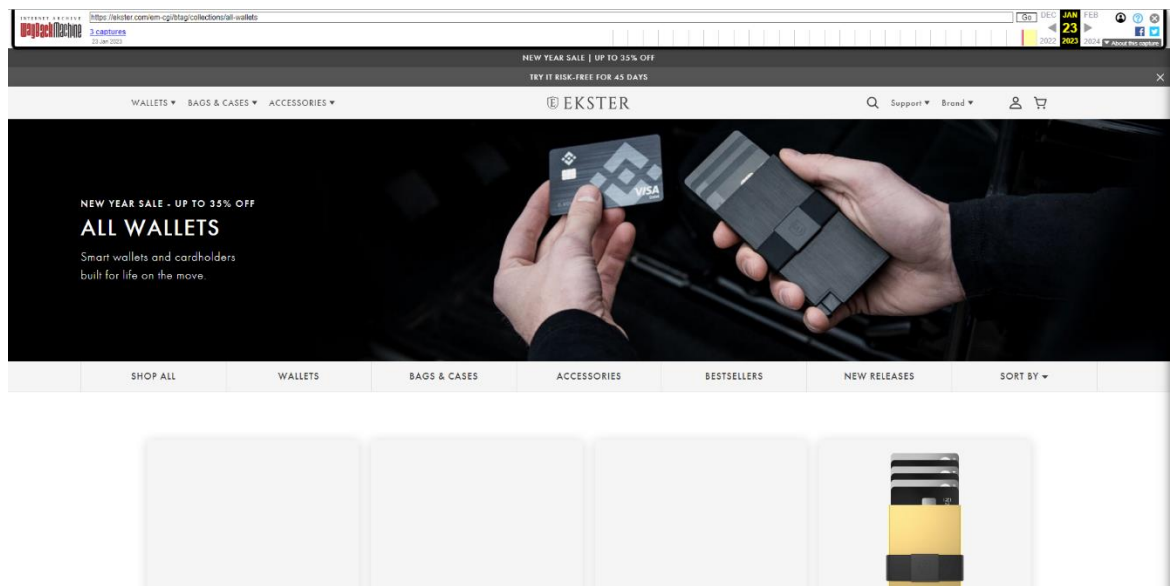
25 23. The truth, however, is that the card holder Plaintiff purchased was not
26 substantially marked down or discounted, or at the very least, any discount he was receiving had
27

28 ² As of the date of filing of this complaint, other “Aluminum Cardholder” versions are being listed at \$72 with a stricken price of \$90. Plaintiff purchase one of the “NEW” “Aluminum Cardholders” which are listed at \$80 with a stricken price of \$100. See <https://www.ekster.com/products/aluminum-cardholder> (last visited Aug. 11, 2023).

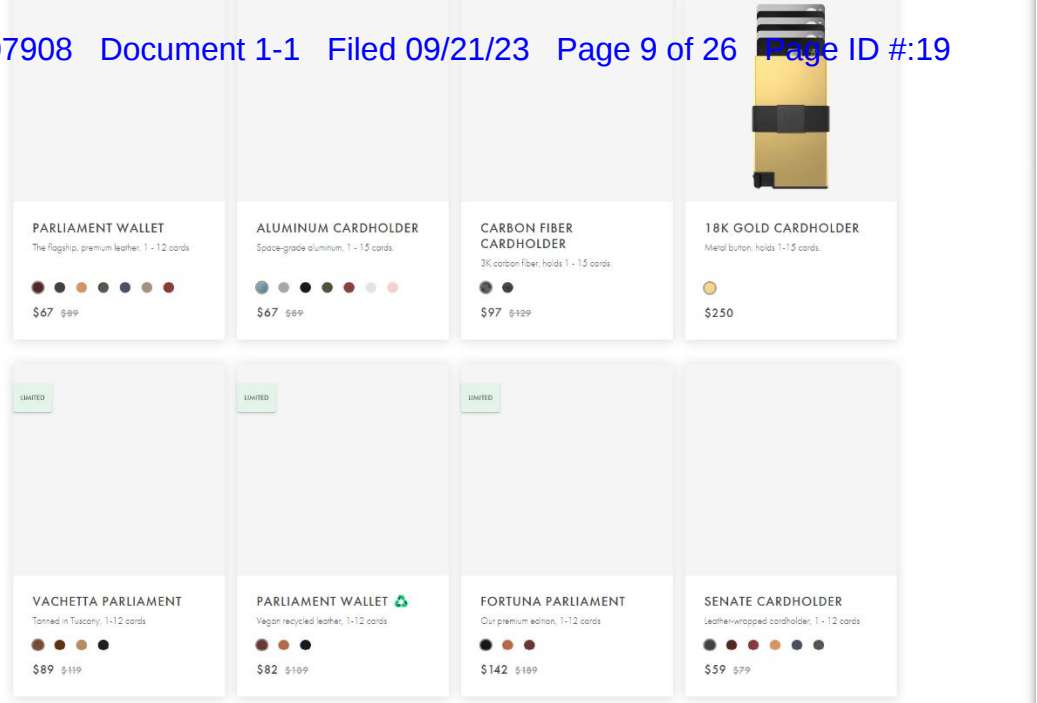
1 been grossly exaggerated. That is because the card holder Plaintiff bought had never been offered
 2 on Defendant’s Website for any reasonably substantial period of time—if ever—at the full
 3 Reference Price of \$100. In fact, for at least the 90-day period prior to Plaintiff’s purchase (and
 4 likely for a longer period), Defendant had not offered the card holder at the Reference Price.

5 24. The Reference Price was a fake price used in Defendant’s deceptive marketing
 6 scheme, which is clear from evidence captured on the “WayBack Machine,” an online tool that
 7 allows users to view screenshots of websites at particular points in time. See
 8 <https://archive.org/web/> (explaining how the WayBack Machine captures screenshots from
 9 websites created years ago, and allows users to see snapshots of websites it has navigated and
 10 archived at various time periods; the tool archives more than 150 billion web pages that have
 11 appeared since 1996, creating a digital footprint of everything that has appeared on any given
 12 website at various points in time); see also *Marten Transport, LTD v. Platform Advertising, Inc.*,
 13 No. 14-2464-JWL, 2016 WL 1718862, at *2 (D. Kan. Apr. 29, 2016) (relying on the WayBack
 14 Machine as a source of competent evidence).

15 25. More specifically, as shown by the WayBack Machine’s screen capture of
 16 Defendant’s website at various points in time, Defendant was employing the *nearly the exact*
 17 *same Reference Price in January 2023*.³ In other words, Defendant has not been selling the
 18 Product at the Reference Price in the recent past—let alone in the past three months:

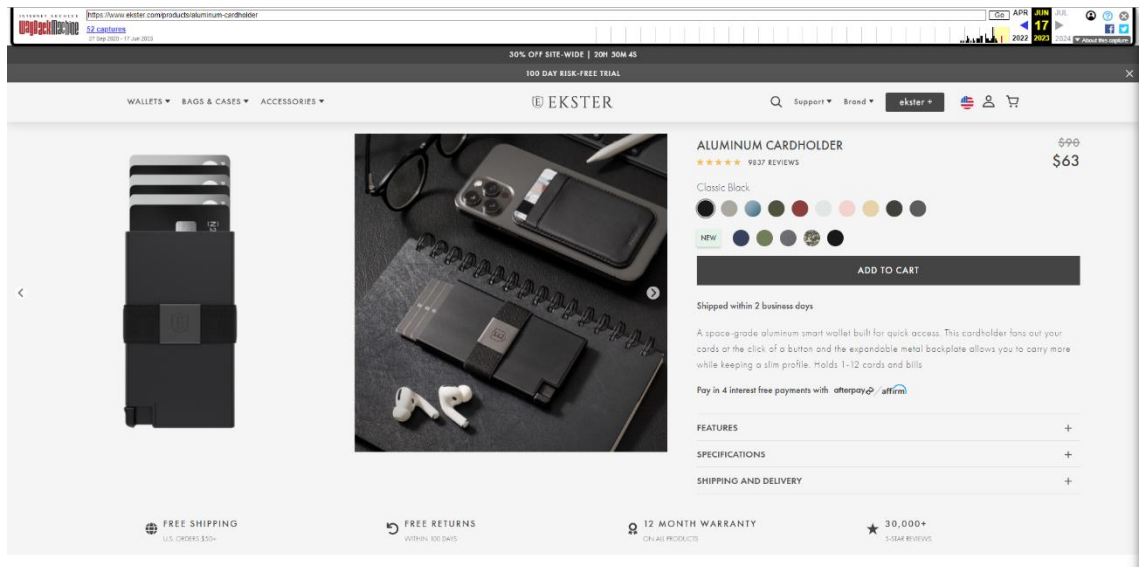


³ In January 2023, the Reference Price for the “Aluminum Cardholder” was \$89 instead of \$90.



See <https://web.archive.org/web/20230123221732/https://ekster.com/em-gi/btag/collections/all-wallets> (last visited Aug. 11, 2023).

26. Indeed, approximately three months ago in April 2023, Defendant was listing its card holders with the same Reference Price as listed at the time of filing this complaint:



See <https://web.archive.org/web/20230414015524/https://ekster.com/em-gi/btag/products/aluminum-cardholder/> (last visited Aug. 11, 2023).

27. Defendant knows that the prices are fake and artificially inflated, and intentionally uses them in its deceptive pricing scheme on its Website to increase sales and profits by misleading Plaintiff and members of the putative class to believe that they are buying products at a substantial discount. Defendant thereby induces customers to buy products they never would

1 have bought—or at the very least, to pay more for merchandise than they otherwise would have
2 if Defendant was simply being truthful about its “sales.”

3 28. Therefore, Plaintiff would not have purchased the Product listed above, or at the
4 very least, would not have paid as much as he did, had Defendant been truthful. Plaintiff was
5 persuaded to make his purchase only because of the fake sale based on Defendant’s fake
6 Reference Price scheme. Plaintiff is susceptible to this recurring harm because he cannot be
7 certain that Defendant has corrected this deceptive pricing scheme, and he desires to shop at
8 Defendant’s online store in the future.

9 **B. Research Shows That the Use of Reference Price Advertising Schemes**
10 **Similar to Defendant’s Influences Consumer Behavior and Affects**
11 **Consumers’ Perceptions of a Product’s Value.**

12 29. The effectiveness of Defendant’s deceitful pricing scheme is backed by
13 longstanding scholarly research. In the seminal article entitled *Comparative Price Advertising:*
14 *Informative or Deceptive?* (cited in *Hinojos v. Kohl’s Corp.*, 718 F.3d 1098, 1106 (9th Cir.
15 2013)), Professors Dhruv Grewal and Larry D. Compeau write that, “[b]y creating an impression
16 of savings, the presence of a higher reference price enhances subjects’ perceived value and
17 willingness to buy the product.” Dhruv Grewal & Larry D. Compeau, *Comparative Price*
18 *Advertising: Informative or Deceptive?*, 11 J. PUB. POL’Y & MKTG. 52, 55 (1992). Therefore,
19 “empirical studies indicate that, as discount size increases, consumers’ perceptions of value and
20 their willingness to buy the product increase, while their intention to search for a lower price
21 decreases.” *Id.* at 56. For this reason, the Ninth Circuit in *Hinojos* held that a plaintiff making a
22 claim of deceptive pricing (strikingly similar to the claim at issue here) had standing to pursue
23 his claim against the defendant retailer. In doing so, the Court observed that “[m]isinformation
24 about a product’s ‘normal’ price is . . . significant to many consumers in the same way as a false
25 product label would be.” *Hinojos*, 718 F.3d at 1106.

26 30. Professors Compeau and Grewal reached similar conclusions in a 2002 article:
27 “decades of research support the conclusion that advertised reference prices do indeed enhance
28 consumers’ perceptions of the value of the deal.” Dhruv Grewal & Larry D. Compeau,

1 *Comparative Price Advertising: Believe It or Not*, 36 J. OF CONSUMER AFFAIRS 287 (2002). The
2 professors also found that “[c]onsumers are influenced by comparison prices even when the
3 stated reference prices are implausibly high.” *Id.*

4 31. In another scholarly publication, Professors Joan Lindsey-Mullikin and Ross D.
5 Petty concluded that “[r]eference price ads strongly influence consumer perceptions of value . . .
6 Consumers often make purchases not based on price but because a retailer assures them that a
7 deal is a good bargain. This occurs when . . . the retailer highlights the relative savings compared
8 with the prices of competitors.” Joan Lindsey-Mullikin & Ross D. Petty, *Marketing Tactics*
9 *Discouraging Price Search: Deception and Competition*, 64 J. OF BUS. RESEARCH 67 (2011).

10 32. Similarly, according to Professors Praveen K. Kopalle and Joan Lindsey-
11 Mullikin, “research has shown that retailer-supplied reference prices clearly enhance buyers’
12 perceptions of value” and “have a significant impact on consumer purchasing decisions.” Praveen
13 K. Kopalle & Joan Lindsey-Mullikin, *The Impact of External Reference Price on Consumer*
14 *Price Expectations*, 79 J. OF RETAILING 225 (2003).

15 33. The results of a 1990 study by Professors Jerry B. Gotlieb and Cyndy Thomas
16 Fitzgerald, came to the conclusion that “reference prices are important cues consumers use when
17 making the decision concerning how much they are willing to pay for the product.” Jerry B.
18 Gotlieb & Cyndy Thomas Fitzgerald, *An Investigation into the Effects of Advertised Reference*
19 *Prices on the Price Consumers Are Willing to Pay for the Product*, 6 J. OF APP’D BUS. RES. 1
20 (1990). This study also concluded that “consumers are likely to be misled into a willingness to
21 pay a higher price for a product simply because the product has a higher reference price.” *Id.*

22 34. The unmistakable inference to be drawn from this research and the Ninth Circuit’s
23 opinion in *Hinojos* is that the deceptive advertising through the use of false reference pricing
24 employed here by Defendant is intended to, and does in fact, influence customer behavior—as it
25 did Plaintiff’s purchasing decision here—by artificially inflating customer perceptions of a given
26 item’s value and causing customers to spend money they otherwise would not have, purchase
27 items they otherwise would not have, and/or spend more money for a product than they otherwise
28 would have absent the deceptive advertising.

1 **CLASS ACTION ALLEGATIONS**

2 35. Plaintiff brings this action on behalf of himself and all persons similarly situated,
3 and seeks certification of the following class:

4 All persons who purchased one or more of Defendant's products from
5 Defendant's Website while in California from August 1, 2020, through the present
6 (the "Class Period") at a discount from a higher reference price and who have not
7 received a refund or credit for their purchase(s).

8 36. The above-described class of persons shall hereafter be referred to as the "Class."
9 Excluded from the Class are any and all past or present officers, directors, or employees of
10 Defendant, any judge who presides over this action, and any partner or employee of Class
11 Counsel. Plaintiff reserves the right to expand, limit, modify, or amend this class definition,
12 including the addition of one or more subclasses, in connection with his motion for class
13 certification, or at any other time, based upon, *inter alia*, changing circumstances and/or new
14 facts obtained during discovery.

15 37. **Numerosity**. The Class is so numerous that joinder of all members in one action
16 is impracticable. The exact number and identities of the members of the Class is unknown to
17 Plaintiff at this time and can only be ascertained through appropriate discovery, but on
18 information and belief, Plaintiff alleges that there are thousands of members of the Class. The
19 precise number of Class members is unknown to Plaintiff.

20 38. **Typicality**. Plaintiff's claims are typical of those of other members of the Class,
21 all of whom have suffered similar harm due to Defendant's course of conduct as described in this
22 Complaint. All Class members have been deceived (or were likely to be deceived) by Defendant's
23 false and deceptive price advertising scheme, as alleged in this Complaint. Plaintiff is advancing
24 the same claims and legal theories on behalf of herself and all Class members.

25 39. **Adequacy of Representation**. Plaintiff is an adequate representative of the Class
26 and will fairly and adequately protect the interests of the Class. Plaintiff has retained attorneys
27 who are experienced in the handling of complex litigation and class actions, and Plaintiff and his
28 counsel intend to prosecute this action vigorously. Plaintiff has no antagonistic or adverse

1 interests to those of the Class.

2 40. **Predominance of Common Questions of Law or Fact.** Common questions of
3 law and fact exist as to all members of the Class that predominate over any questions affecting
4 only individual members of the Class. These common legal and factual questions, which do not
5 vary among members of the Class, and which may be determined without reference to the
6 individual circumstances of any member of the Class, include, but are not limited to, the
7 following:

- 8 a) Whether, during the Class Period, Defendant advertised false Reference Prices
9 of its products offered on its Website.
- 10 b) Whether, during the Class Period, Defendant advertised price discounts from
11 false Reference Prices on products offered on its Website.
- 12 c) Whether the products listed on Defendant’s Website during the Class Period
13 were offered at their Reference Prices for any reasonably substantial period of
14 time prior to being offered at prices that were discounted from their Reference
15 Prices.
- 16 d) Whether Defendant’s deceptive pricing scheme using false Reference Prices
17 constitutes an “unlawful,” “unfair,” or “fraudulent” business practice in
18 violation of the California Unfair Competition Law, Cal. Bus & Prof. Code §§
19 17200, *et seq.*
- 20 e) Whether Defendant’s deceptive pricing scheme using false Reference Prices
21 constitutes “unfair, deceptive, untrue or misleading advertising” in violation of
22 the California Unfair Competition Law, Cal. Bus & Prof. Code §§ 17200, *et*
23 *seq.*
- 24 f) Whether Defendant’s deceptive pricing scheme using false Reference Prices
25 constitutes false advertising in violation of the California False Advertising
26 Law under Business & Professions Code §§ 17500, *et seq.*
- 27 g) Whether Defendant’s false Reference Prices on products offered on its Website
28 during the Class Period are false representations.

- 1 h) Whether and when Defendant learned that false Reference Prices on products
- 2 offered on its Website during the Class Period were false representations.
- 3 i) Whether Defendant had a duty to disclose to its customers that the Reference
- 4 Prices were fake “original” prices in furtherance of sham sales.
- 5 j) To what extent did Defendant’s conduct causes, and continues to cause, harm
- 6 to the Class.
- 7 k) Whether the members of the Class are entitled to damages and/or restitution.
- 8 l) Whether injunctive relief is appropriate and necessary to enjoin Defendant
- 9 from continuing to engage in false or misleading advertising.
- 10 m) Whether Defendant’s conduct was undertaken with conscious disregard of the
- 11 rights of the members of the Class and was done with fraud, oppression, and/or
- 12 malice.

13 41. **Superiority**. A class action is superior to other available methods for the fair and
14 efficient adjudication of this controversy because individual litigation of the claims of all
15 members of the Class is impracticable. Requiring each individual class member to file an
16 individual lawsuit would unreasonably consume the amounts that may be recovered. Even if
17 every member of the Class could afford individual litigation, the adjudication of at least
18 thousands of identical claims would be unduly burdensome to the courts. Individualized litigation
19 would also present the potential for varying, inconsistent, or contradictory judgments and would
20 magnify the delay and expense to all parties and to the court system resulting from multiple trials
21 of the same factual issues.

22 42. By contrast, the conduct of this action as a class action, with respect to some or
23 all of the issues presented, presents no management difficulties, conserves the resources of the
24 parties and of the court system, and protects the rights of the members of the Class. Plaintiff
25 anticipates no difficulty in the management of this action as a class action. The prosecution of
26 separate actions by individual members of the Class may create a risk of adjudications with
27 respect to them that would, as a practical matter, be dispositive of the interests of the other
28 members of the Class who are not parties to such adjudications, or that would substantially impair

1 or impede the ability of such non-party Class members to protect their interests.

2 43. **Ascertainability**. Upon information and belief, Defendant keeps extensive
3 computerized records of their sales and customers through, among other things, databases storing
4 customer orders, customer order histories, customer profiles, customer loyalty programs, and
5 general marketing programs. Defendant has one or more databases through which a significant
6 majority of members of the Class may be identified and ascertained, and they maintain contact
7 information, including email addresses and home addresses (such as billing, mailing, and
8 shipping addresses), through which notice of this action is capable of being disseminated in
9 accordance with due process requirements.

10 **CAUSES OF ACTION**

11 **First Cause of Action**

12 **Violation of California’s Unfair Competition Law**

13 **Cal. Bus. & Prof. Code §§ 17200, *et seq.***

14 **(By Plaintiff Against Defendants on Behalf of the Class)**

15 44. Plaintiff repeats and re-alleges the allegations contained in every preceding
16 paragraph as if fully set forth herein.

17 45. California Business and Professions Code §§ 17200 *et seq.*, also known as the
18 California Unfair Competition Law (“UCL”), prohibits acts of “unfair competition,” including
19 any “unlawful, unfair or fraudulent business act or practice” as well as “unfair, deceptive, untrue
20 or misleading advertising.” Cal. Bus. & Prof. Code § 17200.

21 46. The UCL imposes strict liability. Plaintiff need not prove that Defendant
22 intentionally or negligently engaged in unlawful, unfair, or fraudulent business practices—but
23 only that such practices occurred.

24 **“Unlawful” Actions**

25 47. A cause of action may be brought under the “unlawful” prong of the UCL if a
26 practice violates another law. Such an action borrows violations of other laws and treats these
27 violations, when committed pursuant to business activity, as unlawful practices independently
28 actionable under the UCL. The violation of any law constitutes an “unlawful” business practice

1 under the UCL.

2 48. Here, by engaging in false advertising, as well as the false, deceptive, and
3 misleading conduct alleged above, Defendant has engaged in unlawful business acts and
4 practices in violation of the UCL, including violations of state and federal laws and regulations,
5 such as 15 U.S.C. § 45(a)(1), 16 C.F.R. § 233.1, California Business & Professions Code sections
6 17500 and 17501, and California Civil Code sections 1770(a)(9) and 1770(a)(13).

7 49. The Federal Trade Commission Act (“FTCA”) prohibits “unfair or deceptive acts
8 or practices in or affecting commerce[.]” 15 U.S.C. § 45(a)(1). Under FTC regulations, false
9 former pricing schemes similar to the ones employed by Defendant, are deceptive practices that
10 would violate the FTCA:

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

23 16 C.F.R. §§ 233.1(a) (emphasis added).

24 50. Further, as detailed below in the Second Cause of Action, Defendant’s conduct
25 also violates California’s false advertising laws. Specifically, California Business & Professions
26 Code section 17500 provides, in relevant part, that it is unlawful for any corporation, with intent
27 directly or indirectly to dispose of personal property, to make or disseminate in any “manner or
28 means whatever, including over the Internet, any statement, concerning that . . . personal property

1 . . . which is untrue or misleading, and which is known, or which by the exercise of reasonable
2 care should be known, to be untrue or misleading[.]” Cal. Bus. & Prof. Code § 17500.

3 51. California law also expressly prohibits false former pricing schemes like the one
4 employed by Defendant. California Business & Professions Code section 17501, entitled “Worth
5 or value; statements as to former price,” states as follows:

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

11 Cal. Bus. & Prof. Code § 17501.

12 52. Moreover, as detailed below in the Third Cause of Action, Defendant’s conduct
13 also violates the California Consumer Legal Remedies Act (“CLRA”). *See* Cal. Civ. Code §§
14 1750, *et seq.* More specifically, Defendant violated the CLRA’s provisions prohibiting
15 businesses from “[a]dvertising goods or services with intent not to sell them as advertised,” Cal.
16 Civ. Code § 1770(a)(9), and “[m]aking false or misleading statements of fact concerning reasons
17 for, existence of, or amounts of price reductions[.]” Cal. Civ. Code § 1770(a)(13).

18 **“Unfair” Actions**

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

23 54. Here, Defendant’s actions constitute “unfair” business acts or practices because,
24 as alleged above, Defendant engaged in a misleading and deceptive pricing scheme by
25 advertising and representing false Reference Prices and thereby falsely advertising and
26 representing markdowns or “discounts” that were false and inflated. Defendant’s deceptive
27 marketing practice gave consumers the false impression that its products were regularly sold on
28 the market for a substantially higher price in the recent past than they actually were and thus led

1 to the false impression that Defendant’s products were worth more than they actually were.
2 Defendant’s acts and practices therefore offended an established public policy, and they engaged
3 in immoral, unethical, oppressive, and unscrupulous activities that are substantially injurious to
4 consumers.

5 55. The harm to Plaintiff and members of the Class outweighs the utility of
6 Defendant’s practices. There were reasonably available alternatives to further Defendant’s
7 legitimate business interests, other than the misleading and deceptive conduct described in this
8 Complaint.

9 **“Fraudulent” Actions**

10 56. A business act or practice is “fraudulent” within the meaning of the UCL if
11 members of the public are likely to be deceived.

12 57. Here, members of the public are likely to be deceived by Defendant’s conduct as
13 alleged above. Among other things, Defendant affirmatively misrepresented the Reference Prices
14 of its products, which thereby misled and deceived customers into believing that they were
15 buying merchandise from Defendant at substantially marked-down and discounted prices.
16 Defendant’s deceptive marketing practice gave consumers the false impression that their
17 products were regularly sold on the market for a substantially higher price in the recent past than
18 they actually were and led to the false impression that Defendant’s products were worth more
19 than they actually were.

20 58. In addition, Defendant had a duty to disclose the truth about its pricing deception,
21 including, among other things, that the Reference Prices advertised and published on its Website
22 were not, in fact, prices at which Defendant’s products had sold for in the recent past for a
23 reasonably substantial period of time, but that instead, in reality, Defendant’s products rarely (if
24 ever) were offered at the advertised Reference Prices. Defendant, however, concealed this
25 material information from customers and the general public. Members of the public, therefore,
26 were also likely to be deceived by Defendant’s failure to disclose material information.

27 59. Plaintiff and each member of the Class suffered an injury in fact and lost money
28 or property as a result of Defendant’s unlawful, unfair, and/or fraudulent business practices, and

1 as a result of Defendant’s unfair, deceptive, untrue or misleading advertising.

2 60. Plaintiff, on behalf of himself and the members of the Class, seeks disgorgement
3 of all moneys received by Defendant through the conduct described above.

4 61. Plaintiff, on behalf of himself and the members of the Class, seeks a temporary,
5 preliminary, and/or permanent injunction from this Court prohibiting Defendant from engaging
6 in the patterns and practices described herein, including but not limited to, putting a stop to their
7 deceptive advertisements and false Reference Prices in connection with the sale of Defendant’s
8 products on its Website.

9 62. Injunctive relief is necessary to prevent future harm to consumers, including
10 Plaintiff, who would like to purchase the products in the future. Every day, consumers like
11 Plaintiff are misled into believing they are receiving a discount. Without injunctive relief,
12 Defendant will continue to mislead consumers, and consumers will purchase products they
13 otherwise would not have purchased because they will be unable to determine whether they are
14 actually receiving a discount.

15 **Second Cause of Action**

16 **Violation of California’s False Advertising Law**

17 **Cal. Bus. & Prof. Code §§ 17500, *et seq.***

18 **(By Plaintiff Against Defendants on Behalf of the Class)**

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

21 64. The California False Advertising Law, codified at California Business &
22 Professions Code sections 17500, *et seq.* (the “FAL”) provides, in relevant part, that it is unlawful
23 for any corporation, with intent directly or indirectly to dispose of personal property, to make or
24 disseminate in any “manner or means whatever, including over the Internet, any statement,
25 concerning that . . . personal property . . . which is untrue or misleading, and which is known, or
26 which by the exercise of reasonable care should be known, to be untrue or misleading[.]” Cal.
27 Bus. & Prof. Code § 17500.

28 65. Similarly, the FAL provides, in relevant part, that “no price shall be advertised as

1 a former price of any advertised thing, unless the alleged former price was the prevailing market
2 price . . . within three months next immediately preceding the publication of the advertisement
3 or unless the date when the alleged former price did prevail is clearly, exactly, and conspicuously
4 stated in the advertisement.” Cal Bus. & Prof. Code § 17501.

5 66. Here, Defendant routinely disseminated on its Website false Reference Prices for
6 the products offered for sale on their website, including to Plaintiff. Such statements of Defendant
7 were untrue, or at the very least, were misleading. Among other things, Defendant rarely, if ever,
8 offered Defendant’s products on its Website at the Reference Prices displayed in connection with
9 its products. Further, Defendant rarely, if ever, offered its products on its Website at the
10 Reference Prices within the three months immediately preceding the publication of the Reference
11 Prices. Defendant therefore misled customers, including Plaintiff, into believing that the
12 Reference Prices are, or were, genuine former prices and that the “sale” prices relative to the
13 published Reference Prices, in fact, reflected real and substantial discounts. Defendant’s
14 deceptive marketing practice gave consumers the false impression that their products were
15 regularly sold for a substantially higher price in the recent past than they actually were and thus
16 led to the false impression that Defendant’s products were worth more than they actually were.

17 67. Defendant engaged in this deceptive conduct with the intent to dispose of personal
18 property—namely, with the intent to increase sales of Defendant’s products offered by Defendant
19 on its Website.

20 68. Defendant knew, or by the exercise of reasonable care should have known, that
21 its dissemination of Reference Prices for its products sold on its Website were untrue and/or
22 misleading. Among other things, Defendant represented the Reference Prices in connection with
23 its products sold on its Website even though it knew, or in the exercise of reasonable care should
24 have known, that such products had rarely, if ever, sold at the crossed-out Reference Prices.

25 69. As a direct and proximate result of Defendant’s misleading and false
26 advertisements, Plaintiff and members of the Class have suffered injury in fact and have lost
27 money. As such, Plaintiff requests that this Court order Defendant to restore this money to
28 Plaintiff and all members of the Class, and to enjoin Defendant from continuing its false and

1 misleading advertising practices in violation of California law in the future. Otherwise, Plaintiff,
2 members of the Class, and the broader general public will be irreparably harmed and/or denied
3 an effective and complete remedy.

4 **Third Cause of Action**

5 **Violation of the California Consumer Legal Remedies Act**

6 **Cal. Civ. Code §§ 1750, *et seq.***

7 **(By Plaintiff Against Defendants on Behalf of the Class)**

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

10 71. The Consumer Legal Remedies Act of 1970, Cal. Civ. Code §§ 1750, *et seq.* (the
11 “CLRA”) is a California consumer protection statute which allows plaintiffs to bring private civil
12 actions for “unfair methods of competition and unfair or deceptive acts or practices undertaken
13 by any person in a transaction . . . which results in the sale or lease of goods or services to any
14 consumer.” Cal. Civ. Code § 1770(a). The purposes of the CLRA are “to protect consumers
15 against unfair and deceptive business practices and to provide efficient and economical
16 procedures to secure such protection.” Cal. Civ. Code § 1760.

17 72. Plaintiff and each member of the Class are “consumers” as defined by California
18 Civil Code section 1761(d). Defendant’s sale of its products on the Website to Plaintiff and the
19 Class were “transactions” within the meaning of California Civil Code section 1761(e). The
20 product purchased by Plaintiff and the Class are “goods” within the meaning of California Civil
21 Code section 1761(a).

22 73. Defendant violated and continues to violate the CLRA by engaging in the
23 following practices prohibited by California Civil Code section 1770(a) in transactions with
24 Plaintiff and the Class which were intended to result in, and did result in, the sale of Defendant-
25 branded products:

26 (1) Advertising goods or services with the intent not to sell them as advertised;

27 and

28 (2) Making false or misleading statements of fact concerning reasons for, the

1 existence of, or amounts of price reductions.

2 Cal. Civ. Code §§ 1770(a)(9) & (13).

3 74. With regard to section 1770(a)(9), Defendant advertised and represented its
4 branded products on the Website with the “intent not to sell” them as advertised because, among
5 other things the false Reference Prices advertised in connection with products offered on their
6 website misled and continue to mislead customers into believing the merchandise was previously
7 offered for sale and/or sold at the higher Reference Prices for some reasonably substantial period
8 of time.

9 75. With regard to section 1770(a)(13), Defendant made false or misleading
10 statements of fact concerning the “existence of” and the “amounts of price reductions” because,
11 among other things no true price reductions existed—or at the very least, any price reductions
12 were exaggerated—in that Defendant’s products were rarely, if ever, previously offered for sale
13 and/or sold at the higher Reference Prices for a reasonably substantial period of time.

14 76. At this time Plaintiff seeks only injunctive relief as to this cause of action. Pursuant
15 to Cal. Civ. Code § 1782, in conjunction with the filing of this action, Plaintiff’s counsel is
16 notifying Defendant by separate letter of the particular violations of the CLRA and demanding
17 that it correct or agree to correct the actions described in this Complaint. If Defendant fails to do
18 so, Plaintiff shall amend his Complaint as a matter of right (or otherwise seek leave to amend the
19 Complaint) to include compensatory and monetary damages to which Plaintiff and the Class are
20 entitled.

21 **Fourth Cause of Action**

22 **Fraudulent Concealment**

23 **(By Plaintiff Against Defendants on Behalf of the Class)**

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

26 78. Defendant uniformly disclosed some facts to Plaintiff and all members of the
27 Class during the Class Period in connection with its products on the Website. Namely, Defendant
28 disclosed a Reference Price for each item by displaying a Reference Price substantially higher

1 than the offered selling price, which is marked down or discounted from the Reference Price by
2 a significant discount.

3 79. Defendant, however, intentionally failed to disclose other facts, making
4 Defendant's disclosure deceptive. Specifically, Defendant failed to disclose that Defendant
5 rarely, if ever, previously offered for sale and/or sold its products at the higher Reference Price
6 for any reasonably substantial period of time. As a result, Defendant deceived Plaintiff and the
7 Class into believing that they were purchasing items at a substantial markdown or discount when,
8 in reality, the false Reference Price and discounting practice artificially inflated the true market
9 value of the items they purchased.

10 80. As a separate basis for concealment, Defendant uniformly and intentionally
11 concealed from Plaintiff and all members of the Class that the items they purchased from
12 Defendant had rarely, if ever, been sold by Defendant in the recent past at the substantially higher
13 Reference Price displayed on Defendant's Website and/or in the prevailing market. These were
14 facts known only to Defendant that Plaintiff and the Class could not have discovered.

15 81. Plaintiff and the Class did not know of the concealed facts.

16 82. Defendant intended to deceive Plaintiff and the Class by concealing the facts
17 described above.

18 83. Had the omitted information been disclosed, Plaintiff reasonably would have
19 behaved differently. Among other things, Plaintiff would not have purchased the item he
20 purchased from Defendant, or at the very least, would not have paid as much for the items as he
21 ultimately did.

22 84. The omitted information was material and thus, reliance is presumed on a class-
23 wide basis. *Davis-Miller v. Auto. Club of S. Cal.*, 201 Cal.App.4th 106, 122 (2011). The omitted
24 information related to the price of the items sold on Defendant's Website and whether Plaintiff
25 was receiving a true and genuine substantial discount or whether, instead, Plaintiff was being
26 deceived into buying products through a pricing scheme utilizing fake, artificially inflated former
27 prices. A reasonable person would plainly attach importance to matters affecting pricing in
28 determining their purchasing decision.

1 85. As a direct and proximate result of the above, Plaintiff and the Class have been
2 harmed and suffered damages in an amount to be proven at trial.

3 86. Defendant undertook these illegal acts intentionally or with conscious disregard
4 of the rights of Plaintiff and the Class, and did so with fraud, malice, and/or oppression. Based
5 on the allegations above, Defendant's actions constituted fraud because Defendant intended to
6 and did deceive and injure Plaintiff and the Class. Based on the allegations above, Defendant's
7 actions constituted malice because Defendant acted with the intent to and did cause injury to
8 Plaintiff and the Class, and also because Defendant's deceptive conduct was despicable and was
9 done with a willful and knowing disregard of the rights of Plaintiff and the Class. Based on the
10 allegations above, Defendant's actions constituted oppression because Defendant's deceptive
11 conduct was despicable and subjected Plaintiff and the Class to cruel and unjust hardship in
12 knowing disregard of their rights.

13 **PRAYER FOR RELIEF**

14 WHEREFORE, Plaintiff prays for relief and judgment in favor of himself and the Class
15 as follows:

16 **On the First Cause of Action for Violations of the Unfair Competition Law (Cal. Bus. &**
17 **Prof. Code §§ 17200, et seq.)**

18 A. For an order certifying that the action be maintained as a class action, that Plaintiff
19 be designated the class representative, and that undersigned counsel be designated as class
20 counsel.

21 B. For an award of equitable and declaratory relief.

22 C. For pre- and post-judgment interest and costs of suit incurred herein.

23 D. For attorneys' fees incurred herein pursuant to California Code of Civil Procedure
24 section 1021.5, or to the extent otherwise permitted by law.

25 E. For such other and further relief as the Court may deem just and proper.

26 **On the Second Cause of Action for Violations of the False Advertising Law (Cal. Bus. &**
27 **Prof. Code §§ 17500, et seq.)**

28 A. For an order certifying that the action be maintained as a class action, that Plaintiff

1 be designated the class representative, and that undersigned counsel be designated as class
2 counsel.

3 B. For an injunction putting a stop to the deceptive and misleading conduct described
4 herein and ordering Defendant to correct its deceptive and misleading advertising and pricing
5 practices.

6 C. For an award of restitution and disgorgement of moneys paid that Defendant
7 obtained as a result of its unfair, deceptive, untrue, and misleading advertising, all as described
8 above.

9 D. For an award of equitable and declaratory relief.

10 E. For pre- and post-judgment interest and costs of suit incurred herein.

11 F. For attorneys' fees incurred herein pursuant to California Code of Civil Procedure
12 section 1021.5, or to the extent otherwise permitted by law.

13 G. For such other and further relief as the Court may deem just and proper.

14 **On the Third Cause of Action for Violations of the Consumer Legal Remedies Act (Cal.**

15 **Civ. Code §§ 1750, et seq.)**

16 A. For an order certifying that the action be maintained as a class action, that Plaintiff
17 be designated the class representative, and that undersigned counsel be designated as class
18 counsel.

19 B. For an injunction putting a stop to the deceptive and misleading conduct described
20 herein and ordering Defendant to correct its deceptive and misleading advertising and pricing
21 practices.

22 C. For pre- and post-judgment interest and costs of suit incurred herein.

23 D. For attorneys' fees incurred herein pursuant to California Civil Code section 1780,
24 or to the extent otherwise permitted by law.

25 E. For such other and further relief as the Court may deem just and proper.

26 **On the Fourth Cause of Action for Fraudulent Concealment**

27
28

- 1 A. For an order certifying that the action be maintained as a class action, that Plaintiff
2 be designated the class representative, and that undersigned counsel be designated as class
3 counsel.
- 4 B. For compensatory damages in an amount to be proven at trial.
- 5 C. For pre- and post-judgment interest and costs of suit incurred herein.
- 6 D. For attorneys' fees incurred herein pursuant to California Code of Civil Procedure
7 section 1021.5, or to the extent otherwise permitted by law.
- 8 E. For such other and further relief as the Court may deem just and proper.
- 9

10 Dated: August 11, 2023

Respectfully submitted,

11 PACIFIC TRIAL ATTORNEYS, APC

12
13 By: 
14 Scott. J. Ferrell
Attorneys for Plaintiff