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9 UNITED STATES DISTRICT COURT
10 SOUTHERN DISTRICT OF CALIFORNIA

11 JENNIFER ADAMS, individually and on
12 behalf of all similarly situated persons,

13 Plaintiff,

14 v.

15 GESHEM LLC, a Delaware limited
16 liability company; and DOES 1 through
17 10,

18 Defendants.

Case No. '24CV1147 BEN DDL

CLASS ACTION COMPLAINT

JURY TRIAL DEMANDED

1 Plaintiff Jennifer Adams (“Plaintiff”) brings this class action complaint individually
2 and on behalf of all others similarly situated against GESHEM LLC and DOES 1 through
3 10 (collectively, “Defendants” or “Poly & Bark”). The allegations contained in this class
4 action complaint are based on Plaintiff’s personal knowledge of facts pertaining to herself
5 and upon information and belief, including further investigation conducted by Plaintiff’s
6 counsel, as to the remainder.

7 **I. NATURE OF THE ACTION**

8 1. Defendants have violated California’s “prohibition on advertising non-
9 existent sales.” *Hinojos v. Kohl’s Corp.*, 718 F.3d 1098, 1106 (9th Cir. 2013). “[P]rice
10 advertisements matter.” *Id.*

11 2. This is a class action lawsuit brought to address Defendants’ misleading and
12 unlawful pricing, sales, and discounting practices on their website www.polyandbark.com.
13 The products at issue are all goods that have at any time been offered on the website, at a
14 sale or discounted price from a higher reference price. The products consist entirely (or
15 almost entirely) of Poly & Bark’s in-house furniture and decor. Defendants advertise false,
16 misleading, and inflated reference prices to deceive customers into a belief that the sale
17 price is a discounted bargain price.

18 3. Anyone visiting the website who buys an item on “sale” from a former or
19 regular price is being misled, including anyone who buys an item on sale using an
20 automatically or manually applied coupon code. This is because that item has not been
21 listed for sale or sold *on the website*, in the recent past and for a substantial time, at the
22 regular price. Yet Defendants’ use of inflated reference prices and purported limited time
23 sales all lead reasonable consumers to believe that the products in fact had been listed for
24 sale or sold on the website, at the former and regular price, in the recent past, for a
25 substantial period of time.

26 4. On information and belief, all or nearly all the reference prices on the website
27 are false and misleading. They are not former or regular prices at which the products were
28

1 offered on the website in the recent past for a substantial time. They are inflated prices
2 posted to lure consumers into purchasing items from Defendants.

3 5. Beyond that, on information and belief, Defendants’ products sold on the
4 website not only have a market value lower than the promised former price, but the market
5 value of the products is also lower than the discounted “sale” price. By using false
6 reference pricing and false limited time sales, Defendants artificially drive up demand for
7 the products, and by extension drive up the price of the products. As a result, consumers
8 received a product worth less than the price paid. To illustrate, assume a company knows
9 a product will sell in the marketplace at \$30. But to increase revenue and capture market
10 share, the company advertises the product as having a regular price of \$100 and being on
11 “sale” at 60% off (i.e., \$60 off). Because consumers value products based on the regular
12 price, and a purported limited-time sale conveys savings, the company can sell that \$30
13 product for \$40.

14 6. As a result, consumers are deceived into spending money they otherwise
15 would not have spent, purchasing items they would not have purchased, and/or spending
16 more money for an item than they otherwise would have absent deceptive marketing.

17 **II. PARTIES**

18 7. Plaintiff Jennifer Adams is a resident of the State of California and County
19 of San Diego. She was present in San Diego County at the time she made her purchases
20 from the website.

21 8. Defendant Geshem LLC is, on information and belief, a Delaware limited
22 liability company with its members each citizens of Delaware, Illinois, and/or Florida. On
23 information and belief, it owns the Poly & Bark brand, and owns, operates, manages, and
24 is responsible for sales through the website. Poly & Bark is an online and furniture retailer.
25 Through the website, Defendants sell their products to consumers in California and
26 nationwide.

27 9. On information and belief, at all times relevant to this Complaint, each of the
28 Defendants herein, whether named or designated as a DOE, was an agent, servant, co-

1 conspirator, partner, joint venturer, wholly owned and controlled subsidiary and/or alter
2 ego of each of the remaining Defendants, and was at all times acting within the course and
3 scope of said agency, service, conspiracy, partnership and/or joint venture. On information
4 and belief, Defendants, and each of them, aided and abetted, encouraged and rendered
5 substantial assistance in accomplishing the wrongful conduct and their wrongful goals and
6 other wrongdoing complained of herein. In taking action, as particularized herein, to aid
7 and abet and substantially assist the commission of these wrongful acts and other
8 wrongdoings complained of, each of the Defendants acted with an awareness of its
9 primary wrongdoing and realized that its conduct would substantially assist the
10 accomplishment of the wrongful goals and conduct.

11 10. Plaintiff further alleges, on information and belief, that all pricing, marketing,
12 discounting, and sales decisions for the website, including the false and misleading sales
13 and discounting practices alleged in this action, were made by each of Defendants, and
14 such decisions were made at the direction of Geshem LLC and DOES 1 through 10.

15 **III. JURISDICTION AND VENUE**

16 11. This Court has jurisdiction over this lawsuit under the Class Action Fairness
17 Act, 28 U.S.C. § 1332(d)(2), because this is a proposed class action in which: (i) there are
18 at least 100 class members; (ii) the aggregate amount in controversy exceeds \$5,000,000,
19 exclusive of interest and costs; and (iii) at least one putative class member and one
20 Defendant are citizens of different states.

21 12. Venue is proper in this district pursuant to 28 U.S.C. § 1391 because a
22 substantial part of the events or omissions giving rise to the claims herein occurred in this
23 judicial district. As set forth herein, Defendants own and operate the website, and
24 marketed, sold, and shipped products to purchasers located in this district, including at
25 least one plaintiff.

26 13. Further, as set forth herein, Defendants have contacts in this district sufficient
27 to subject them to the personal jurisdiction of this district as if this district were a separate
28 state. Each Defendant continuously and systematically places goods into the stream of

1 commerce for distribution in California, maintains an interactive commercial website,
2 offers to ship products to California, and allows customers in California to order products.
3 Exercising jurisdiction over each Defendant is fair, just, and reasonable considering the
4 quality and nature of each Defendant’s acts that occur in California and which affect
5 interests located in California. Each Defendant has purposefully availed itself of the
6 privilege of conducting activities in California, and should reasonably anticipate being
7 haled into court in California.

8 **IV. GENERAL ALLEGATIONS**

9 **A. Company Background**

10 14. Poly & Bark is a designer, manufacturer, and online retainer of furniture
11 products. The company emphasizes the unique qualities of its offered products. According
12 to Poly & Bark, its products offer a “one-of-a-kind look.”¹ For example, regarding its
13 leather products, “full grain hides showcase the animal’s organic, lived-in imperfections
14 and even markings from its contact with the environment. That’s why no two are exactly
15 alike—each piece is completely unique.”²

16 15. The www.polyandbark.com website is the primary and leading channel
17 through which Defendants’ products are sold. On information and belief, the website is
18 the exclusive channel through which most products were sold.

19 16. Defendants, through the website, have sold millions of units of merchandise
20 to consumers in California and nationwide.

21 **B. Defendants’ False and Deceptive Pricing Scheme**

22 **1. The Products Are Not Regularly Listed or Sold on the Website at**
23 **the Reference Prices**

24 17. Poly & Bark’s business model relies on deceiving consumers with false or
25 misleading sales.

27 ¹<https://www.polyandbark.com/pages/product-care> (last accessed July 2, 2024).

28 ² *Id.*

1 18. On any given date, all or nearly all products on the website are represented
2 as being discounted from a substantially higher reference price. Specifically, Defendant
3 advertises sitewide sales, or nearly sitewide sales. Defendant prominently displays on the
4 landing page of the website some form of sale where the products are supposedly marked
5 down by a specific percentage or dollar amount, for example, 20% off, using a product
6 code, and will expire. But when one sale expires, another similar sale is promptly
7 instituted, or the sale never ends. This cycle continues over and over.

8 19. Examples of such sitewide sales are shown below.

9
10 **May 12, 2024**



15 **March 23, 2024**

16
17 The Spring home edit starts now! Take 20% OFF your order with code: SPRING (Terms apply).

18
19 **February 8, 2024**

20
21 Presidents' Day Sale! Save 20% off while stocks last, with code: PRESIDENT (Terms apply)

22 **January 4, 2024**

23
24 New Year, New decor! Take 24% off with code: 2024 (Terms apply)

25
26 **November 14, 2023**

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28 Save BIG during the Black Friday Sale: Take 25% off with code: BF2023 (Terms apply)

October 13, 2023

Fall in LOVE! 25% off at checkout with code: FALLSAVINGS (Terms apply)

August 15, 2023

Early Bird LABOR DAY SALE! 25% off at checkout with code: LABORDAY23 (Terms apply)

July 4, 2023



June 29, 2023

Your special offer: get 10% off at checkout with July 4th Sale code: FREEDOM (Terms apply)

20. Similarly, on individual product pages and product category pages, the products are advertised with a higher regular price and a lower discounted price accompanied by “Save \$ ___” or “\$ __ off.” Representative examples are below.



Capa Sofa
from \$2,549
Save ~~\$638~~ with code COLUMBUS



Paxton 24" Counter Stool
from \$133 each ~~take \$19~~
off with code BFCM15



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May 8, 2023



February 3, 2023

Save **\$90** with *Final Sale code*
LOVEPB

June 29, 2022

4TH OF JULY SALE: 10% OFF SITEWIDE, PLUS AN EXTRA 5% OFF SOFAS, SECTIONALS, LOVESEATS AND SOFA BEDS. USE CODE 1776 AT CHECKOUT.

November 25, 2022



October 7, 2022

Columbus Day Sale STARTS NOW! 10% off + EXTRA 5% off with code "1492".

25. There are many examples of individual products remaining on sale for extended periods. For instance, on September 23, 2023, the Calle 75" Apartment Sofa was advertised with a sale price of \$2,095 and reduced to \$1,571 with the code "FALLSAVINGS." As of June 1, 2024, the product remains on sale with a reference price of \$2,157 and a sale price of \$1,726 with code "MEMORIAL."

September 23, 2023

June 1, 2024



Calle 75" Apartment Sofa
\$2,095

Calle 75" Apartment Sofa
\$2,157

Save **\$524** with code *FALLSAVINGS*

\$1726 with code *MEMORIAL*

26. As another example, on September 23, 2023, the Napa Velvet Sofa was advertised with a reference price of \$1,429 and a sale price of \$358 with code "FALLSAVINGS." As of June 1, 2024, the product remains on sale with a reference price of \$1,343 and a sale price of \$1,075 with code "MEMORIAL."

September 23, 2023

June 1, 2024



Napa Velvet Sofa
from \$1,429

Napa Velvet Sofa
from \$1,343

Save **\$358** with code *FALLSAVINGS*

\$1075 with code *MEMORIAL*

1 27. Similarly, as of October 13, 2023, the Capri Sofa was advertised with a
2 reference price of \$1,749 and a sale price of \$1,311 with code “COLUMBUS.” As of
3 June 1, 2024, the product is still on sale with a reference price of \$1,644 and a sale price
4 of \$1,316 with code “MEMORIAL.”

5 **October 13, 2023**

6 **June 1, 2024**



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Capri Sofa
\$1,749
Save \$438 with code COLUMBUS



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Capri Sofa
\$1,644
\$1316 with code MEMORIAL

15 **2. The Reference Prices are not the Market Price of the Products,**
16 **Including During the Rolling 90-Day Period Prior to Offering**

17 28. Separately, Defendant cannot claim that the reference price for all products
18 is the prevailing market price of the products.

19 29. The website is the primary and leading channel through which Poly & Bark’s
20 in-house branded products are sold, and these products are always or almost always
21 offered by Poly & Bark at a discount. Accordingly, the market price for Poly & Bark’s in-
22 house branded products is the website’s discounted offering price—not the fictitious
23 reference price.

24 30. To the extent (if any) competing retailers sell the identical products offered
25 by Defendants, on information and belief, Defendants’ advertised reference prices are
26 unsubstantiated and based on an undisclosed formula, or are outdated, or are cherrypicked
27 and thus not representative of the prevailing market prices. On information and belief,
28 Defendants do not independently verify that the reference prices are the prevailing market
prices at which the products are listed for sale by other retailers for a substantial period of

1 time and in substantial quantities. On information and belief, Defendants do not update
2 the references prices on a daily basis.

3 31. On information and belief, Defendants' advertised reference prices are higher
4 than the prevailing market prices for the identical products. Because Defendants
5 consistently sells the products at issue at prices significantly (i.e., 20% or more) lower
6 than its advertised former prices, there is no reasonable basis to believe that Defendants
7 consistently sell their products at prices below the prevailing market prices. In competitive
8 markets, the actual prices offered by vendors selling the same item tend to converge on
9 the market price.

10 C. Plaintiff's Purchase from the Website

11 32. On January 21, 2023, Plaintiff Adams visited the website and purchased a set
12 of three Paxton 24" Counter Height Stools. Based on and consistent with archived copies
13 of the website, Plaintiff saw on the website's homepage a sitewide promotion of "10% off
14 . . . with code NY23." Indeed, archived copies of the website's homepage dated January
15 3, 2023 and January 28, 2023 (shortly before and after Plaintiff's purchase) depict the
16 following banner advertisement:



20 33. Further, based on and consistent with archived copies of the website, Plaintiff
21 saw on the product listing page the former or regular price of \$329 and the statement "take
22 \$33 off with code NY23." She then proceeded to purchase the product with the
23 understanding that she was receiving all advertised discounts off the former and regular
24 prices charged by Defendants. She paid \$296.10 for the product before tax.

25 34. As of July 1, 2024, the product is still on sale, now with a reference price of
26 \$299, and a sale price of \$240 using the 20% off coupon code JULY4TH.
27
28

1 35. On June 4, 2023, Plaintiff Adams visited the website and purchased three sets
2 of two Paxton Dining Chairs. Based on and consistent with archived copies of the website,
3 Plaintiff saw on the website’s homepage a sitewide promotion of “10% off . . . with code
4 HONOR.”

5 36. Further, based on and consistent with archived copies of the website, Plaintiff
6 saw on the product listing page the former or regular price of \$229 and the statement “take
7 \$23 off with code HONOR” or similar. She then proceeded to purchase the products with
8 the understanding that she was receiving all advertised discounts off the former and
9 regular prices charged by Defendants. She paid \$618.30 for the products (three sets of two
10 chairs) before tax and received an alleged discount of \$68.70.

11 37. Plaintiff thus viewed and relied on the website’s purported current and
12 limited-time sale promotions. She relied on the above representations that the products (1)
13 had a former and regular price of the stated reference price, and (2) had been offered for
14 sale *on the website* at the stated reference price, in the recent past, on a regular basis and
15 for a substantial time. And she relied on the representations that the products were truly
16 on sale as being sold at a substantial discount for a limited time.

17 38. The above-listed products Plaintiff purchased were not substantially marked
18 down or discounted, and any discount she was receiving had been grossly exaggerated.

19 39. For at least the 90-day period prior to Plaintiff’s purchases, and months and
20 years more, Defendants very rarely, if ever, offered any of the discounted items sold on its
21 website at the reference prices.

22 40. Plaintiff would not have purchased the items at the advertised prices, or
23 would not have paid as much as she did, had Defendants been truthful. Plaintiff was
24 persuaded to make her purchases because of the misleading sale based on false reference
25 prices.

26 41. Plaintiff continues to be interested in purchasing home furnishings and décor
27 like that offered by Defendants at discounted prices, but she will be unable to trust and
28 rely on Defendants’ advertising, and so will not purchase the products from Defendants.

1 Absent injunctive relief, Plaintiff cannot know whether Defendants' former and regular
2 prices represent honest prices at which the products were listed for sale on the website, on
3 a regular basis for a reasonably substantial period of time, or if Defendants' sales are
4 perpetual. Nor can she readily ascertain the prevailing market price in the preceding
5 months.

6 **D. Research Shows That Reference Price Advertising Influences**
7 **Consumer Behavior and Perceptions of Value**

8 42. Academic studies support the effectiveness of Defendants' deceptive pricing
9 scheme.

10 43. "By creating an impression of savings, the presence of a higher reference
11 price enhances subjects' perceived value and willingness to buy the product."³ Thus,
12 "empirical studies indicate that, *as discount size increases, consumers' perceptions of*
13 *value and their willingness to buy the product increase, while their intention to search for*
14 *a lower price decreases.*"⁴ Indeed, the Ninth Circuit observed that "[m]isinformation
15 about a product's 'normal' price is . . . significant to many consumers in the same way as
16 a false product label would be." *Hinojos*, 718 F.3d at 1106.

17 44. "[D]ecades of research support the conclusion that advertised reference
18 prices do indeed enhance consumers' perceptions of the value of the deal."⁵ According to
19 academic studies, "[c]onsumers are influenced by comparison prices even when the stated
20 reference prices are implausibly high."⁶

21 45. Another academic journal explains that "[r]eference price ads strongly
22 influence consumer perceptions of value Consumers often make purchases not based
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24 ³ Dhruv Grewal & Larry D. Compeau, *Comparative Price Advertising: Informative*
25 *or Deceptive?*, 11 J. Pub. Pol'y & Mktg. 52, 55 (Spring 1992).

26 ⁴ *Id.* at 56 (emphasis added).

27 ⁵ Dhruv Grewal & Larry D. Compeau, *Comparative Price Advertising: Believe It*
Or Not, J. of Consumer Affairs, Vol. 36, No. 2, at 287 (Winter 2002).

28 ⁶ *Id.*

1 on price but because a retailer assures them that a deal is a good bargain. This occurs when
2 . . . the retailer highlights the relative savings compared with the prices of competitors . .
3 . [T]hese bargain assurances (BAs) change consumers' purchasing behavior and may
4 deceive consumers."⁷

5 46. "[R]esearch has shown that retailer-supplied reference prices clearly enhance
6 buyers' perceptions of value" and "have a significant impact on consumer purchasing
7 decisions."⁸

8 47. "[R]eference prices are important cues consumers use when making the
9 decision concerning how much they are willing to pay for the product."⁹ This study also
10 concluded that "consumers are likely to be misled into a willingness to pay a higher price
11 for a product simply because the product has a higher reference price."¹⁰

12 48. Accordingly, research confirms that deceptive advertising through false
13 reference pricing is intended to, and does, influence consumer behavior by artificially
14 inflating consumer perceptions of an item's value and causing consumers to spend money
15 they otherwise would not have, purchase items they otherwise would not have, and/or
16 purchase products from a specific retailer.

17 **E. Consumers Suffered Economic Harm**

18 49. Consumers paid a "price premium" for the products. If the reference prices,
19 alleged discounts, and temporary coupon codes were omitted from the website, then
20 consumers would not have paid as much as they did for the products (or would not have
21

23 ⁷ Joan Lindsey-Mullikin & Ross D. Petty, *Marketing Tactics Discouraging Price*
24 *Search: Deception and Competition*, 64 J. of Bus. Research 67 (January 2011).

25 ⁸ Praveen K. Kopalle & Joan Lindsey-Mullikin, *The Impact of External Reference*
Price On Consumer Price Expectations, 79 J. of Retailing 225 (2003).

26 ⁹ Jerry B. Gotlieb & Cyndy Thomas Fitzgerald, *An Investigation Into the Effects of*
27 *Advertised Reference Prices On the Price Consumers Are Willing To Pay For the Product*,
6 J. of App'd Bus. Res. 1 (1990).

28 ¹⁰ *Id.*

1 purchased the products), and Defendants would not have been able to charge the prices
2 they ultimately did.

3 50. Defendants' discounted products sold on the website have a market value
4 lower than the promised former and regular price, and as a result, consumers were harmed.
5 As explained above, the reference prices are false and the products rarely, if ever, offered
6 or sold at the reference price on the website.

7 51. Additionally, Defendants' products sold on the website not only have a
8 market value lower than the promised regular price, but the value of the products is also
9 lower than the "sale" price. By using false reference pricing and false limited time sales,
10 Defendants artificially drive up demand for the products, and by extension drive up the
11 price of the products. As a result, consumers received a product worth less than the price
12 paid. Reasonable consumers would not have paid the prices charged had they known that
13 the products were rarely, if ever, offered for sale on the website at the reference prices.

14 52. Again, an example illustrates the point. Assume a company knows a product
15 will sell in the marketplace at \$30. But to increase revenue, the company advertises the
16 product as having a "regular" price of \$100 and being on "sale" at 60% off (i.e., \$60 off).
17 Because consumers value products based on the regular price, and a sale conveys
18 additional savings, the company can sell that \$30 product for \$40. Defendants have done
19 so.

20 **F. Defendants' Deceptive Pricing Practice Violates Federal Law**

21 53. The Federal Trade Commission Act ("FTCA") prohibits "unfair or deceptive
22 acts or practices in or affecting commerce[.]" 15 U.S.C. § 45(a)(1). Under FTC
23 regulations, false former pricing schemes like the ones employed by Defendant are
24 deceptive practices that violate the FTCA.

25 54. Pursuant to 16 C.F.R. § 233.1, entitled Former Price Comparisons:

26
27 (a) One of the most commonly used forms of bargain advertising is to offer a
28 reduction from the advertiser's own former price for an article. If the *former price*
is the actual, bona fide price at which the article was offered to the public on a

1 *regular basis* for a *reasonably substantial period of time*, it provides a legitimate
2 basis for the advertising of a price comparison. Where the former price is genuine,
3 the bargain being advertised is a true one. If, on the other hand, the former price
4 being advertised is not bona fide but fictitious – for example, where an *artificial,*
5 *inflated price* was established for the purpose of enabling the subsequent offer of a
6 large reduction – the “bargain” being advertised is a false one; the purchaser is not
7 receiving the unusual value he expects.

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

15 (c) The following is an example of a price comparison based on a fictitious former
16 price. John Doe is a retailer of Brand X fountain pens, which cost him \$5 each. His
17 usual markup is 50 percent over cost; that is, his regular retail price is \$7.50. In
18 order subsequently to offer an unusual “bargain,” Doe begins offering Brand X at
19 \$10 per pen. He realizes that he will be able to sell no, or very few, pens at this
20 inflated price. But he doesn’t care, for he maintains that price for only a few days.
21 Then he “cuts” the price to its usual level—\$7.50—and advertises: “Terrific
22 Bargain: X Pens, Were \$10, Now Only \$7.50!” *This is obviously a false claim.* The
23 advertised “bargain” is not genuine.

24 (d) Other illustrations of fictitious price comparisons could be given. An advertiser
25 might use a price at which he *never offered the article at all*; he might feature a
26 price which was *not used in the regular course of business*, or which was *not used*
27 *in the recent past* but at some *remote period in the past*, without making disclosure
28 of that fact; he might use a price that was not openly offered to the public, or that
was *not maintained for a reasonable length of time*, but was immediately reduced.

55. The FTCA also prohibits the pricing scheme employed by Defendants
regardless of whether the product advertisements and representations use the words
“regular,” “original,” or “former” price. Under 16 C.F.R. § 233.1:

(e) If the former price is set forth in the advertisement, *whether accompanied or not*
by descriptive terminology such as “Regularly,” “Usually,” “Formerly,” etc.,
the advertiser should make certain that the former price is not a fictitious one. If the

1 former price, or the amount or percentage of reduction, is not stated in the
2 advertisement, as when the ad merely states, “Sale,” the advertiser must take care
3 that the amount of reduction is not so insignificant as to be meaningless. It should
4 be sufficiently large that the consumer, if he knew what it was, would believe that
5 a genuine bargain or saving was being offered. An advertiser who claims that an
6 item has been “Reduced to \$9.99,” when the former price was \$10, is misleading
7 the consumer, who will understand the claim to mean that a much greater, and not
8 merely nominal, reduction was being offered.

9 56. The FTCA also prohibits retailers from offering fake limited duration sales.
10 See 16 C.F.R. § 233.5 which provides:

11 [Retailers] should not represent that they are selling at “factory” prices when they
12 are not selling at the prices paid by those purchasing directly from the manufacturer.

13 ...

14 They should not offer an advance sale under circumstances where they do not in
15 good faith expect to increase the price at a later date, or make a ‘limited’ offer which,
16 in fact, is not limited.

17 **G. Class Action Allegations**

18 57. Plaintiff brings this action on behalf of herself and all persons similarly
19 situated pursuant to Rule 23(b)(2), 23(b)(3), and 23(c)(4) of the Federal Rules of Civil
20 Procedure and seeks certification of the following class and subclass:

21 **California Class:**

22 All persons in California who purchased one or more items from
23 www.Polyandbark.com, during the Class Period, at a discount from a higher
24 reference price.

25 58. The California Class is referred to as the “Class.” Excluded from the Class
26 are the Defendants, the officers and directors of the Defendants at all relevant times,
27 members of their immediate families and their legal representatives, heirs, successors or
28 assigns and any entity in which any Defendant has or had a controlling interest. Also

1 excluded from the Class are persons or entities that purchased products from Defendants
2 for purposes of resale.

3 59. The “Class Period” is the time period beginning on the date established by
4 the Court’s determination of any applicable statute of limitations, after consideration of
5 any tolling, discovery, concealment, and accrual issues, and ending on the date of entry of
6 judgment.¹¹

7 60. Plaintiff reserves the right to expand, limit, modify, or amend the class
8 definitions stated above, including the addition of one or more subclasses, in connection
9 with a motion for class certification, or at any other time, based upon, among other things,
10 changing circumstances, or new facts obtained during discovery.

11 61. **Numerosity.** The Class is so numerous that joinder of all members in one
12 action is impracticable. The exact number and identities of the members of the Class is
13 unknown to Plaintiff at this time and can only be ascertained through appropriate
14 discovery, but on information and belief, Plaintiff alleges that there are in excess of 5,000
15 members of the Class.

16 62. **Typicality.** Plaintiff’s claims are typical of those of other members of the
17 Class, all of whom have suffered similar harm due to Defendants’ course of conduct as
18 described herein.

19 63. **Adequacy of Representation.** Plaintiff is an adequate representative of the
20 Class and will fairly and adequately protect the interests of the Class. Plaintiff has retained
21 attorneys who are experienced in the handling of complex litigation and class actions, and
22 Plaintiff and her counsel intend to diligently prosecute this action.

23 64. **Existence and Predominance of Common Questions of Law or Fact.**
24 Common questions of law and fact exist as to all members of the Class that predominate
25 over any questions affecting only individual members of the Class. These common legal
26

27 ¹¹ The Class Period begins at minimum 4 years from the date of filing of this action,
28 but based on tolling, may extend beyond that date.

1 and factual questions, which do not vary among members of the Class, and which may be
2 determined without reference to the individual circumstances of any member of the Class,
3 include, but are not limited to, the following:

- 4 a. Whether, during the Class Period, Defendants advertised false reference
5 prices on products offered on the website.
- 6 b. Whether, during the Class Period, Defendants advertised price discounts
7 from false reference prices on products offered on the website.
- 8 c. Whether the products listed on Defendants' website during the Class Period
9 were offered at their reference prices for any reasonably substantial period of
10 time prior to being offered at prices that were discounted from their reference
11 prices.
- 12 d. Whether Defendants' deceptive pricing scheme using false reference prices
13 constitute an "unlawful," "unfair," or "fraudulent" business practice in
14 violation of the California Unfair Competition Law, Cal. Bus & Prof. Code §
15 17200, et seq.
- 16 e. Whether Defendants' deceptive pricing scheme using false reference prices
17 constitutes false advertising in violation of the California False Advertising
18 Law under Business & Professions Code § 17500, et seq.
- 19 f. Whether Defendants' use of false reference prices on products offered on
20 their website during the Class Period was material.
- 21 g. Whether Defendants had a duty to conspicuously disclose to customers that
22 the reference prices were false former/regular prices.
- 23 h. Whether the members of the Class are entitled to damages and/or restitution.
- 24 i. Whether injunctive relief is appropriate and necessary to enjoin Defendants
25 from continuing to engage in false or misleading advertising.
- 26 j. Whether Defendants' conduct was undertaken with conscious disregard of
27 the rights of the members of the Class and was done with fraud, oppression,
28 and/or malice.

1 **65. Superiority.** A class action is superior to other available methods for the fair
2 and efficient adjudication of this controversy because individual litigation of the claims of
3 all members of the Class is impracticable. Requiring each individual class member to file
4 an individual lawsuit would unreasonably consume the amounts that may be recovered.
5 Even if every member of the Class could afford individual litigation, the adjudication of
6 at least tens of thousands of identical claims would be unduly burdensome to the courts.
7 Individualized litigation would also present the potential for varying, inconsistent, or
8 contradictory judgments and would magnify the delay and expense to all parties and to
9 the court system resulting from multiple trials of the same factual issues. By contrast, the
10 conduct of this action as a class action, with respect to some or all of the issues presented
11 herein, presents no management difficulties, conserves the resources of the parties and of
12 the court system, and protects the rights of the members of the Class. Each Plaintiff
13 anticipates no difficulty in the management of this action as a class action. The prosecution
14 of separate actions by individual members of the Class may create a risk of adjudications
15 with respect to them that would, as a practical matter, be dispositive of the interests of the
16 other members of the Class who are not parties to such adjudications, or that would
17 substantially impair or impede the ability of such non-party Class members to protect their
18 interests.

19 **66. Substantial Similarity.** The products at issue in the action are substantially
20 similar in all material respects. Namely, the products were all advertised with a false
21 reference price, a percentage or dollar discount, a false sale price, and were the subject of
22 sitewide coupon codes. The products are also all sold by Defendants on the website and
23 fall under the umbrella of home furnishings and decor.

1 **V. TOLLING OF THE STATUTE OF LIMITATIONS AND DELAYED**
2 **DISCOVERY**

3 67. All applicable statutes of limitations have been tolled by the delayed
4 discovery doctrine. Plaintiff and Class members could not have reasonably discovered
5 Defendants’ practice of running perpetual sales, based on deceptive reference prices and
6 deceptive sale prices, at any time prior to commencing this class action litigation.

7 68. A reasonable consumer viewing the website on multiple occasions would
8 simply believe that a product is on sale for the time period represented on the website.
9 Short of visiting and checking the website daily for many months, a reasonable consumer
10 would not suspect that Defendants’ sales and pricing practices were false and misleading.
11 Nor would a reasonable consumer be able to ascertain the market value of the products
12 being sold absent extensive investigation.

13 69. Plaintiff did not learn of Defendants’ deceptive pricing practices alleged
14 herein until shortly before commencing this action.

15 70. As a result, any and all applicable statutes of limitations otherwise applicable
16 to the allegations herein have been tolled.

17 **FIRST CAUSE OF ACTION**

18 **VIOLATION OF CALIFORNIA UNFAIR COMPETITION LAW (CAL. BUS. &**
19 **PROF. CODE § 17200, et seq.)**

20 **(On Behalf of the California Class)**

21 71. Plaintiff restates the preceding allegations as if set forth herein.

22 72. California Business and Professions Code section 17200 et seq., known as
23 the California Unfair Competition Law (“UCL”), prohibits acts of “unfair competition,”
24 including any “unfair or fraudulent business act or practice” as well as “unfair, deceptive,
25 untrue or misleading advertising.”

26 ***Fraudulent***

27 73. Under the UCL, a business act or practice is “fraudulent” if it actually
28 deceives or is likely to deceive members of the consuming public.

1 74. Reasonable consumers are likely to be deceived by Defendants' conduct as
2 alleged above. Defendants affirmatively misrepresented the reference prices of products
3 which, in turn, misled and deceived consumers into believing that they were buying
4 products at substantially discounted prices. Defendants' deceptive marketing gave
5 consumers the false impression that its products were regularly listed or sold on the
6 website for a substantially higher price.

7 75. Defendants' representations that its products were on sale, that the sale was
8 limited in time, that the products had a specific former and regular price, and that
9 consumers were receiving discounts, were false and misleading.

10 76. Defendants had a duty to disclose the truth about their pricing deception,
11 including that the reference prices advertised on its website were not, in fact, prices at
12 which the items were listed or sold on the website in the recent past for a reasonably
13 substantial period of time, but in truth, the items never (or rarely) were offered or sold at
14 the reference prices. Reasonable consumers were likely to be deceived by this material
15 omission.

16 77. Defendants' conduct was and continues to be fraudulent because it has the
17 effect of deceiving consumers into believing they are receiving a product that is worth
18 more than it actually is, by presenting a fake sale price.

19 78. Defendants' representations were materially misleading to Plaintiff and other
20 reasonable consumers. Consumers are heavily influenced by price, including significant
21 price reductions of purported limited duration, as employed by Defendants' high-pressure
22 sales tactics.

23 79. Plaintiff relied on Defendants' misleading representations and omissions, as
24 detailed above, believing that she was receiving a genuine discount of limited duration
25 from a prevailing and genuine regular and former price.

26 80. Absent Defendants' misrepresentations, Plaintiff and the Class would not
27 have purchased the items they purchased from Defendants, or, at minimum, they would
28

1 not have paid as much for the items as they ultimately did. Plaintiff and the Class’s reliance
2 was a substantial factor in causing them harm.

3 81. Had the omitted information been disclosed, Plaintiff would have been aware
4 of it and reasonably would have behaved differently. Among other things, Plaintiff would
5 not have purchased the items she purchased from Defendants, or, at minimum, would not
6 have paid as much for the items as they did.

7 82. As a result of Defendants’ fraudulent business acts and practices, Defendants
8 have and continue to fraudulently obtain money from Plaintiff and members of the Class.

9 ***Unfairness***

10 83. Under the UCL, a business act or practice is “unfair” if its conduct is
11 substantially injurious to consumers, offends public policy, and is immoral, unethical,
12 oppressive, and unscrupulous, as the benefits for committing such acts or practices are
13 outweighed by the gravity of the harm to the alleged victims.

14 84. Defendants’ deceptive marketing gave consumers the false impression that
15 their products were regularly listed or sold on the website for a substantially higher price
16 in the recent past than they were and, thus, led to the false impression that Defendants’
17 products were worth more than they were.

18 85. Defendants’ conduct was and continues to be of no benefit to reasonable
19 consumers. It is misleading, unfair, unlawful, and is injurious to consumers. It is also
20 against public policy, as it harms fair competition. For example, the federal Lanham Act
21 includes prohibitions on “commercial advertising or promotion” that “misrepresents the
22 nature, characteristics, qualities, or geographic origin of his or her or another person’s
23 goods, services, or commercial activities.” 41 U.S.C. § 1125(a). Similarly, the FTCA and
24 implementing regulations prohibit advertising a former price “for the purpose of
25 establishing a fictitious [] price on which a deceptive comparison might be based” (16
26 C.F.R. § 233.1) and prohibit “offer[ing] an advance sale under circumstances where they
27 do not in good faith expect to increase the price at a later date” (16 C.F.R. § 233.5). Each
28 Defendant is siphoning sales away from sellers who compete fairly on price and do not

1 promote fake former prices and fake sales of limited duration. Further, there is no benefit
2 to consumers who pay a sale price that is actually a regular price.

3 86. The harm to Plaintiff and members of the California Class outweighs the
4 utility of Defendants’ practices. There were reasonably available alternatives to further
5 Defendant’s legitimate business interests, other than the unfair conduct described herein.

6 87. As a result of Defendants’ unfair business acts and practices, Defendants have
7 and continues to unfairly obtain money from Plaintiff and members of the proposed Class.

8 ***Unlawful***

9 88. A cause of action may be brought under the “unlawful” prong of the UCL if
10 a practice violates another law. Such action borrows violations of other laws and treats
11 these violations as unlawful practices independently actionable under the UCL.

12 89. By engaging in false advertising, as well as the false, deceptive, and
13 misleading conduct alleged above, Defendants engaged in unlawful business acts and
14 practices in violation of the UCL, including violations of state and federal laws and
15 regulations. Specifically, as detailed herein, Defendants violated 16 C.F.R. §§ 233.1 and
16 233.5, and California Business & Professions Code sections 17501.

17 * * *

18 90. In the alternative to those claims seeking remedies at law, Plaintiff and class
19 members allege that there is no plain, adequate, and complete remedy that exists at law to
20 address Defendants’ unlawful and unfair business practices. The legal remedies available
21 to Plaintiff are inadequate because they are not “equally prompt and certain and in other
22 ways efficient” as equitable relief. *American Life Ins. Co. v. Stewart*, 300 U.S. 203, 214
23 (1937); *see also United States v. Bluit*, 815 F. Supp. 1314, 1317 (N.D. Cal. Oct. 6, 1992)
24 (“The mere existence’ of a possible legal remedy is not sufficient to warrant denial of
25 equitable relief.”); *Quist v. Empire Water Co.*, 2014 Cal. 646, 643 (1928) (“The mere fact
26 that there may be a remedy at law does not oust the jurisdiction of a court of equity. To
27 have this effect, the remedy must also be speedy, adequate, and efficacious to the end in
28 view ... It must reach the whole mischief and secure the whole right of the party in a

1 perfect manner at the present time and not in the future.”). For example, equitable claims
2 may be tried by the court, whereas legal claims are tried by jury, and the need for a jury
3 trial may result in delay and additional expense. Additionally, unlike damages, the Court’s
4 discretion in fashioning equitable relief is very broad and can be awarded in situations
5 where the entitlement to damages may prove difficult. *Cortez v. Purolator Air Filtration*
6 *Products Co.*, 23 Cal.4th 163, 177-180 (2000) (restitution under the UCL can be awarded
7 “even absent individualized proof that the claimant lacked knowledge of the overcharge
8 when the transaction occurred.”). Thus, restitution would allow recovery even when
9 normal consideration associated with damages would not. *See, e.g., Fladeboe v. Am. Isuzu*
10 *Motors Inc.*, 150 Cal. App. 4th 42, 68 (2007) (noting that restitution is available even in
11 situations where damages may not be available). Furthermore, the standard, showing, and
12 necessary elements for a violation of the UCL “unlawful” and “unfair” prongs are different
13 from those that govern legal claims.

14 91. Plaintiff, on behalf of herself and the members of the Class, seeks restitution
15 and restitutionary disgorgement of all moneys received by Defendants through the conduct
16 described above.

17 92. Plaintiff, on behalf of herself and the members of the Class, seeks an
18 injunction from this Court prohibiting Defendants from engaging in the patterns and
19 practices described herein, including putting a stop to the deceptive advertisements and
20 false reference prices in connection with the sale of products on the website. Plaintiff and
21 Class members are entitled to injunctive relief. On information and belief, the
22 dissemination of Defendants’ false and misleading advertising is ongoing.

23 **SECOND CAUSE OF ACTION**

24 **VIOLATION OF CALIFORNIA FALSE ADVERTISING LAW, CAL. BUS. &**

25 **PROF. CODE § 17500, et seq.**

26 **(On Behalf of the California Class)**

27 93. Plaintiff restates the preceding allegations as if set forth herein.
28

1 94. The California False Advertising Law, codified at California Business &
2 Professions Code section 17500, et seq. (the “FAL”) provides, in relevant part, that it is
3 unlawful for any business, with intent directly or indirectly to dispose of personal property,
4 to make or disseminate in any “manner or means whatever, including over the Internet,
5 any statement, concerning that . . . personal property . . . which is untrue or misleading,
6 and which is known, or which by the exercise of reasonable care should be known, to be
7 untrue or misleading[.]” Cal. Bus. & Prof. Code § 17500. The “intent” required by section
8 17500 is the intent to dispose of property, and not the intent to mislead the public in the
9 disposition of such property.

10 95. A separate section of the FAL, Cal Bus. & Prof. Code § 17501, provides:

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

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

19
20 96. As used in Cal Bus. & Prof. Code § 17501:

- 21
- 22 • The term “prevailing market price” refers to the “retail [price] if the offer is
at retail.” *Id.*
 - 23 • The term “advertised thing” refers to the exact same product offered—*not* an
24 equivalent or similar product. *People v. Superior Ct. (J.C. Penney Corp.)*, 34
25 Cal. App. 5th 376, 412 (2019) (“if the advertisement specifies a precise
26 item—say, by reference to name, brand, or other distinctive features . . . the
27 market and therefore the market price is potentially determined on the basis
of sales of *that item only.*”) (emphasis added).
- 28

- 1 • The term “‘former price’ . . . includes but is not limited to the following words
2 and phrases when used in connection with advertised prices; ‘formerly—,’
3 ‘regularly—,’ ‘usually—,’ ‘originally—,’ ‘reduced from __,’ ‘was __ now
4 __,’ ‘__ % off.’” 4 Cal. Code Regs., § 1301 (emphasis added).
- 5 • The “the three-month period is properly construed as a ‘*rolling*’ period, that
6 is, one whose beginning and end changes each day, thus requiring a *daily*
7 *recalculation* of the prevailing market price during the three-month period.”
8 *People v. Superior Ct. (J.C. Penney Corp.)*, 34 Cal. App. 5th 376, 416 n.26
9 (2019) (emphasis added).

9 97. Defendants violated Cal Bus. & Prof. Code § 17500.

10 98. Defendants violated Cal Bus. & Prof. Code § 17501.

11 99. As explained above, Defendants regularly disseminated false and misleading
12 reference prices for the products offered for sale on the website, including to Plaintiff.
13 Defendants rarely, if ever, offered products on the website at the reference prices within
14 the three months immediately preceding the publication of the reference prices.
15 Additionally, the reference prices shown were not the prevailing market prices for the
16 products in the three months immediately preceding the publication.

17 100. Defendants did not verify that the advertised reference prices were the
18 prevailing market prices within the preceding three months. On information and belief,
19 Defendants had no policies or procedures to verify and update the reference prices on a
20 daily basis.

21 101. Defendants’ deceptive marketing practice gave consumers the false
22 impression that their products were regularly offered and sold for a substantially higher
23 price in the recent past than they were and, thus, led to the false impression that
24 Defendants’ products were worth more than they were.

25 102. Defendants knew that its advertised reference prices for the products sold on
26 its website were untrue and/or misleading. Defendants knew that such products had rarely,
27 if ever, been offered or sold on the website at the reference prices.

1 103. As a direct and proximate result of Defendants’ misleading and false
2 advertisements, Plaintiff and members of the Class have suffered injury in fact and have
3 lost money. Plaintiff requests restitution and an injunction prohibiting Defendants from
4 continuing its false and misleading advertising practices in violation of California law in
5 the future.

6 104. Plaintiff and Class members are entitled to injunctive relief. On information
7 and belief, the dissemination of Defendants’ false and misleading advertising is ongoing.

8 105. In the alternative to those claims seeking remedies at law, Plaintiff and Class
9 members allege that there is no plain, adequate, and complete remedy that exists at law to
10 address Defendants’ unlawful and unfair business practices. The legal remedies available
11 to Plaintiff are inadequate because they are not “equally prompt and certain and in other
12 ways efficient” as equitable relief. *American Life Ins. Co. v. Stewart*, 300 U.S. 203, 214
13 (1937); *see also United States v. Bluit*, 815 F. Supp. 1314, 1317 (N.D. Cal. Oct. 6, 1992)
14 (“The mere existence’ of a possible legal remedy is not sufficient to warrant denial of
15 equitable relief.”); *Quist v. Empire Water Co.*, 2014 Cal. 646, 643 (1928) (“The mere fact
16 that there may be a remedy at law does not oust the jurisdiction of a court of equity. To
17 have this effect, the remedy must also be speedy, adequate, and efficacious to the end in
18 view ... It must reach the whole mischief and secure the whole right of the party in a
19 perfect manner at the present time and not in the future.”). For example, equitable claims
20 may be tried by the court, whereas legal claims are tried by jury, and the need for a jury
21 trial may result in delay and additional expense. Additionally, unlike damages, the Court’s
22 discretion in fashioning equitable relief is very broad and can be awarded in situations
23 where the entitlement to damages may prove difficult. *Cortez v. Purolator Air Filtration*
24 *Products Co.*, 23 Cal.4th 163, 177-180 (2000) (restitution under the UCL can be awarded
25 “even absent individualized proof that the claimant lacked knowledge of the overcharge
26 when the transaction occurred.”). Thus, restitution would allow recovery even when
27 normal consideration associated with damages would not. *See, e.g., Fladeboe v. Am. Isuzu*
28 *Motors Inc.*, 150 Cal. App. 4th 42, 68 (2007) (noting that restitution is available even in

1 situations where damages may not be available). Furthermore, the standard, showing, and
2 necessary elements for a violation of the FAL under Cal Bus. & Prof. Code § 17501 are
3 different from those that govern legal claims.

4 **THIRD CAUSE OF ACTION**

5 **VIOLATION OF THE CALIFORNIA CONSUMER LEGAL REMEDIES ACT,**

6 **CAL. CIV. CODE § 1750, et seq.**

7 **(On Behalf of the California Class)**

8 106. Plaintiff restates the preceding allegations as if set forth herein.

9 107. The Consumer Legal Remedies Act, Cal. Civ. Code sections 1750 *et seq.* (the
10 “CLRA”), is a California consumer protection statute which allows plaintiffs to bring
11 private civil actions for “unfair methods of competition and unfair or deceptive acts or
12 practices undertaken by any person in a transaction . . . which results in the sale or lease
13 of goods or services to any consumer.” Cal. Civ. Code § 1770(a).

14 108. Plaintiff and each member of the Class are “consumers” as defined by
15 California Civil Code section 1761(d). Defendants’ sale of products on the website to
16 Plaintiff and the Class were “transactions” within the meaning of California Civil Code
17 section 1761(e). The products purchased by Plaintiff and the Class are “goods” within the
18 meaning of California Civil Code section 1761(a).

19 109. Defendants violated and continues to violate the CLRA by engaging in the
20 following practices prohibited by California Civil Code section 1770(a) in transactions
21 with Plaintiff and the Class which were intended to result in, and did result in, the sale of
22 Defendants’ products:

- 23 a. Making false or misleading statements of fact concerning reasons for,
24 existence of, or amounts of price reductions (Cal. Civ. Code § 1770(a)(13))
25 b. Advertising goods or services with intent not to sell them as advertised (Cal.
26 Civ. Code § 1770(a)(9))
27 c. Misrepresenting that goods are of a particular standard, quality, or grade (Cal.
28 Civ. Code § 1770(a)(7))

1 d. Representing that goods do have characteristics they do not actually have
2 (Cal. Civ. Code § 1770(a)(5))

3 110. Regarding section 1770(a)(13), Defendants made false or misleading
4 statements of fact concerning the “existence of” and the “amounts of price reductions”
5 because (a) no true price reductions existed in that Defendants’ merchandise was rarely, if
6 ever, offered for sale and/or sold *on the website* at the higher reference prices, let alone on
7 a regular basis for a reasonably substantial period of time, (b) the reference prices
8 Defendants advertised in connection with its products are not prevailing market prices
9 because, on information and belief, the products were not sold elsewhere at the reference
10 prices for a reasonably substantial period of time, and (c) Defendants falsely represent the
11 products as on sale for limited time when in truth a new substantially equivalent sale is
12 promptly instituted after the expiration of an existing sale.

13 111. With regards to section 1770(a)(9), (7), and (5), Defendants advertised and
14 represented products on the website with the “intent not to sell” them as advertised and
15 misrepresenting product characteristics and standard because, as explained herein, (a) the
16 false reference prices advertised in connection with products offered on the website misled
17 and continue to mislead customers into believing (i) the merchandise was previously
18 offered for sale and/or sold *on the website* at the higher reference prices on a regular basis
19 for a reasonably substantial period of time, and (ii) were valued in the market at the
20 advertised “regular” price, and (b) Defendants falsely represent the products as on sale for
21 limited time when in truth a new substantially equivalent sale is promptly instituted after
22 the expiration of an existing sale.

23 112. In addition, Defendants had a duty to conspicuously disclose the truth about
24 their pricing deception, including that the reference prices advertised on the website were
25 not prices at which Defendants’ items were listed or sold on the website in the recent past
26 on a regular basis for a reasonably substantial period of time, and in truth, Defendants’
27 products are typically not offered or sold on the website (and/or in the marketplace) at the
28 advertised reference prices. Defendants also failed to disclose that the expiration of any

1 given sale would be followed by a substantially equivalent sale. Reasonable consumers
2 were likely to be deceived by Defendants' failure to disclose material information.

3 113. Plaintiff and the Class reasonably relied on Defendants' representations.
4 Absent Defendants' misrepresentations, Plaintiff and the Class would not have purchased
5 the items they purchased from Defendants, or, at the very least, they would not have paid
6 as much for the items as they did. Plaintiff and the Class's reliance was a substantial factor
7 in causing them harm.

8 114. Had the omitted information been disclosed, Plaintiff and the Class
9 reasonably would have been aware of it and behaved differently. Among other things,
10 Plaintiff and the Class would not have purchased the items they purchased from
11 Defendants or, at the very least, would not have paid as much for the items as they did.

12 115. Plaintiff, through counsel, is providing notice to Defendants pursuant to Cal.
13 Civ. Code § 1782(a) via certified mail, but the 30-day response period has not elapsed.
14 Thus, Plaintiff claims no damages pursuant to this count, but will timely amend this
15 Complaint after expiration of the response period to seek money damages and punitive
16 damages under the CLRA. At this time, Plaintiff seeks only injunctive or other equitable
17 relief under the CLRA as described above.

18 **FOURTH CAUSE OF ACTION**

19 **FRAUD (INTENTIONAL MISREPRESENTATION AND OMISSION)**

20 **(On Behalf of the California Class)**

21 116. Plaintiff restates the preceding allegations as if set forth herein.

22 117. Plaintiff pleads this claim under California law.

23 118. Defendants made false or misleading statements of fact concerning the
24 existence of and the amounts of price reductions because, as explained herein, (a) the false
25 reference prices advertised in connection with products offered on the website misled and
26 continue to mislead customers into believing the products were previously offered for sale
27 and/or sold *on the website* at the higher reference prices on a regular basis for a reasonably
28 substantial period of time, and (b) Defendants falsely represent the products as on sale for

1 limited time when in truth a new substantially equivalent sale is promptly instituted after
2 the expiration of an existing sale.

3 119. In addition, Defendants had a duty to conspicuously disclose the truth about
4 its pricing deception, including that the reference prices advertised on the website were
5 not prices at which Defendants' items were listed or sold on the website in the recent past
6 on a regular basis for a reasonably substantial period of time, and in truth, Defendants'
7 products are typically not offered or sold on the website (and/or in the marketplace) at the
8 advertised reference prices. Defendants also failed to disclose that the expiration of any
9 given sale would be followed by a substantially equivalent sale. Reasonable consumers
10 were likely to be deceived by Defendants' failure to disclose material information.

11 120. Defendants knew that their representations were false when made, or at the
12 very least, were made recklessly and without regard for their truth. Defendants knew that
13 the items Plaintiff and the Class purchased had rarely, if ever, been offered or sold on the
14 website at the substantially higher reference price in the recent past.

15 121. Defendants' representations were made with the intent that Plaintiff and the
16 Class rely on the false representations and spend money they otherwise would not have
17 spent, purchase items they otherwise would not have purchased, and/or spend more money
18 for an item than they otherwise would have absent the deceptive marketing scheme.

19 122. Defendants' conduct was made with the intent to maximize its profits at the
20 detriment of reasonable consumers.

21 123. Plaintiff and the Class reasonably relied on Defendants' representations.
22 Absent Defendants' misrepresentations, Plaintiff and the Class would not have purchased
23 the items they purchased from Defendants, or, at the very least, they would not have paid
24 as much for the items as they ultimately did. Plaintiff and the Class's reliance was a
25 substantial factor in causing them harm.

26 124. Had the omitted information been disclosed, Plaintiff and the Class
27 reasonably would have behaved differently. Among other things, they would not have
28

1 purchased the items they purchased from Defendants or, at the very least, would not have
2 paid as much for the items as they ultimately did.

3 125. As a direct and proximate result of the above, Plaintiff and the Class have
4 suffered damages in an amount to be proven at trial.

5 126. Plaintiff and the Class are also entitled to punitive or exemplary damages.
6 Defendants, individually and through their senior executives and officers, undertook the
7 illegal acts intentionally or with conscious disregard of the rights of Plaintiff and the Class,
8 and did so with fraud, malice, and/or oppression. Based on the allegations above,
9 Defendants' actions were fraudulent because Defendants intended to and did deceive and
10 injure Plaintiff and the Class. Based on the allegations above, Defendants' conduct was
11 made with malice because Defendants acted with the intent to and did cause injury to
12 Plaintiff and the Class, and because Defendants willfully and knowingly disregarded the
13 rights of Plaintiff and the Class.

14 **FIFTH CAUSE OF ACTION**

15 **UNJUST ENRICHMENT/QUASI-CONTRACT**

16 **(On Behalf of the California Class)**

17 127. Plaintiff restates the preceding allegations as if set forth herein.

18 128. Plaintiff pleads this claim under California law and in the alternative to her
19 remaining claims.

20 129. California law permits a standalone claim for unjust enrichment, allowing the
21 court to construe the cause of action as a quasi-contract claim. *Astiana v. Hain Celestial*
22 *Group, Inc.*, 783 F.3d 753, 756 (9th Cir. 2015).

23 130. California law recognizes a right to disgorgement of profits resulting from
24 unjust enrichment, even where an individual has not suffered a corresponding loss. *In re*
25 *Facebook, Inc. Internet Tracking Litig.*, 956 F.3d 589, 599 (9th Cir. 2020).

26 131. California law requires disgorgement of unjustly earned profits regardless of
27 whether a defendant's actions caused a plaintiff to directly expend his or her own financial
28

1 resources or whether a defendant's actions directly caused the plaintiff's property to
2 become less valuable.

3 132. Under California law, a stake in unjustly earned profits exists regardless of
4 the plaintiff's actual loss.

5 133. By their wrongful acts and omissions, Defendants were unjustly enriched at
6 the expense of and to the detriment of Plaintiff and the Class and/or while Plaintiff and the
7 Class were unjustly deprived. Defendants' unlawful and deceptive pricing scheme induced
8 Plaintiff and the Class to spend money they otherwise would not have spent, purchase
9 items they otherwise would not have purchased, and/or spend more money for a product
10 than they otherwise would have absent the deceptive advertising.

11 134. Plaintiff and members of the Class also conferred a monetary benefit on
12 Defendants in the form of Defendants' profits generated by the deceptive marketing
13 scheme. Defendants profited from inappropriately and artificially inflated prices.

14 135. On behalf of the Class, Plaintiff seeks restitution from Defendants and an
15 order disgorging all payments and profits unfairly obtained by Defendants from Plaintiff
16 and the Class.

17 136. Plaintiff and the Class seek this equitable remedy because their legal
18 remedies are inadequate. An unjust enrichment theory provides the equitable
19 disgorgement of profits even where an individual has not suffered a corresponding loss in
20 the form of money damages.

21 **SIXTH CAUSE OF ACTION**

22 **NEGLIGENT MISREPRESENTATION**

23 **(On Behalf of the California Class)**

24 137. Plaintiff restates the preceding allegations as if set forth herein.

25 138. Plaintiff pleads this claim under California law.

26 139. Defendants made false or misleading statements of fact concerning the
27 existence of and the amounts of price reductions because, as explained herein, (a) the false
28 reference prices advertised in connection with products offered on the website misled and

1 continue to mislead customers into believing the products were previously offered for sale
2 and/or sold *on the website* at the higher reference prices on a regular basis for a reasonably
3 substantial period of time, and (b) Defendants falsely represent the products as on sale for
4 limited time when in truth a new substantially equivalent sale is promptly instituted after
5 the expiration of an existing sale.

6 140. Defendants had a duty to conspicuously disclose the truth about its pricing
7 deception, including that (1) the reference prices advertised and published on the website
8 were not prices at which Defendants' items had been offered and/or sold on the website in
9 the recent past on a regular basis for a reasonably substantial period of time, (2)
10 Defendants' products rarely (if ever) were offered or sold anywhere at the advertised
11 reference prices on a regular basis for a reasonably substantial period of time, and (3) the
12 expiration of any given sale would be followed by a substantially equivalent sale.

13 141. Defendants knew or should have known that their representations were false
14 when made. Defendants knew that the items Plaintiff and the Class purchased had rarely,
15 if ever, been offered or sold on the website at the substantially higher reference price in
16 the recent past. Defendants knew their sales were falsely advertised as being of limited
17 duration. And Defendants knew or should have known that the reference prices were not
18 the prevailing market prices.

19 142. Defendants had no good faith or reasonable basis to believe that its
20 representations were true when made.

21 143. Defendants' representations were made with the intent that Plaintiff and the
22 Class rely on the false representations and spend money they otherwise would not have
23 spent, purchase items they otherwise would not have purchased, and/or spend more money
24 for an item than they otherwise would have absent the deceptive marketing scheme.

25 144. Defendants engaged in this fraud to the Plaintiff and the Class's detriment to
26 increase Defendants' own sales and profits.

27 145. Plaintiff and the Class reasonably relied on Defendants' representations.
28 Absent Defendants' misrepresentations, Plaintiff and the Class would not have purchased

1 the items they purchased from Defendants, or, at the very least, they would not have paid
2 as much for the items as they ultimately did. Plaintiff and the Class's reliance was a
3 substantial factor in causing them harm.

4 146. Had the omitted information been disclosed, Plaintiff and the Class
5 reasonably would have behaved differently. Among other things, they would not have
6 purchased the items they purchased from Defendants or, at the very least, would not have
7 paid as much for the items as they did.

8 147. As a direct and proximate result of the above, Plaintiff and the Class have
9 suffered damages in an amount to be proven at trial.

10 **PRAYER FOR RELIEF**

11 WHEREFORE, Plaintiff, individually and on behalf of the proposed Class,
12 respectfully prays for following relief:

- 13 a. Certification of this case as a class action on behalf of the proposed Class and
14 any subclasses defined above, appointment of each Plaintiff as Class
15 representative, and appointment of their counsel as Class counsel;
- 16 b. An award to each Plaintiff and the proposed Class and subclasses of
17 restitution and/or other equitable relief, including, without limitation,
18 restitutionary disgorgement of all profits Defendants obtained from each
19 Plaintiff and the proposed Class as a result of its unlawful, unfair and
20 fraudulent business practices described herein;
- 21 c. An injunction ordering Defendants to cease the false advertising and unfair
22 business practices complained of herein;
- 23 d. An award of all economic, monetary, actual, consequential, and
24 compensatory damages caused by Defendants' conduct;
- 25 e. An award of nominal, punitive, and statutory damages where available;
- 26 f. Reasonable expenses and attorneys' fees;
- 27 g. Pre- and post-judgment interest, to the extent allowable; and
- 28 h. For such further relief that the Court may deem just and proper.

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DEMAND FOR JURY TRIAL

Plaintiff, individually and on behalf of the proposed Class, demands a trial by jury for all claims so triable.

Dated: July 3, 2024

MILBERG COLEMAN BRYSON
PHILLIPS GROSSMAN, PLLC

By: /s/ Alexander E. Wolf

ALEXANDER E. WOLF
Attorneys for Plaintiff