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1 LAW OFFICES OF ZEV B. ZYSMAN
2 A Professional Corporation
3 Zev B. Zysman (176805)
4 zev@zysmanlawca.com
5 15760 Ventura Boulevard, 16th Floor
6 Encino, CA 91436
7 Tel.: 818-783-8836
8 Fax: 818-783-9985

9 Attorneys for Plaintiff and
10 the Proposed Class

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**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF VENTURA**

12 LYNETTE FLIEGELMAN, on behalf of
13 herself and all others similarly situated,

14 Plaintiffs

15 vs.

16 THE TALBOTS, INC. and DOES 1 through
17 100, inclusive,

18 Defendants.

CASE NO.

CLASS ACTION COMPLAINT

1. Unfair Business Practices in Violation of California Business & Professions Code Sections 17200, *et seq.*
2. Fraudulent Business Practices in Violation of California Business & Professions Code Sections 17200, *et seq.*
3. Unlawful Business Practices in Violation of California Business & Professions Code Sections 17200, *et seq.*
4. False Advertising in Violation of California Business & Professions Code Sections 17500, *et seq.*
5. Violations of California Consumer Legal Remedies Act

1 Plaintiff Lynette Fliegelman ("Plaintiff"), brings this action against Defendant The
2 Talbots, Inc. ("Defendant" or "Talbots") and DOES 1-100 on behalf of herself, and all others
3 similarly situated, upon information and belief, except as to her own actions, the investigation of
4 her counsel, and the facts that are a matter of public record, as follows:

5
6 **INTRODUCTION**

7 1. This class action arises out of Defendant's unlawful, unfair, and fraudulent business
8 practice commonly referred to as "false reference pricing." "False reference pricing" is the act of
9 misrepresenting the original or regular price of some good that is purportedly offered at a "sale
10 price," a business practice that Defendant engages in to increase sales. As alleged herein, during
11 at least the past four years, Defendant has misled consumers by advertising the false former or
12 purported "regular" prices which were fabricated, and corresponding phantom "savings" on
13 women's apparel, shoes, accessories and other items sold in its Talbots "Outlet" stores in
14 California.

15 2. California law prohibits the discounting of retail merchandise from its original
16 price for more than ninety (90) days. See California Business & Professions Code §17501.
17 Federal regulations also mandate that a retailer offer only genuine discounts from regular retail
18 prices; not false discounts from inflated original prices. See 16 C.F.R. §233.1.

19 3. Some retailers, such as Talbots, employ false reference pricing because it misleads
20 consumers into believing that they are "getting a good deal," thereby increasing sales. The United
21 States Court of Appeals for the Ninth Circuit succinctly explained: "Most consumers have, at
22 some point, purchased merchandise that was marketed as being 'on sale' because the proffered
23 discount seemed too good to pass up. Retailers, well aware of consumers' susceptibility to a
24 bargain, therefore have an incentive to lie to their customers by falsely claiming that their products
25 have previously sold at a far higher 'original' price in order to induce customers to purchase
26 merchandise at a purportedly marked-down 'sale' price. Because such practices are misleading –
27 and effective – the California Legislature has prohibited them." *Hinojos v. Kohl's Corp.*, 718 F.3d
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1 1098, 1101 (9th Cir. 2013).

2 4. The intentional use of false and fraudulent reference pricing tactics is increasingly
3 deceiving consumers in the market. To illustrate, on January 30, 2014, four members of Congress
4 demanded a Federal Trade Commission ("FTC") investigation of misleading marketing practices
5 by outlet stores across the United States. The four Members of Congress described a pricing
6 scheme similar to the one implemented at Talbots Outlet stores and stated: "[h]owever, we are
7 concerned that outlet store consumers are being misled into believing they are purchasing products
8 originally intended for sale at the regular retail store. Many outlets may also be engaged in
9 deceptive reference pricing. It is a common practice at outlet stores to advertise a retail price
10 alongside the outlet store price – even on made-for-outlet merchandise that does not sell at regular
11 retail locations. Since the item was never sold in the regular retail store or at the retail price, the
12 retail price is impossible to substantiate. We believe this practice may be a violation of the FTC's
13 Guides Against Deceptive Pricing (16 CFR 233)." See
14 [www.whitehouse.senate.gov/news/release/sens-and-rep-to-ftc-outlet-stores-may-be-misleading-](http://www.whitehouse.senate.gov/news/release/sens-and-rep-to-ftc-outlet-stores-may-be-misleading-consumers)
15 [consumers.](http://www.whitehouse.senate.gov/news/release/sens-and-rep-to-ftc-outlet-stores-may-be-misleading-consumers)

16 5. During the Class Period (defined below), Defendant continuously advertised false
17 price discounts for merchandise sold throughout its Outlet stores in California. Defendant would
18 offer substantial discounts from the "regular" prices listed on the original price tag. Specifically,
19 the words "Special Value" are set forth on every price tag in the Outlet stores to indicate the
20 "regular" price at which merchandise was purportedly offered for sale. The represented, "Special
21 Value" prices on the price tags were also false "regular" prices. In fact, based on Plaintiff's
22 investigation, the "Special Value" prices were artificially inflated and were never the true regular
23 prices for merchandise sold at Talbots Outlet stores. In addition, the represented "Special Value"
24 prices were not the prevailing market retail prices within three months next immediately preceding
25 the publication and dissemination of the advertised former prices, as required by California law.

26 6. Defendant conveys its deceptive pricing scheme through in store signage offering
27 steep discounts from the "Special Value" regular prices listed on the products' price tags in the
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1 Outlet stores. The "Special Value" regular prices listed and advertised on Defendant's price tags
2 are fake reference prices; utilized only to perpetuate Defendant's fake-discount scheme. The
3 pricing scheme is prominently displayed on virtually all items throughout the store. There are
4 typically large placard signs on top of or alongside each rack of clothing or accessories,
5 advertising a "discounted % off," or a "discounted whole-price" reduction for the item. For
6 example, a product may have a price tag with a "regular" price of \$89.50 and the related signage
7 advertising "40% Off Regular-Price Items," which is substantially less than the regular price listed
8 on the price tag. See Exhibit "A." Another example is a product having a price tag with a
9 "regular" price of \$69.50 and the related signage advertising a "sale price" of \$29.99. See Exhibit
10 "B." However, the "Special Value" regular prices listed on the price tags have never existed
11 and/or were not the prevailing market retail prices for such products within the three months next
12 immediately preceding the publication of the price tags, as required by California law. They are
13 fictional creations intentionally designed to enable Defendant's phantom markdowns.
14 Furthermore, upon check-out, Defendant provides California consumers, including Plaintiff, with
15 sales receipts continuing the misrepresentations regarding false price reductions. For example, the
16 stated *discount* from the false former "regular" price is listed for each item purchased.

17 7. Talbots knows consumers are bargain-hunters, and knows consumers are lured by
18 the prospect of a bargain at "Outlet" stores. "Outlet" stores are commonly understood by the
19 public to be selling the same merchandise that the manufacturer typically sells at its regular non-
20 outlet retail stores, but at a discount. According to Business Insider, "[t]he common assumption
21 about outlet stores is that you're getting the same goods that are in a regular store without the big
22 price tag." See <http://www.businessinsider.com/outlet-stores-arent-a-good-deal-2014-5>. However,
23 outlet stores typically sell different merchandise than their retail counterparts, without informing
24 customers that this is the situation.

25 8. In this case, Defendant offers for sale products manufactured exclusively and
26 intended solely for sale in its Outlet stores. Further exacerbating consumers' perception of deep
27 discounts is the fact that Defendant sells higher quality products at its company-operated mainline
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1 retail stores. Defendant knows that consumers expect to receive a discount when shopping at its
2 Outlet stores, and accordingly, preys on consumer expectations by artificially marking up the
3 regular price of its products and then offering discounts off of the artificially inflated regular price
4 to induce consumers to purchase their products. The regular price exists to provide an illusory
5 discount when compared to the actual sales price offered. This tactic is called "reference pricing."
6 The regular price listed on the price tags were and are the prices chosen by Defendant to enable it
7 to engage in its phantom markdown scheme.

8 9. Defendant conveys its deceptive pricing scheme to consumers through promotional
9 materials, in-store advertising displays, and print advertisements which are uniform. Upon
10 information and belief, Defendant's false price advertising scheme has been rampant throughout
11 California as part of a massive, years-long, pervasive campaign and has been consistent across all
12 of Defendant's exclusive branded apparel and accessories sold in its Outlet stores. Indeed, most,
13 if not all products sold in Talbots Outlet stores are subject to the same fraudulent pricing scheme
14 complained of herein.

15 10. Upon information and belief, thousands of Defendant's consumers in California,
16 including Plaintiff, were victims of Defendant's deceptive, misleading, and unlawful false pricing
17 scheme. This deception will continue if Defendant is not enjoined from continuing its pricing
18 scheme.

19 11. Defendant knows or should reasonably know that its comparative price advertising
20 is false, deceptive, misleading and unlawful under California law.

21 12. Defendant has fraudulently concealed from, and intentionally failed to disclose to,
22 Plaintiff and other members of the Class, the true facts about its product prices and falsely
23 advertised price discounts from those purported "regular" prices.

24 13. At all relevant times, Defendant has been under a duty to Plaintiff and the Class to
25 disclose the truth about its former "regular" prices and false discounts.

26 14. The facts which Defendant misrepresented or failed to disclose are material facts
27 that a reasonable person would have considered material, i.e., facts which would contribute to a
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1 reasonable person's decision to purchase Defendant's merchandise. Defendant's false
2 representations of former "regular" prices and false representations of purported savings, discounts
3 and bargains are objectively material to the reasonable consumer, including Plaintiff, and therefore
4 reliance upon such representations may be presumed as a matter of law.

5 15. Plaintiff relied upon Defendant's false representations of regular prices and
6 discounts when purchasing merchandise from Talbots Outlet store. Plaintiff would not have made
7 such purchases, but for Defendant's false representations and fraudulent omissions of the regular
8 price of the items purchased, as compared with the supposedly discounted or sale price at which
9 Plaintiff purchased the items.

10 16. Plaintiff reasonably believed the truth of the represented prices attached to the price
11 tags, or in advertisements or on signage regarding, products purchased at Talbots Outlet store,
12 which expressly represented that Plaintiff was getting a substantial percentage discount or whole-
13 price reduction off the products. Plaintiff reasonably understood the price on the price tag to be a
14 valid representation of the former regular price. However, because Defendant never adopted its
15 own former regular price, its former price merely constituted a ploy to conjure the illusion of a
16 non-existent "discount" on goods that were never offered anywhere close to the higher price
17 Defendant claimed.

18 17. Plaintiff and the Class reasonably and justifiably acted and relied on the substantial
19 price differences that Defendant advertised; and made purchases believing that they were
20 receiving a substantial discount on an item of greater value than it actually was. Plaintiff and the
21 Class reasonably understood the price on the price tags to be a valid representation of a former
22 regular price. However, the price on the price tags did not represent a former price or the
23 prevailing market prices for the products. Plaintiff, like other Class members, was lured in, relied
24 on, and was damaged by these pricing schemes that Defendant carried out.

25 18. Defendant intentionally concealed and failed to disclose material facts regarding
26 the truth about its misrepresentations and false former price advertising scheme for the purpose of
27 inducing Plaintiff and Class members to purchase merchandise in its Talbots Outlet stores.

19. Through its false and deceptive marketing, advertising and pricing scheme, Defendant has violated, and continues to violate California law prohibiting advertising goods for sale as discounted from purported former prices which are false, and prohibiting misleading statements about the existence and amount of price reductions. Specifically, Defendant has violated, and continues to violate, California's Business & Professions Code §§ 17200, *et seq.* (the "UCL"), California's Business & Professions Code §§ 17500, *et seq.* (the "FAL"), and the California Consumers' Legal Remedies Act, California Civil Code §§ 1750, *et seq.* (the "CLRA"), and the Federal Trade Commission Act ("FTCA"), which prohibits "unfair or deceptive acts or practices in or affecting commerce" (15 U.S.C. § 45(a)(1)) and false advertisements. 15 U.S.C. § 52(a).

20. Plaintiff brings this action on behalf of herself and other similarly situated consumers who have purchased one or more items at Talbots Outlet stores in California that were deceptively represented as discounted from false former prices in order to halt the dissemination of this false, misleading, and deceptive pricing scheme, to correct the false and misleading perception it has created in the minds of consumers, and to obtain redress for those who have purchased such products. Plaintiff seeks restitution and other appropriate equitable remedies, including an injunction under the UCL and FAL; and an injunction under the CLRA.

JURISDICTION AND VENUE

20 21. This Court has subject matter jurisdiction over the causes of action asserted herein
21 pursuant to California Code of Civil Procedure § 410.10 and Article VI, § 10 of the California
22 Constitution. In the aggregate, the damages caused to the members of the Class as defined below
23 exceed the jurisdictional minimum of this Court, but neither the Plaintiff nor any member of the
24 Class individually has suffered damages of, at least, \$75,000.

25 22. This Court has personal jurisdiction over the Defendant named herein because
26 Defendant does sufficient business in California, has sufficient minimum contacts with California
27 and/or otherwise intentionally avails itself of the markets within California through its sales,

1 advertising and marketing to render the exercise of jurisdiction by California courts and the
2 application of California law to the claims of the Plaintiff permissible under traditional notions of
3 fair play and substantial justice.

4 23. Venue is proper in this Court since, as detailed below, the named Plaintiff is a
5 resident of this County, the acts and transactions giving rise to this action occurred in this County,
6 a substantial number of Defendant's acts occurred in this County, and Defendant received
7 substantial compensation from sales of its products in this County by doing business here. Thus,
8 as to the named Plaintiff and other Class members, certain obligations and liability of the
9 Defendant arose in part in this County.

10 THE PARTIES

11 A. Plaintiff

12 24. Plaintiff Lynette Fliegelman ("Fliegelman") is a citizen and resident of Ventura
13 County, California. It is alleged that on December 19, 2016, in reliance on Defendant's false and
14 deceptive advertising, marketing and pricing schemes, Plaintiff purchased over \$54.00 in
15 exclusive branded apparel at Talbots Outlet store located in Camarillo, California, and was
16 damaged thereby.

17 B. Defendant

18 25. Defendant The Talbots, Inc. ("Talbots") is a Delaware corporation which is
19 licensed to do, and is doing, business throughout the United States, with its principal place of
20 business located at One Talbots Drive, Hingham, Massachusetts 02043. Defendant owns and
21 operates Talbots Outlet stores in California, and advertises, markets, distributes, and/or sells
22 women's apparel, shoes, accessories and other items in California and throughout the United
23 States.

24 26. The only stores that are the subject of this Complaint are the Talbots Outlet stores
25 located in California.
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1 C. Doe Defendants

2 27. The true names and capacities of Defendants sued in this Complaint as Does 1
3 through 100, inclusive, are currently unknown to Plaintiff, and therefore Plaintiff sues such
4 Defendants by such fictitious names. Plaintiff will amend this Complaint to reflect the true names
5 and capacities of the Defendants designated herein as Does 1 through 100, when they have been
6 ascertained, along with the appropriate charging allegations, as may be necessary.

7 28. Plaintiff is informed and believes, and on that basis alleges, that each of the
8 fictitiously named Defendants was in some manner legally responsible for the actionable and
9 unlawful actions, policies and practices as alleged herein. Plaintiff will amend this Complaint to
10 set forth the true names and capacities of said Defendants, along with the appropriate charging
11 allegations when the same have been ascertained. Each reference in this Complaint to "Talbots"
12 or "Defendant" is also a reference to all Defendants sued as Does 1 through 100.

13 D. Agency/Aiding And Abetting

14 29. Plaintiff is informed and believes, and on that basis alleges, that at all times herein
15 mentioned, Defendants, and each of them, were an agent or joint venturer of each of the other
16 Defendants, and in doing the acts alleged herein, were acting within the course and scope of such
17 agency. Each Defendant had actual and/or constructive knowledge of the acts of each of the other
18 Defendants, and ratified, approved, joined in, acquiesced and/or authorized the wrongful acts of
19 each co-defendant, and/or retained the benefits of said wrongful acts.

20 30. Plaintiff is further informed and believes, and on that basis alleges, that Defendants,
21 and each of them, aided and abetted, encouraged and rendered substantial assistance to the other
22 Defendants in breaching their obligations to Plaintiff and the Class, as alleged herein. In taking
23 action, as particularized herein, to aid and abet and substantially assist the commissions of these
24 wrongful acts and other wrongdoings complained of, each of the Defendants acted with an
25 awareness of his/her/its primary wrongdoing and realized that his/her/its conduct would
26 substantially assist the accomplishment of the wrongful conduct, wrongful goals, and wrongdoing.

1 31. Whenever reference is made in this Complaint to any act of "Talbots" or
2 "Defendant," such shall be deemed to mean that officers, directors, agents, employees, or
3 representatives of the Defendant named in this lawsuit committed or authorized such acts, or failed
4 and omitted to adequately supervise or properly control or direct their employees while engaged in
5 the management, direction, operation or control of the affairs of the Defendant and did so while
6 acting within the scope of their employment or agency.

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8 **CONDUCT GIVING RISE TO THE VIOLATIONS OF THE LAW**

9 A. **Plaintiff's Purchases**

10 32. On December 19, 2016, Plaintiff went shopping at the Talbots Outlet store in
11 Camarillo, California to purchase clothing and related apparel for herself. She observed an
12 exterior window display that advertised "Up to 60% Entire Store."

13 33. Upon entering the store, Plaintiff observed prominent signage on top of or
14 alongside each rack of clothing or accessories, advertising a "discounted % off," or a "discounted
15 whole-price" reduction for each item offered for sale. Believing she was able to pay significantly
16 less than what certain products were worth and normally sell for in the marketplace, Plaintiff was
17 induced to purchase three different items, all of which were offered at prices significantly lower
18 than their stated "regular" prices. Plaintiff purchased the items after relying on Defendant's false
19 discounts and false "regular" former prices for such products.

20 34. Specifically, relying upon Defendant's misrepresentations and false and deceptive
21 advertising, Plaintiff was induced to purchase the following three items: a long-sleeve crewneck
22 tee-shirt, item number 90001632851587642117762 bearing a price tag of "\$26.00," a long-sleeve
23 crewneck tee-shirt, item number 90001632851582042118190 bearing a price tag of "\$26.00," and
24 a long-sleeve denim shirt, item number 90101632874340942383620 bearing a price tag of
25 "\$74.50." See true and correct copies of price tags attached to clothing which Plaintiff purchased
26 on December 19, 2016, attached hereto as Exhibit "C."

1 35. Plaintiff observed signage adjacent to and above these items that advertised
2 percentage discounts of "60% Off Regular-Price Items." The signs were located near the items
3 offered for sale, clearly indicating that the items were being sold at significant discounts off their
4 "regular" prices. The tee-shirts contained price tags representing them to have a regular "Special
5 Value" price of \$26.00, and the signage which represented that the tee shirts were on sale for
6 "60% Off Regular-Price," leaving a discount and savings of \$15.60, and purchase price at \$10.40.
7 The long-sleeve denim shirt contained a price tag representing it to have a regular "Special Value"
8 price of \$74.50, and the signage which represented that the denim shirt was on sale for "60% Off
9 Regular-Price," leaving a discount and savings of \$44.70, and purchase price at \$29.80.

10 36. Relying on Defendant's misrepresentations and false and deceptive advertising and
11 believing that she was receiving a significant discount by purchasing these items at 60% off the
12 "regular" price, Plaintiff decided to purchase the items and proceeded to the cash register where
13 she did in fact purchase the items. Plaintiff also believed she was purchasing merchandise that
14 was of the same like, kind and quality of that sold in the regular company-operated retail stores.
15 These purported "regular" prices and corresponding price reductions and savings were false and
16 deceptive, as the prevailing market retail price for the three shirts during the three months
17 immediately prior to Plaintiff's purchase of such items were never at the represented former
18 "regular" prices. Plaintiff would not have purchased the shirts in the absence of Defendant's
19 misrepresentations. Instead, Defendant continuously offered the subject shirts, like the majority of
20 products offered for sale at Talbots Outlet stores, for sale at discounted prices. As a result,
21 Plaintiff has been personally victimized by and suffered economic injury as a direct result of
22 Defendant's unlawful, unfair and fraudulent conduct.

23 37. Furthermore, upon check-out on December 19, 2016, Defendant provided Plaintiff
24 with a sales receipt containing the same misrepresentations regarding false price reductions off the
25 regular prices on the three shirts. The sales receipt clearly represented that Plaintiff was receiving
26 the benefit of a "60%" discount off the "Regular Price" for each item purchased and listed the
27 discount or savings amount for each item, and then the sales price after the purported discount.
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1 See true and correct copy of Plaintiff's sales receipt, dated December 19, 2016, attached hereto as
2 Exhibit "D."

3 B. Defendant Engages In Deceptive Advertising

4 38. Subsequent to Plaintiff's purchase, an investigation conducted on behalf of Plaintiff
5 confirmed that the "regular" prices listed on the price tags for Plaintiff's purchases at Talbots
6 Outlet stores were never the prevailing market price at Talbots Outlet stores in the preceding 90
7 days before Plaintiff's purchase. Additionally, the investigation revealed that Defendant's
8 deceptive advertising practices were systematic and pervasive at Talbots Outlet stores as items
9 remain continuously discounted from their "regular" price tag price or they are not offered for sale
10 at their "regular" price tag price for any substantial period of time, and in most cases, not at all,
11 and in compliance with California law. Indeed, in most instances, *new* items appear at the Talbots
12 Outlet stores that are immediately discounted, rendering the "Special Value" regular prices
13 completely meaningless, false, and misleading. The difference between the discounted sale prices
14 and the "Special Value" regular price is a false savings percentage or whole-price reduction used
15 to lure consumers into purchasing products they believe are significantly discounted. In addition,
16 the clothing and many of the other items sold at Talbots Outlet stores are manufactured for, and
17 sold *exclusively* by, those Outlets, which means that such items were never sold – or even intended
18 to be sold – at the regular price listed on their price tags. Most, if not all, of these items were
19 never offered for sale in Talbots' non-outlet retail stores in California.

20 39. By failing to price clothing and other items at their actual regular price for a
21 substantial period of time, Defendant artificially inflated the market price or value of the clothing
22 and other items it sells, including the shirts purchased by Plaintiff. Moreover, by failing to price
23 its merchandise, including the shirts purchased by Plaintiff at their regular price for a substantial
24 period of time, and in compliance with California law, Defendant interfered with market forces,
25 driving the selling price of its products higher than they would be if Defendant had complied with
26 the law.

1 40. Defendant's false discounting practice, as described herein, has the effect of setting
2 an artificially high market value for its "on sale" merchandise. Customers, like Plaintiff, purchase
3 merchandise from Defendant believing they are receiving a substantial discount on their
4 purchases, when in fact they are not. They are instead purchasing an item they would not
5 otherwise buy and paying a higher price than they would otherwise pay were the products subject
6 to fair market competition and pricing.

7 41. Plaintiff's and Class members' reliance upon Defendant's false price comparison
8 advertising was not only reasonable, but entirely intended by Defendant. In fact, empirical
9 marketing studies demonstrate that reference pricing actually creates an impression of higher value
10 and an incentive for retailers to engage in this false and fraudulent behavior:

11 [c]omparative price advertising offers consumers a basis for comparing the
12 relative value of the product offering by suggesting a monetary worth of the
13 product and any potential savings [A] comparative price advertisement
14 can be construed as deceptive if it makes any representation, or involves
15 any practice that may materially mislead a reasonable consumer.

16 *Comparative Price Advertising: Informative or Deceptive?*, Dhruv Grewal and Larry D.
17 Compeau, *Journal of Public Policy & Marketing*, Vol. 11, No. 1, at 52 (Spring 1992).
18 Furthermore:
19

20 [b]y creating an impression of savings, the presence of a higher reference
21 price enhances subjects' perceived value and willingness to buy the product. .
22 . . Thus, if the reference price is not truthful, a consumer may be encouraged
23 to purchase as a result of a false sense of value.

24 *Id.* at 55, 56.

25 42. A retailer's "reference price," the stated price presented alongside the retailer's "on
26 sale" price, provides consumers a reference point with which to evaluate the prospective purchase.
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1 The reference price is often described with terms such as "Regular Price," "Original Price," and/or
2 "Former Price."

3 43. A retailer's reference price impacts the consumer's behavior in the marketplace.
4 As the reference price increases, so does the consumer's perception of the value of the transaction,
5 the consumer's willingness to make the purchase, and the amount of money the consumer is
6 willing to pay for the product.

7 44. When the reference price is bona fide and truthful, it helps consumers make
8 informed purchasing decisions. In contrast, consumers are harmed when merchants advertise their
9 products alongside falsely-inflated former prices, i.e., "false reference prices," as consumers are
10 provided a false sense of value. In this context, the reference price is no longer informative but
11 deceptive because consumers are deprived of a full and fair opportunity to accurately evaluate the
12 specific sales offer in its relevant market. As the Ninth Circuit recognizes, "[m]isinformation
13 about a product's "normal" price is . . . significant to many consumers in the same way as a false
14 product label would be." *See Hinojos v. Kohl's Inc.* 718 F.3d at 1106.

15 45. Moreover, the hidden nature of false discounting makes it effective. Consumers,
16 like Plaintiff, unaware of the practices at issue, instead complete their purchases believing that
17 they "got a good deal." Retailers, like Defendant, make falsely-discounted sales without suspicion
18 because consumers do not have access to the comprehensive historical pricing information
19 necessary to reveal the deception.

20 46. The full extent of Defendant's false and deceptive pricing scheme can only be
21 revealed through a full examination of records exclusively in the possession of Defendant.

22 47. Plaintiff would purchase Defendant's products in the future from Talbots Outlet
23 stores, if price tags accurately reflect former "regular" prices and "sales" prices were not marketed
24 in a deceptive manner that is likely to mislead consumers like herself. Currently, however,
25 Plaintiff and other consumers have no realistic way to know which – if any – of Defendant's price
26 tags and sale prices are not false or deceptive. If the Court were to issue an injunction ordering
27 Defendant to comply with California's comparative price advertising laws, and prohibiting
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1 Defendant's use of the deceptive practices discussed herein, Plaintiff would be able to make
2 informed purchase decisions for Defendant's products at Talbots Outlet stores.

3
4 **PLAINTIFF'S CLASS ACTION ALLEGATIONS**

5 48. Plaintiff brings this action as a class action on behalf of herself, and all others
6 similarly situated. The proposed Class that Plaintiff seeks to represent is defined as follows:

7 All persons who, during the period of time beginning May 17, 2013 through the
8 date the Court enters preliminary approval (the "Class Period"), purchased one (1)
9 or more products at any Talbots outlet store in the State of California and did not
10 receive a refund or credit for their purchase(s).

11 49. Excluded from the Class are Defendant; its corporate parents, subsidiaries, affiliates,
12 and any entity in which Defendant has a controlling interest; any of its officers, directors,
13 employees, or agents; the legal representatives, successors or assigns of any such excluded persons
14 or entities; and the judicial officers to whom this matter is assigned as well as their court staff.
15 Plaintiff reserves the right to expand, limit, modify, or amend this class definition, including the
16 addition of one or more subclasses, in connection with her motion for class certification, or at any
17 other time, based upon, *inter alia*, changing circumstances and/or new facts obtained during
18 discovery.

19 50. The members of the Class are so numerous that joinder of all members is
20 impracticable. While the exact number of Class members is unknown to Plaintiff at this time,
21 Plaintiff estimates that the Class consists of thousands of members. Moreover, Plaintiff alleges
22 that the precise number of Class members, their identities, and their locations can be ascertained
23 though appropriate discovery and records of Defendant and its agents. Defendant keeps extensive
24 computerized records of its customers through, *inter alia*, customer loyalty programs, co-branded
25 credit cards and general marketing programs. Defendant has one or more databases through which
26 a significant majority of Class members may be identified and ascertained, and it maintains
27 contact information, including email and home mailing addresses, through which notice of this
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1 action could be disseminated to potential Class members in accordance with due process
2 requirements.

3 51. There is a well-defined community of interest in the questions of law and fact
4 affecting the parties represented in this action.

5 52. Common questions of law and fact exist as to all members of the Class. These
6 common questions predominate over the questions affecting only individual members of the Class.

7 53. Among the questions of law and fact common to the Class are, *inter alia*:

8 a. Whether, during the Class Period, Defendant used false "regular" price tags and
9 falsely advertised price discounts on merchandise it sold in its California Talbots Outlet stores;

10 b. Whether, during the Class Period, the "regular" prices advertised by Defendant
11 were the prevailing market prices for the respective merchandise sold by Defendant during the
12 three month period preceding the dissemination and/or publication of the advertised former prices;

13 c. Whether Defendant's use of false or deceptive price advertising constituted false
14 advertising under California law;

15 d. Whether Defendant engaged in unfair, unlawful and/or fraudulent business
16 practices under California law;

17 e. Whether Defendant misrepresented and/or failed to disclose material facts about its
18 product pricing and discounts;

19 f. Whether Defendant has made false or misleading statements of fact concerning the
20 reasons for, existence of, or amounts of price reductions;

21 g. Whether Defendant's conduct, as alleged herein, was intentional and knowing;

22 h. Whether Class members are entitled to damages and/or restitution; and, if so, what
23 is the amount of revenues and/or profits Defendant received and/or was lost by Class members as
24 a result of the conduct alleged herein;

25 i. Whether an injunction is necessary to prevent Defendant from continuing to use
26 false, misleading or illegal price comparisons; and

27 j. Whether Plaintiff and Class members are entitled to an award of reasonable
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1 attorneys' fees, pre-judgment interest and costs of suit.

2 54. Plaintiff's claims are typical of, and are not antagonistic to, the claims of all Class
3 members. Plaintiff and the Class she seeks to represent have all been deceived (or were likely to
4 be deceived) by Defendant's false former price advertising scheme, as alleged herein. Plaintiff is
5 advancing the same claims and legal theories on behalf of herself and all members of the Class.

6 55. Plaintiff is an adequate representative of the Class because she is a member of the
7 Class and her interests do not conflict with the interests of the Class members she seeks to
8 represent. Plaintiff will fairly and adequately represent and protect the interest of the Class
9 because she is not antagonistic to the Class. Plaintiff has retained counsel who are competent and
10 experienced in the prosecution of consumer fraud and class action litigation.

11 56. A class action is superior to other available means for the fair and efficient
12 adjudication of Plaintiff's and Class members' claims. Because of the relatively modest size of
13 individual Class members' claims, few, if any, Class members could afford to seek legal redress of
14 the wrongs complained of herein on an individual basis. Absent the class action, Class members
15 and the general public would not likely recover, or would not likely have the chance to recover,
16 damages or restitution, and Defendant will be permitted to retain the proceeds of its unfair and
17 unlawful misdeeds.

18 57. All Class members, including Plaintiff, were exposed to one or more of
19 Defendant's misrepresentations or omissions of material fact claiming that former "regular"
20 advertised prices were in existence. Due to the scope and extent of Defendant's consistent false
21 price advertising scheme, disseminated in a massive, years-long campaign to California consumers
22 via in-store display advertising, print advertising, and the like, it can be reasonably inferred that
23 such misrepresentations or omissions of material fact were uniformly made to all members of the
24 Class. In addition, it can be reasonably presumed that all Class members, including Plaintiff,
25 affirmatively acted in response to the representations contained in Defendant's false advertising
26 scheme when purchasing merchandise at Defendant's Outlet stores.

FIRST CAUSE OF ACTION

**Violation Of The "Unfair" Prong Of The UCL
(By Plaintiff and the Class Against Defendant)**

58. Plaintiff re-alleges and incorporates by reference the allegations contained in the preceding paragraphs as though fully set forth herein.

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

60. The UCL imposes strict liability. Plaintiff need not prove that Defendant intentionally or negligently engaged in unlawful, unfair, or fraudulent business practices - only that such practices occurred.

61. A business act or practice is "unfair" under the UCL if the reasons, justifications and motives of the alleged wrongdoer are outweighed by the gravity of the harm to the alleged victims.

62. Defendant has violated and continues to violate the "unfair" prong of the UCL by representing a false "regular" price and corresponding price discount for its products sold at Talbots Outlet stores where Defendant, in fact, inflated the purported "regular" prices for such products such that the promised discount was false, misleading and deceptive.

63. Defendant's acts and practices are unfair because they caused Plaintiff, and are likely to cause consumers, to falsely believe that Talbots Outlet stores are offering value, discounts or bargains from the prevailing market value or worth of the products sold that did not, in fact, exist. As a result, purchasers, including Plaintiff, reasonably perceived that they were receiving products that regularly sold in the retail marketplace at substantially higher prices (and are, therefore, worth more) than what they paid. This perception has induced reasonable purchasers, including Plaintiff, to buy such products, which they otherwise would not have purchased.

64. The gravity of the harm to members of the Class resulting from these unfair acts and practices outweighed any conceivable reasons, justifications and/or motives of Defendant for engaging in such deceptive acts and practices. By committing the acts and practices alleged

1 above, Defendant engaged in unfair business practices within the meaning of California Business
2 & Professions Code §§ 17200, *et seq.*

3 65. As a direct and proximate result of Defendant's acts and practices, Plaintiff and
4 Class members have suffered injury in fact and have lost money or property as a result of
5 purchasing Defendant's products.

6 66. Through its unfair acts and practices, Defendant has improperly obtained money
7 from Plaintiff and the Class. As such, Plaintiff requests that this Court cause Defendant to restore
8 this money to Plaintiff and all Class members, and to enjoin Defendant from continuing to violate
9 the UCL as discussed herein and/or from violating the UCL in the future. Otherwise, Plaintiff and
10 the Class may be irreparably harmed and/or denied an effective and complete remedy if such an
11 order is not granted.

12 SECOND CAUSE OF ACTION

13 Violation Of The "Fraudulent" Prong Of The UCL 14 (By Plaintiff and the Class Against Defendant)

15 67. Plaintiff re-alleges and incorporates by reference the allegations contained in the
16 preceding paragraphs as though fully set forth herein.

17 68. The UCL defines unfair business competition to include any "unlawful, unfair or
18 fraudulent" act or practice, as well as any "unfair, deceptive, untrue or misleading" advertising.
19 Cal. Bus. & Prof. Code § 17200.

20 69. A business act or practice is "fraudulent" under the UCL if it is likely to deceive
21 members of the consuming public.

22 70. Defendant's price tags, marketing and advertising materials concerning false
23 former "regular" prices were "fraudulent" within the meaning of the UCL because they deceived
24 Plaintiff, and were likely to deceive members of the Class, into believing that Defendant was
25 offering value, discounts or bargains at Talbots Outlet stores from the prevailing market value or
26 worth of the products sold that did not, in fact, exist. As a result, purchasers, including Plaintiff,
27 reasonably perceived that they were receiving products that regularly sold in the retail marketplace
28 at substantially higher prices (and were, therefore, worth more) than what they paid. This

1 perception induced reasonable purchasers, including Plaintiff, to buy such products from
2 Defendant, which they otherwise would not have purchased.

3 71. Defendant's acts and practices as described herein have deceived Plaintiff and were
4 highly likely to deceive members of the consuming public. Specifically, in deciding to purchase
5 products from Talbots Outlet stores, Plaintiff relied on Defendant's misleading and deceptive
6 representations regarding its "Special Value" regular prices, and "sale" prices. Each of these
7 factors played a substantial role in Plaintiff's decision to purchase those products, and Plaintiff
8 would not have purchased those items in the absence of Defendant's misrepresentations.
9 Accordingly, Plaintiff suffered monetary loss as a direct result of Defendant's practices described
10 herein.

11 72. As a direct and proximate result of Defendant's acts and practices, Plaintiff and
12 Class members have suffered injury in fact and have lost money or property as a result of
13 purchasing Defendant's products.

14 73. As a result of the conduct described above, Defendant has been unjustly enriched at
15 the expense of Plaintiff and members of the proposed Class. Specifically, Defendant has been
16 unjustly enriched by obtaining revenues and profits that it would not otherwise have obtained
17 absent its false, misleading and deceptive conduct.

18 74. Through its unfair acts and practices, Defendant has improperly obtained money
19 from Plaintiff and the Class. As such, Plaintiff requests that this Court cause Defendant to restore
20 this money to Plaintiff and all Class members, and to enjoin Defendant from continuing to violate
21 the UCL as discussed herein and/or from violating the UCL in the future. Otherwise, Plaintiff and
22 the Class may be irreparably harmed and/or denied an effective and complete remedy if such an
23 order is not granted.

24 THIRD CAUSE OF ACTION

25 Violations Of The "Unlawful" Prong Of The UCL
26 (By Plaintiff and the Class Against Defendant)

27 75. Plaintiff re-alleges and incorporates by reference the allegations contained in the
28 preceding paragraphs as though fully set forth herein.

1 76. The UCL defines unfair business competition to include any "unlawful, unfair or
2 fraudulent" act or practice, as well as any "unfair, deceptive, untrue or misleading" advertising.
3 Cal. Bus. & Prof. Code § 17200.

4 77. A business act or practice is "unlawful" under the UCL if it violates any other law
5 or regulation.

6 78. The FTCA prohibits "unfair or deceptive acts or practices in or affecting
7 commerce" (15 U.S.C. § 45(a)(1)) and specifically prohibits false advertisements. 15 U.S.C. §
8 52(a)). The FTC has established Guidelines that describe false former pricing schemes, similar to
9 Defendant's in all material respects, as deceptive practices that would violate the FTCA:

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

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

27 16 C.F.R. § 233.1.
28

1 79. California statutory and regulatory law also expressly prohibits false former pricing
2 schemes. Cal. Bus. & Prof. Code § 17501, entitled "*Value determinations; Former price*
3 *advertisements*," states:

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

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

13 80. As detailed in Plaintiff's Fifth Cause of Action below, Cal. Civ. Code § 1770,
14 subsection (a)(9), prohibits a business from "[a]dvertising goods or services with intent not to sell
15 them as advertised," and subsection (a)(13) prohibits a business from "[m]aking false or
16 misleading statements of fact concerning reasons for, existence of, or amounts of price
17 reductions."

18 81. Defendant's use of and reference to a materially false "regular" price, or purported
19 percentage discount or whole-price reduction in connection with its marketing and advertisements
20 concerning the merchandise sold at Talbots Outlet stores violated and continues to violate the
21 FTCA, 15 U.S.C. § 45(a)(1) and 15 U.S.C. § 52(a), as well as FTC Guidelines published at Title
22 16, Code of Federal Regulations, Section 233. It also violated and continues to violate Cal. Bus.
23 & Prof. Code § 17501, and Cal. Civ. Code § 1770, sections (a)(9) and (a)(13) by advertising false
24 discounts from purported former prices that were, in fact, not the prevailing market prices within
25 three months next preceding the publication and dissemination of advertisements containing the
26 false former prices.

82. As a direct and proximate result of Defendant's acts and practices, Plaintiff and Class members have suffered injury in fact and have lost money or property as a result of purchasing Defendant's products.

83. As a result of the conduct described above, Defendant has been unjustly enriched at the expense of Plaintiff and members of the proposed Class. Specifically, Defendant has been unjustly enriched by obtaining revenues and profits that it would not otherwise have obtained absent its false, misleading and deceptive conduct.

84. Through its unfair acts and practices, Defendant has improperly obtained money from Plaintiff and the Class. As such, Plaintiff requests that this Court cause Defendant to restore this money to Plaintiff and all Class members, and to enjoin Defendant from continuing to violate the UCL as discussed herein and/or from violating the UCL in the future. Otherwise, Plaintiff and the Class may be irreparably harmed and/or denied an effective and complete remedy if such an order is not granted.

FOURTH CAUSE OF ACTION:

**Violation Of California False Advertising Law
California Business & Professions Code Sections 17500, *et. seq.*
(By Plaintiff and the Class Against Defendant)**

85. Plaintiff re-alleges and incorporates by reference the allegations contained in the preceding paragraphs as though fully set forth herein.

86. The California False Advertising Law prohibits unfair, deceptive, untrue, or misleading advertising, including, but not limited to, false statements as to worth, value and former price.

87. Cal. Bus. & Prof. Code § 17500 provides that:

[i]t is unlawful for any . . . corporation . . . with intent . . . to dispose of . . .

personal property . . . to induce the public to enter into any obligation relating

thereto, to make or disseminate or cause to be made or disseminated . . . from

this state before the public in any state, in any newspaper or other

publication, or any advertising device, or by public outcry or proclamation,

1 or in any other manner or means whatever, including over the Internet, any
2 statement . . . which is *untrue* or *misleading*, and which is known, or which
3 by the exercise of reasonable care should be known, to be untrue or misleading . . .
4 [Emphasis added.].

5 88. The "intent" required by Cal. Bus. & Prof. Code § 17500 is the intent to dispose of
6 property, and not the intent to mislead the public in the disposition of such property.

7 89. Similarly, Cal. Bus. & Prof. Code § 17501 provides, "no price shall be advertised
8 as a former price of any advertised thing, unless the alleged former price was the prevailing
9 market price . . . within three months next immediately preceding the publication of the
10 advertisement or unless the date when the alleged former price did prevail is clearly, exactly, and
11 conspicuously stated in the advertisement."

12 90. Defendant's routine practice of advertising "Special Value" regular prices on all of
13 its exclusive, made for Talbots Outlet merchandise, which were never the true prevailing prices of
14 those products was an unfair, deceptive and misleading advertising practice. This deceptive
15 marketing practice gave consumers the false impression that the products sold at Talbots Outlet
16 stores were regularly sold in the retail marketplace at substantially higher prices than they actually
17 were. Therefore, leading to the false impression that the merchandise was worth more than it
18 actually was.

19 91. Defendant misled consumers by making untrue and misleading statements and
20 failing to disclose what is required as stated in the Code, as alleged above.

21 92. As a direct and proximate result of Defendant's acts and practices, Plaintiff and
22 Class members have suffered injury in fact and have lost money or property as a result of
23 purchasing Defendant's products.

24 93. Through its unfair acts and practices, Defendant has improperly obtained money
25 from Plaintiff and the Class. As such, Plaintiff requests that this Court cause Defendant to restore
26 this money to Plaintiff and all Class members, and to enjoin Defendant from continuing to violate
27 the False Advertising Law as discussed herein in the future. Otherwise, Plaintiff and the Class may
28

1 be irreparably harmed and/or denied an effective and complete remedy if such an order is not
2 granted.

3 FIFTH CAUSE OF ACTION

4 For Violation Of The Consumer Legal Remedies Act
5 California Civil Code Sections 1750, *et. seq.*
(By Plaintiffs and the Class Against Defendant)

6 94. Plaintiff re-alleges and incorporates by reference the allegations contained in the
7 preceding paragraphs as though fully set forth herein.

8 95. This cause of action is brought pursuant to the CLRA.

9 96. Plaintiff and each member of the proposed Class are "consumers" within the
10 meaning of California Civil Code § 1761(d).

11 97. Defendant's sale of merchandise to Plaintiff and the Class were "transactions"
12 within the meaning of California Civil Code § 1761(e). The products purchased by Plaintiff and
13 the Class are "goods" within the meaning of California Civil Code § 1761(a).

14 98. As described herein, Defendant violated, and continues to violate, the CLRA by
15 falsely representing the nature, existence and amount of price discounts by fabricating inflated
16 "Special Value" regular prices. Such a pricing scheme is in violation of Cal. Civ. Code § 1770,
17 subsection (a)(9) ("[a]dvertising goods or services with intent not to sell them as advertised") and
18 subsection (a)(13) ("[m]aking false or misleading statements of fact concerning reasons for,
19 existence of, or amounts of price reductions").

20 99. Plaintiff relied on Defendant's false representations in deciding to purchase
21 merchandise from Defendant. Plaintiff would not have purchased such merchandise absent
22 Defendant's unlawful conduct. As a result of these acts and practices, Plaintiff suffered damage in
23 that she spent money at Talbots Outlet store that she would not have otherwise spent absent
24 Defendant's unlawful and misleading acts and practices.

25 100. Pursuant to Section 1782(a) of the CLRA, on May 17, 2017, Plaintiff's Counsel, on
26 behalf of Plaintiff Fliegelman, served Defendant by United States certified mail, return receipt
27 requested, with notice of Defendant's particular violations of the CLRA and requested that
28

1 Defendant identify victims, notify victims and remedy its illegal conduct within 30 days. The
2 letter was sent on behalf of the Plaintiff and all others similarly situated. More than 30 days have
3 passed since the sending of the CLRA notice, and no cure has been effectuated.

4 101. Plaintiff seeks actual and punitive damages under the CLRA, in addition to
5 injunctive relief, as attorneys' fees and costs.

6
7 **PRAYER FOR RELIEF**

8 WHEREFORE, Plaintiff, on behalf of herself and members of the Class, prays for relief
9 and judgment against Defendant as follows:

10 1. For an order certifying this matter as a class action and designating Plaintiff as the
11 Class Representative and Plaintiff's Counsel as Class Counsel;

12 2. For an order awarding restitution and disgorgement of all profits and unjust
13 enrichment that Defendant obtained from Plaintiff and the Class members as a result of its
14 unlawful, unfair, and fraudulent business practices described herein;

15 3. For an order awarding actual and punitive damages as permitted under the CLRA;

16 4. For appropriate injunctive relief as permitted by law or equity;

17 5. For an order directing Defendant to engage in a corrective advertising campaign;

18 6. For an award of attorneys' fees as authorized by statute including, but not limited
19 to, the provisions of California Civil Code § 1780(e), California Code of Civil Procedure §
20 1021.5, as authorized under the "common fund" doctrine, and as authorized by the "substantial
21 benefit" doctrine;

22 7. For costs of the suit incurred herein;

23 8. For prejudgment interest at the legal rate; and

24 9. For such other and further relief as the Court may deem proper.

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DEMAND FOR JURY TRIAL

Plaintiff hereby demands a trial by jury for Plaintiff and the Class as to all issues so triable.

Dated: June 15, 2018

LAW OFFICES OF ZEV B. ZYSMAN, APC



ZEV B. ZYSMAN

Attorneys for Plaintiff Lynette Fliegelman and
The Proposed Class