

Consumer

Outlet Pricing Class Actions Percolating As Holiday Shopping Season Nears

BY LISA HELEM

On the cusp of the busy holiday shopping season, would-be class actions alleging deceptive outlet store pricing practices are pending against Ralph Lauren, Michael Kors, and at least five other retailers, according to recent federal and state court filings in California and New York.

The suits, filed in the Southern District of New York, the Southern District of California, and several California state courts, allege that retailers employed deceptive or misleading pricing practices in their outlet or factory stores that lured buyers into believing they were receiving bargains compared with prices offered in traditional stores.

In reality, the “sham” comparison prices were, Tressa Gattinella alleges in her suit against Michael Kors, “fictional creations” designed to enable “phantom markdowns.”

Gattinella’s case is scheduled for a case management conference Oct. 31 (*Gattinella v. Michael Kors (USA), Inc.*, S.D.N.Y., No. 1:14-cv-05731, *complaint filed* 9/2/14).

California Consumer Claims. New York plaintiffs’ attorney Wayne S. Kreger and his team filed four would-be class actions against Ralph Lauren, Nordstrom, Levi’s and Michael Kors between late July and early September.

Their latest suit, *Branca v. Ralph Lauren*, alleges that Kevin Branca and “thousands of California consumers were victims of Ralph Lauren’s deceptive, misleading and unlawful false pricing scheme” used at Polo Ralph Lauren Factory stores in California, according to an amended complaint filed Oct. 10 (*Branca v. Ralph Lauren Corp.*, S.D.N.Y., No. 1:14-cv-07097, *complaint filed* 10/10/14).

“We took these cases because we are concerned with consumer fraud, and the scheme employed by these retailers is a prime example of the deception suffered by ordinary consumers in the marketplace,” Kreger said in an Oct. 24 e-mail.

The cases all involve purchases that were made in California outlet locations, Kreger says.

In California, the “burden of proof is easy to establish—either the former price was actually used in the last three months or it wasn’t,” he said.

Kreger referenced the California Business & Professions Code § 17501 requirement that former price advertisements must be “the prevailing market price” within the three months preceding the publication of the advertised price unless the date when the former price prevailed is conspicuously stated in the ad.

That case is scheduled for a case management conference Dec. 5.

Reached by e-mail Oct. 27, Lary A. Rappaport, a partner with Proskauer LLP and counsel for Ralph Lauren, declined to comment on the case, per Ralph Lauren’s policy on pending litigation, he said.

A spokeswoman for Levi Strauss & Co. declined to comment on that company’s case Oct. 27. Attorneys for Michael Kors didn’t immediately respond to requests for comment for this story.

Deceptive Comparative Pricing Alleged. Ralph Lauren used allegedly false “Value Was” pricing and offered “Our Price” pricing displayed on the same sales labels for Polo Factory Products.

“By purchasing the items for the ‘Our Price’ [amount] instead of the ‘Value Was’ price, Plaintiff was led to believe that he saved a significant percentage on his purchases,” Branca’s amended complaint alleges.

But, because Ralph Lauren didn’t intend to sell or actually sell the items at the “Value Was” price, Branca “was deceived by the false price comparison into making a full retail purchase with no discount,” his complaint alleges.

Similarly, Gattinella, of Santa Barbara, Calif., alleges in her suit against Michael Kors that she was induced by a similar, allegedly deceptive price comparison, to purchase a pair of Side Anklez white jeans from a Kors Outlet in Camarillo, Calif.

The jeans listed an MSRP of \$120.00, “Our Price” of \$99.99, and then a reduced price of \$79.99. Gattinella said she was led to believe that she saved 33 percent on her purchase from the MSRP price. But, “[i]n reality, Michael Kors never intended, nor did they ever, sell the jeans at the represented MSRP price.”

The suits against Nordstrom and Levi’s—and suits filed by other plaintiffs’ attorneys against Saks Fifth Avenue, LLC, The Gap and Neiman Marcus—make similar claims. The complaint against Saks was filed Aug. 19 (*Malik v. Saks Fifth Avenue, LLC*, Cal. Super. Ct., No. BC555134, *complaint filed* 8/19/14).

How Will Retailers Respond? So, will these recent class actions cause retailers to respond and adjust their pricing practices in the future?

Kreger thinks so.

“Retailers will have to represent an honest price for products manufactured for sale specifically in outlets,” Kreger said. “The honest price is the actual price for which the product is offered for sale without a second, inflated price which is designed to deceive the consumer into thinking that the actual price is a discount or sale price.”

Alston & Bird partner Lindsay Carlson, whose practice focuses on consumer class action defense, said that, generally, retailers can take proactive measures to ensure they don’t run afoul of state consumer protection laws.

“I think that retailers will need to take a close look at their price advertising practices, and some may need to update the language they use to communicate with consumers regarding discounts and sales,” Carlson said in an Oct. 24 e-mail.

“For former price comparisons, retailers should be able to ‘show their work’ to justify the advertising of the comparative higher price consistent with the laws of the states in which they do business,” Carlson said.

Gattinella, Branca and Farwell are represented by the Law Offices of Wayne Kreger; Tycko, Zavareei & Spiva (or Tycko & Zavareei LLP) and others.

Michael Kors (USA), Inc., Michael Kors, LLC, Michael Kors Retail, Inc. and Michael Kors Stores, LLC are represented by Paul, Weiss, Rifkind, Wharton & Garrison LLP.

Ralph Lauren is represented by Proskauer LLP.

Rubenstein and Tova Malik are represented by Kirtland & Packard LLP.

The Neiman Marcus Group LLC is represented by K&L Gates LLP.

BY LISA HELEM

To contact the reporter on this story: Lisa Helem in Washington at lhelem@bna.com

To contact the editor responsible for this story: Steven Patrick at spatrick@bna.com

The Gattinella v. Michael Kors first amended complaint is at http://www.bloomberglaw.com/public/document/Gattinella_v_Michael_Kors_USA_Inc_et_al_Docket_No_114cv05731_SDNY.

The Branca v. Ralph Lauren first amended complaint is at http://www.bloomberglaw.com/public/document/Branca_v_Ralph_Lauren_Corp_Docket_No_114cv07097_SDNY_Sept_03_2014/1.

The Malik v. Saks Fifth Avenue, LLC complaint is at http://www.bloomberglaw.com/public/document/TOVA_MALIK_VS_SAKS_FIFTH_AVENUE_LLC_Docket_No_BC555134_Cal_Super_

To request permission to reuse or share this document, please contact permissions@bna.com. In your request, be sure to include the following information: (1) your name, company, mailing address, email and telephone number; (2) name of the document and/or a link to the document PDF; (3) reason for request (what you want to do with the document); and (4) the approximate number of copies to be made or URL address (if posting to a website).