

# NOW & NEXT

## Intellectual Property Alert

APRIL 20, 2023

### Online retailers reach \$197 million settlement over false advertising claims

By Joshua Pollack and Staci Jennifer Trager

Running constant sales or discounts can have significant financial consequences for retailers.



#### What's the Impact

- / Plaintiffs filed a motion in the Central District of California seeking preliminary approval of an eight-figure class action settlement with Boohoo and its subsidiaries.
- / Plaintiffs alleged in the case that Defendants falsely inflated the value of their merchandise because Defendants rarely sold their merchandise at the listed prices.
- / Retailers must be careful regarding the frequency and nature of their percentage-off promotions. If a retailer is constantly running some form of sale, they have risk of receiving a similar suit.

On April 10, 2023, plaintiffs representing themselves and a nationwide class of consumers filed a motion in federal court for preliminary approval of a \$197 million class action settlement with online retailer Boohoo and its subsidiaries Nasty Gal and PrettyLittleThing.

Under the settlement, each class member will receive a \$10 gift card with free shipping (for a total value of \$17.45 per card) to use toward the purchase of any item on the site from which they made a purchase. The gift cards have no expiration dates, blackout dates, minimum purchase requirements, or fees, and they may be used in conjunction with other offers and promotions. There are no restrictions on transferability and, when they are transferred to others, multiple gift cards may be combined (i.e., "stacked"). According to plaintiffs, the class consists of more than 9.4 million individuals with an anticipated distribution of over 11.3 million gift cards.

Plaintiffs contended in the case that Boohoo, Nasty Gal, and PrettyLittleThing perpetually advertised nearly all the products on their US websites with deceptive original prices, also referred to by Plaintiffs as "reference prices." Plaintiffs alleged the reference prices were deceptive because Defendants rarely sell their merchandise at those prices. Instead, according to Plaintiffs, Defendants' reference prices are significantly discounted on a near daily basis by sitewide percentage-off "promotions" or sales (e.g., "50% Off Everything"). Plaintiffs thus claimed that customers are deceived into a false belief that they are receiving a deep discount, when, according to Plaintiffs, they are receiving no such discount. As a result, Plaintiffs contended Defendants falsely inflated the value of their products and induced class members to buy items they would have never bought, or pay more than they otherwise would have paid, had they known the truth about Defendants' practices.

As part of the settlement, in addition to paying for the gift cards, Defendants agreed to conspicuously disclose on their product display pages that the original price advertised is not intended to be a former price, but instead merely reflects Defendants' opinion of the full value: *"Our percentage off promotions, discounts, or sale markdowns are customarily based on our own opinion of the value of this product, which is not intended to reflect a former price at which this product has sold in the recent past. This amount represents our opinion of the full retail value of this product today based on our own assessment after considering a number of factors."*

## Takeaways

Retailers often promote discounts off their regular prices. This is not problematic if the retailer consistently sells its merchandise at the higher, regular price and occasionally offers a percentage-off discount. However, if the retailer rarely, if ever, sells its merchandise for the "regular" price, such that customers are not really receiving a discount when there is a "sale," the retailer runs a significant risk of being sued for false advertising—which could have significant financial consequences for the retailer's business.

There are several potential ways to reduce this risk. One is to provide a written, conspicuous disclosure like the one Defendants agreed to in the Boohoo settlement. Another is to regularly change the reference price by not marking down items or excluding them from sales promotions until they have been offered for sale for a minimum period. Retailers should work with experienced counsel when considering the frequency and nature of their percentage-off promotions.

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