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CASE #: 19-2-13499-2 SEA

**SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY**

JENNIFER HARBERS,
for Herself, as a Private Attorney
General, and/or On Behalf Of All
Others Similarly Situated,

Plaintiff,

v.

EDDIE BAUER LLC,
and DOES 1–20, inclusive,

Defendants.

No. 19-2-13499-2 SEA

FIRST AMENDED CLASS ACTION
COMPLAINT FOR STATUTORY
DAMAGES AND INJUNCTIVE
RELIEF UNDER THE CONSUMER
PROTECTION ACT, RCW 19.86 AND
FOR INJUNCTIVE RELIEF UNDER
THE COMMERCIAL ELECTRONIC
MAIL ACT, RCW 19.190

JUDGE LUM, DEPT. 12

Plaintiff JENNIFER HARBERS, demanding trial by jury as to all issues so triable in a separate document to be filed, alleges as follows, on personal knowledge and/or on information and belief and/or upon the investigation of Plaintiff’s counsel, against Defendant EDDIE BAUER LLC (“Eddie Bauer”), and Defendants Does 1 through 20, inclusive:

I. INTRODUCTION

1. Defendant Eddie Bauer LLC (“Eddie Bauer”) is a retailer of outdoor clothing, accessories, and gear for men and women (www.eddiebauer.com). As alleged herein, Eddie Bauer has violated and continues to violate the Washington Consumer Protection Act, RCW 19.86, and/or the Washington Commercial Electronic Mail Act, RCW 19.190, by

1 transmitting emails to consumers in Washington and nationwide which contain false or
2 misleading information in the subject lines.

3 2. In short, Eddie Bauer transmits emails to consumers in Washington and
4 nationwide which state in the subject lines that Eddie Bauer is offering discounts at a specified
5 percentage off and/or that the discounts apply to “everything.” These statements are false or
6 misleading because, in reality, Eddie Bauer is not offering the products at the promised
7 discount and/or Eddie Bauer is not offering the discounts on “everything.”

8 3. Consequently, Plaintiff and the applicable class of consumers she represents are
9 entitled to statutory damages and injunctive relief under the Washington Consumer Protection
10 Act and injunctive relief under the Washington Commercial Electronic Mail Act, as well as
11 attorneys’ fees and costs.

12 **II. PARTIES**

13 4. Plaintiff Jennifer Harbers is a citizen of the United States of America and a
14 citizen of the State of Washington. She is an adult who resides in the City of Redmond, King
15 County, Washington State.

16 5. Defendant Eddie Bauer LLC is a limited liability company chartered under the
17 laws of the State of Delaware and which currently has and at all relevant times in the past had
18 its headquarters, executive office, principal place of business or nerve center in Bellevue,
19 Washington.

20 6. Defendants Doe 1 through Doe 20, inclusive, aided, abetted and/or dominated
21 Defendant Eddie Bauer LLC in such a manner that Doe 1 through Doe 20, inclusive, are each
22 directly, contributorily, vicariously, derivatively and/or otherwise liable for the acts or
23 omissions of Defendant Eddie Bauer LLC. Plaintiff is currently unaware of the true identities
24 of Doe 1 through Doe 20, inclusive; Plaintiff anticipates that, upon learning the true identities
25 of any of Doe 1 through Doe 20, inclusive, Plaintiff will either freely amend the operative
26 complaint or request leave from the Court to amend the operative complaint.

1 **III. JURISDICTION AND VENUE**

2 7. This Court has subject matter jurisdiction over this civil action pursuant to,
3 without limitation, Section 6 of Article IV of the Washington State Constitution (Superior
4 Court jurisdiction, generally) and RCW 19.86.090 (Superior Court jurisdiction over Consumer
5 Protection Act claims).

6 8. This Court has personal jurisdiction over each of the defendants pursuant to,
7 without limitation, RCW 4.28.185, in that: (1) Defendant Eddie Bauer LLC is headquartered in
8 Washington State and is authorized to do business and regularly conducts business in
9 Washington State; (2) the claims alleged herein arise from Defendant Eddie Bauer LLC's
10 activities within Washington State; and/or (3) Defendant Eddie Bauer LLC has committed
11 tortious acts within the State of Washington (as alleged, without limitation, throughout this
12 Complaint).

13 9. With regard to the cause of action brought pursuant to the Washington
14 Consumer Protection Act, this Court has personal jurisdiction over each of the defendants
15 pursuant to RCW 19.86.160. For example, and without limitation, Defendant Eddie Bauer LLC
16 has engaged in conduct in violation of RCW Chapter 19.86 which has had an impact in
17 Washington State which said chapter reprehends.

18 10. Venue is proper in King County Superior Court because, without limitation,
19 Plaintiff Harbers resides in King County; Defendant Eddie Bauer LLC is headquartered in King
20 County; a significant portion of the acts giving rise to this civil action occurred in King County;
21 and/or Defendant Eddie Bauer LLC intended to and did have a substantial and foreseeable
22 effect on trade or commerce in King County.

23 11. Within the jurisdiction of King County Superior Court, this civil action is
24 assigned to the Seattle Case Assignment Area because, without limitation, Defendant Eddie
25 Bauer LCC is headquartered in the City of Bellevue, King County, and Plaintiff resides in the
26 City of Redmond, King County.

1 **IV. FACTUAL ALLEGATIONS**

2 12. Defendant Eddie Bauer is a popular retailer which claims to offer “premium-
3 quality clothing, accessories, and gear for men and women that complement today’s modern
4 outdoor lifestyle.”

5 13. Eddie Bauer sells its products through its website, www.eddiebauer.com, and in
6 its retail stores. Eddie Bauer currently operates approximately 370 stores in North America,
7 with at least eight locations in Washington State. The Eddie Bauer website is accessible from
8 Washington State and nationwide, and consumers in Washington State and nationwide view the
9 contents of the Eddie Bauer website and purchase goods from Eddie Bauer’s website.

10 14. Almost all the products sold by Eddie Bauer are branded as Eddie Bauer
11 products, and are exclusively sold by Eddie Bauer.

12 **A. Background Information: Eddie Bauer’s “Sales” Are False, And Not**
13 **“Everything” Is On Sale.**

14 15. Eddie Bauer creates purported list prices for its Eddie Bauer-branded products
15 which are inflated far above Eddie Bauer’s intended and regular true selling prices for the
16 products. However, for nearly all of its products, these list prices are false and inflated where
17 Eddie Bauer rarely, if ever, offers the products at the list price. The list prices do not in fact
18 represent the value or regular selling price of the products. Eddie Bauer invents the inflated list
19 prices, which act as false reference prices for advertised false perpetual discounts, in order to
20 create the illusion that Eddie Bauer is offering “premium-quality” clothing and gear.

21 16. Eddie Bauer advertises perpetual “sales” where its products are consistently
22 discounted by 30% to 50% from Eddie Bauer’s self-created list price. For most days of the
23 year, Eddie Bauer advertises store-wide and website-wide sales of a fixed percentage (ranging
24 from 30% to 50%) off. For the other days of the year, Eddie Bauer continues to advertise sales
25 and discounts for the large majority of its products. Based on investigation of Plaintiff’s
26 counsel and on information and belief, Eddie Bauer’s online and in-store list and sales prices
27 are the same or substantially the same.

28 17. For example, based on Plaintiff’s counsel’s investigation, in 2017 there were a

1 total of 290 days in which Eddie Bauer advertised on its website a site-wide sale of either “xx%
2 Off Everything” or “xx% Off Your Entire Purchase.” For the remaining 75 days of 2017, Eddie
3 Bauer continued to offer approximately 60–70% of its products at a discounted price. There
4 was not a single day in 2017 where Eddie Bauer did not offer the majority of its products for
5 sale at a discounted price or offer a fixed percentage off (typically between 30-50% off) of
6 one’s entire purchase.

7 18. Plaintiff’s counsel has been monitoring Eddie Bauer’s website since
8 January 16, 2016, and has assembled a comprehensive historical database of daily prices and
9 screenshots of approximately 1.94 million daily offerings for 8,053 products over these 1,243
10 days.

11 19. Plaintiff’s counsel’s investigation and data demonstrates that only a tiny fraction
12 of products offered by Eddie Bauer in its stores and on its website is consistently offered
13 without an advertised discount. These few non-discounted products primarily consist of
14 sleeping bags, tents, and non-Eddie Bauer brand (i.e., third-party brand) products.

15 20. For the rest of Eddie Bauer’s products (more than 90% of its products), Eddie
16 Bauer’s discounts and list prices are false because Eddie Bauer rarely if ever offers its products
17 at the advertised list price.

18 21. Also, as further described below, when Eddie Bauer claims that “everything” (or
19 a similar word) is on sale, not “everything” is on sale. Typically, “everything” does not in fact
20 include sleeping bags, tents, and non-Eddie Bauer brand (i.e. third-party brand) products.



21 **B. Eddie Bauer Routinely Transmits Commercial Emails Containing False Or**
22 **Misleading Information In The Subject Lines.**

23 22. As part of its regular marketing plan, Eddie Bauer routinely transmits
24 commercial emails containing false or misleading information in the subject lines. (As used in
25 this Complaint, allegations that Eddie Bauer “transmitted” an email are allegations that Eddie
26 Bauer initiated the transmission of the email, conspired with another to initiate the transmission
27 of the email and/or assisted the transmission of the email.)

28 23. From at least November 24, 2017, Defendant Eddie Bauer has transmitted

1 numerous commercial electronic mail messages to Plaintiff Jennifer Harbers (and to a
2 nationwide class of consumers similarly situated to Ms. Harbers) containing false or misleading
3 information in the subject line.

4 24. Eddie Bauer transmitted at least twenty-seven (27) emails which falsely or
5 misleadingly stated “xx% Off Everything” or “xx% Off Your Purchase” or similar language in
6 the subject line. Plaintiff received each of these emails on the date, and containing the email
7 subject line, specified below:

| <u>Date</u> | <u>Email Subject Line</u> |
|-------------|--|
| 12/16/2017 |  Ho-Ho-Whoa! 50% Off Everything |
| 12/17/2017 | Limited Time! 50% Off EVERYTHING |
| 02/13/2018 | Starts Today! 40% Off Everything |
| 03/08/2018 | Take 30% Off EVERYTHING |
| 03/13/2018 | Starts Today! 40% Off Everything |
| 03/30/2018 | 50% Off Everything? This Is MADNESS! |
| 03/31/2018 | Spring Madness! 50%  FF EVERYTHING |
| 04/08/2018 | Last Day! 40% Off Everything |
| 04/26/2018 | Limited Time! 40% Off Your Purchase |
| 06/18/2018 | Last Day! 40% Off Everything |
| 06/28/2018 |  Starts Today! 50% OFF EVERYTHING |
| 07/02/2018 | Oooh! Ahhh! Everything's 50% Off |
| 07/17/2018 | 50% Off E-V-E-R-Y-T-H-I-N-G! |
| 08/03/2018 | Take 40% OFF EVERYTHING! |
| 08/31/2018 | Starts Today! 50% Off Everything |
| 09/04/2018 | Last Day! 50% Off Everything |
| 11/29/2018 |  FINAL HOURS! 50% Off Your Purchase |
| 12/16/2018 | 50% Off Everything + Special Deals! |
| 12/17/2018 | 50% Off Everything + 60% Off Fleece! |

| | |
|------------|---------------------------------------|
| 02/12/2019 | STARTS TODAY! 40% Off Everything! |
| 02/19/2019 | LAST DAY! 40% Off Everything |
| 03/22/2019 | STARTS TODAY! Save 40% On EVERYTHING! |
| 03/28/2019 | STARTS TODAY! 50% Off Everything |
| 03/30/2019 | Spring Madness! 50% off EVERYTHING! |
| 04/05/2019 | 50% Off Everything? This Is MADNESS! |
| 04/08/2019 | 50% Off Everything ENDS TODAY! |
| 04/08/2019 | LAST SHOOT! 50% Off EVERYTHING! |





25. The “xx% Off” statements in these email subject lines are false or misleading. Plaintiff thought—as would an ordinary and reasonable consumer—that the “xx% Off” statements were a percentage off the price at which Eddie Bauer previously offered its products in good faith for a significant period of time. In reality, Eddie Bauer calculated the “% Off” statements from fictitious list prices at which Eddie Bauer never offered its products, rarely offered its products, and/or temporarily offered its products in bad faith to concoct the so-called discount. There was no asterisk or other indicator in the subject line to notify the email recipients that Eddie Bauer had assigned these words and symbols an invented or subjective meaning rather than their ordinary or objective meaning.

26. The language in these email subject lines that the purported discounts were off of “Everything” was a second false statement in each of these email subject lines. Plaintiff thought—as would an ordinary and reasonable consumer—that the off “Everything” statements indicated that *all* of the products offered at Eddie Bauer’s stores and website were being offered at a discount. In fact, some products were not discounted, consisting primarily of sleeping bags, tents, and non-Eddie Bauer brand (i.e., third-party brand) products. There was no asterisk or other indicator in the subject line to notify the email recipients that Eddie Bauer had assigned “Everything” an invented or subjective meaning rather than its ordinary or objective meaning.

27. Likewise, the statements in the April 26, 2018 and November 29, 2018 email

1 subject lines that the purported discounts were “Off Your Purchase” were false or misleading.
 2 Plaintiff thought—as would an ordinary and reasonable consumer—that “Off Your Purchase”
 3 indicated that all of the products offered at Eddie Bauer’s stores and website were being offered
 4 at a discount. In reality, some products were not discounted, consisting primarily of sleeping
 5 bags, tents, and non-Eddie Bauer brand (i.e., third-party brand) products. There was no asterisk
 6 or other indicator in the subject line to notify consumers that Eddie Bauer had assigned the
 7 words “Off Your Purchase” an invented or subjective meaning rather than their ordinary or
 8 objective meaning.

9 28. Eddie Bauer also transmitted another sixteen (16) emails which falsely or
 10 misleadingly stated “xx% Off”, “Take xx% Off”, “Get xx% Off” or similar language in the
 11 subject line (unlike the email subject lines above, there was not a second and simultaneous false
 12 or misleading statement that “Everything” was discounted). Plaintiff received each of these
 13 emails on the date, and containing the email subject line, specified below:

| <u>Date</u> | <u>Email Subject Line</u> |
|-------------|--|
| 11/24/2017 |  Final Hours! 50% Off + Free Shipping |
| 11/26/2017 | Sunday Funday! 50% Off + Free Shipping |
| 11/27/2017 | Cyber Monday! 50% Off + Free Shipping |
| 11/27/2017 | Final Hours! 50% Off + Free Shipping |
| 11/28/2017 | Cyber Monday EXTENDED! 50% Off + Free Shipping |
| 11/28/2017 | Hours Left! 50% Off + Free Shipping |
| 12/12/2017 |  Final Hours! 50% Off + Free Shipping |
| 12/23/2017 | Semi-Annual Sale – 50% Off |
| 03/16/2018 | 40% Off + FREE SHIPPING! |
| 04/02/2018 | It’s Not T   late! Take 50% Off! |
| 07/17/2018 | Final Hours! 50% Off Ends Soon |
| 10/23/2018 | Shop ASAP! 40% Off Ends Today |
| 10/25/2018 | Use Code Inside. GET 50% OFF! |

| | |
|------------|--|
| 11/22/2018 | Happy Thanksgiving! Take 50% Off |
| 12/08/2018 | 50% Off + SPECIAL DEALS INSIDE! |
| 12/11/2018 |  Final Hours! 50% Off Ends Soon |

29. Plaintiff thought—as would an ordinary and reasonable consumer—that the “xx% Off”, “Take xx% Off”, and “Get xx% Off” statements were a percentage off the price at which Eddie Bauer previously offered that product in good faith for a significant period of time. In reality, Eddie Bauer calculated the “% Off” statements from fictitious list prices at which Eddie Bauer never offered that product, rarely offered that product, and/or temporarily offered that product in bad faith to concoct the so-called discount. There was no asterisk or other indicator in the subject line to notify the email recipients that Eddie Bauer had assigned these words and symbols an invented or subjective meaning rather than their ordinary or objective meaning.

30. Based on information and belief, Eddie Bauer transmitted, within the applicable limitations period, other emails with similarly false or misleading information in the subject line which were received by Plaintiff and/or by others similarly situated.

31. The false or misleading nature of Eddie Bauer’s statements was not obvious and was not reasonably ascertainable by Plaintiff or another ordinary and reasonable consumer; as such, the discovery rule should enlarge the applicable limitations period.

32. As of the date of the filing of this pleading, Plaintiff is still receiving Eddie Bauer’s commercial emails. Plaintiff would like to continue to receive Eddie Bauer’s commercial emails, provided that the subject lines of the emails do not contain false or misleading information.

1 **V. CLASS ACTION ALLEGATIONS**

2 33. Plaintiff Harbers brings this class-action lawsuit on behalf of herself and the
3 members of the following nationwide class (the “National Class”):

4 **All residents of the United States of America who, within the**
5 **applicable limitations period, received an email from or at the**
6 **behest of Eddie Bauer LLC that contained in the subject line:**
7 **(a) a “xx% Off” or similar statement and/or (b) a statement**
8 **indicating a discount on “Everything,” “Your Purchase,” or**
9 **similar language when one or more products were excluded**
10 **from the discount.**

11 34. In the alternative, Plaintiff Harbers brings this class-action lawsuit on behalf of
12 herself and the members of the following Washington State class (the “Washington Class”):

13 **All residents of the State of Washington who, within the**
14 **applicable limitations period, received an email from or at the**
15 **behest of Eddie Bauer LLC that contained in the subject line:**
16 **(a) a “xx% Off” or similar statement and/or (b) a statement**
17 **indicating a discount on “Everything,” “Your Purchase,” or**
18 **similar language when one or more products were excluded**
19 **from the discount.**

20 35. Plaintiff pleads the National Class and the Washington Class as alternatives
21 because a discrete factual issue may determine whether Eddie Bauer is liable to the National
22 Class or to the Washington Class. If Plaintiff establishes by the requisite burden of persuasion
23 that Eddie Bauer transmitted one or more emails with a false or misleading subject line from “a
24 computer located in Washington” (RCW 19.190.020(1)), then Eddie Bauer faces liability to the
25 National Class for its misconduct within the State of Washington. *See Thornell v. Seattle*
26 *Service Bureau, Inc.*, 184 Wn.2d 793, 796 (2015) (nationwide liability under Consumer
27 Protection Act for defendant headquartered in Washington State). In the unlikely event Plaintiff
28 cannot establish said fact, then Eddie Bauer still faces significant alternative liability—to the
class of Washington State residents to whom Eddie Bauer transmitted emails with false or
misleading subject lines. *See* RCW 19.190.020(1) (“to an electronic mail address that the
sender knows, or has reason to know, is held by a Washington resident”).

1 36. The term “Class” as used in this Complaint is a reference to either or both of the
2 National Class and/or the Washington Class as context dictates.

3 37. Specifically excluded from the Class are each defendant, any entity in which a
4 defendant has a controlling interest or which has a controlling interest in a defendant, a
5 defendant’s agents and employees and attorneys, the bench officers to whom this civil action is
6 assigned, and the members of each bench officer’s staff and immediate family.

7 38. **Numerosity.** Plaintiff does not know the exact number of Class members but is
8 informed and believes that the Class easily comprises tens of thousands of people in
9 Washington State alone. As such, Class members are so numerous that joinder of all members
10 is impracticable.

11 39. **Commonality and Predominance.** Well-defined, nearly identical legal or factual
12 questions affect the members of the Class. These questions predominate over questions that
13 might affect individual Class members. These common questions include, but are not limited
14 to, the following:

- 15 a. Eddie Bauer’s policies and actions regarding the content of its
16 promotional emails;
- 17 b. The accuracy of the subject lines of Eddie Bauer’s promotional emails;
- 18 c. Whether the pled conduct of Eddie Bauer is injurious to the public
19 interest;
- 20 d. Whether Eddie Bauer should be ordered to pay statutory damages; and/or
- 21 e. Whether Eddie Bauer should be enjoined from further engaging in the
22 misconduct alleged herein.

23 40. The prosecution of separate actions by individual members of the Class would
24 create a risk of inconsistent or varying adjudications with respect to individual members of the
25 Class which would establish incompatible standards of conduct for the party opposing the class.

26 41. The party opposing the Class has acted or refused to act on grounds generally
27 applicable to the Class, thereby making appropriate final injunctive relief or corresponding
28 declaratory relief with respect to the Class as a whole.

1 47. The Washington Consumer Protection Act (the “CPA”), RCW 19.86, was first
2 enacted in 1961 and is Washington’s principal consumer protection statute. The CPA “replaces
3 the now largely discarded standard of *caveat emptor* with a standard of fair and honest
4 dealing.” Washington Pattern Jury Instruction Civil No. 310.00 (Consumer Protection Act—
5 Introduction).

6 48. The CPA’s primary substantive provision declares unfair methods of
7 competition and unfair or deceptive acts or practices to be unlawful. RCW 19.86.020. “The
8 purpose of the private right of action is to enlist the aid of private individuals to assist in the
9 enforcement of the [CPA]. Private consumers may obtain injunctive relief, even if the
10 injunction would not directly affect the individual’s own rights. Thus, the private right of action
11 serves the public interest by preventing unfair or deceptive practices from continuing
12 unchecked.” Washington Pattern Jury Instruction Civil No. 310.00 (Consumer Protection
13 Act—Introduction) (citations and punctuation omitted).

14 49. The CPA recognizes and incorporates *per se* violations. The Washington
15 Legislature routinely prohibits certain specified conduct but, instead of creating a new and
16 independent private right of action to enforce the prohibition, the Legislature deems the
17 unlawful conduct to be a *per se* violation of the CPA. If a defendant engages in that unlawful
18 conduct, a plaintiff may file a CPA complaint alleging the *per se* violation and seek the
19 remedies which Plaintiff chooses to seek that are available under the CPA and/or under the
20 statute which forbids the *per se* violation. *See* Washington Pattern Jury Instruction Civil
21 No. 310.03 (*Per Se* Violation of Consumer Protection Act) and Appendix H (Consumer
22 Protection Act *Per Se* Violations).

23 50. A plaintiff can plead a violation of the Washington Consumer Protection Act by
24 pleading that the CPA was violated *per se* due to a violation of the Washington Commercial
25 Electronic Mail Act. *See* RCW 19.190.030(1)(b) (“It is a violation of the consumer protection
26 act, chapter 19.86 RCW . . . to initiate the transmission of a commercial electronic mail
27 message that . . . [c]ontains false or misleading information in the subject line.”); Washington
28 Statutes of 1998, chapter 149, § 4 (approved by Governor on March 25, 1998).

1 51. The Washington Commercial Electronic Mail Act (“CEMA”) prohibits a person
2 from initiating the transmission from a computer located in Washington State of a commercial
3 electronic mail message which contains false or misleading information in the subject line.
4 RCW 19.190.020(1)(b). CEMA also prohibits a person from initiating the transmission to an
5 electronic mail address that the sender knows, or has reason to know, is held by a Washington
6 State resident of a commercial electronic mail message that contains false or misleading
7 information in the subject line. RCW 19.190.020(1)(b).

8 52. A plaintiff who successfully pleads and proves a CEMA violation as a *per se*
9 violation of the CPA may recover the remedies which Plaintiff chooses to seek that are
10 available under the CPA (e.g., injunctive relief, attorneys’ fees and costs (RCW 19.86.090))
11 and/or the remedies available under CEMA (e.g., statutory damages of \$500 per email sent in
12 violation of CEMA and injunctive relief (RCW 19.190.040, RCW 19.190.090)).

13 53. Plaintiff Harbers’ actual damages are \$0.00; to the extent that Ms. Harbers seeks
14 damages, she seeks *only* statutory damages.

15 54. Defendant Eddie Bauer LLC has initiated the transmission of numerous
16 commercial electronic mail messages to Plaintiff Harbers (the “Emails”). The Emails were
17 electronic mail messages, in that they were electronic messages sent to an electronic mail
18 address; the Emails from Eddie Bauer also referred to an internet domain, whether or not
19 displayed, to which an electronic mail message can or could be sent or delivered.

20 55. Eddie Bauer sent the Emails for the purpose of promoting goods or services for
21 sale or lease. Eddie Bauer was the original sender of the Emails.

22 56. Plaintiff Harbers received the Emails at her electronic mail address, which is the
23 destination, commonly expressed as a string of characters, at which she receives and to which
24 electronic mail may be sent or delivered.

25 57. Eddie Bauer initiated the transmission, conspired with another to initiate the
26 transmission and/or assisted the transmission of the Emails from a computer located in
27 Washington State. In the alternative and/or cumulatively, Eddie Bauer initiated the
28 transmission, conspired with another to initiate the transmission and/or assisted the

1 transmission of the Emails to one or more electronic mail addresses that Eddie Bauer knew, or
2 had reason to know, were held by a Washington State resident, i.e., Ms. Harbers and/or others
3 similarly situated.

4 58. At all relevant times, Eddie Bauer knew that the intended recipient
5 (Ms. Harbers) was a resident of the State of Washington because, without limitation, Eddie
6 Bauer possessed actual knowledge of Ms. Harbers' state of residence, Eddie Bauer possessed
7 constructive knowledge of Ms. Harbers' state of residence, information was available to Eddie
8 Bauer upon request from the registrant of the internet domain name contained in the recipient's
9 electronic mail address, and/or Eddie Bauer otherwise knew or should have known or had
10 reason to know that Ms. Harbers was a resident of the State of Washington.

11 59. The subject line of each Email contained "xx% Off" language and/or the words
12 "Everything" or "Your Purchase." None of the Emails had a subject line containing an asterisk
13 or other indication that the words in the subject line had a special or invented meaning.

14 60. In violation of the Washington Consumer Protection Act (as based *per se* upon a
15 violation of the Washington Commercial Electronic Mail Act) and for the reasons alleged
16 hereinabove, the subject line of each Email contained false or misleading information.

17 61. Generally, a plaintiff pleading a claim under the Washington Consumer
18 Protection Act must plead five necessary elements: (1) an unfair or deceptive act or practice (2)
19 in trade or commerce (3) that affects the public interest, (4) injury to plaintiff's business and
20 property, and (5) causation. *Wright v. Lyft, Inc.*, 189 Wn.2d 718, 728 (2017). Because Plaintiff
21 alleges a *per se* CPA violation by alleging a CEMA violation, all of these five elements are
22 satisfied as a matter of law. *Id.* at 724.

23 62. Eddie Bauer's misconduct as alleged herein was not performed in good faith.
24 Eddie Bauer's misconduct as alleged herein was not reasonable in relation to the development
25 and preservation of business.

26 63. The balance of the equities favors the entry of permanent injunctive relief
27 against Defendant Eddie Bauer. Plaintiff, the members of the Class and the general public will
28 be irreparably harmed absent the entry of permanent injunctive relief against Defendant.

1 Plaintiff, the members of the Class and the general public lack an adequate remedy at law. A
2 permanent injunction against Defendant is in the public interest. Defendant's unlawful behavior
3 is, based on information and belief, ongoing as of the date of the filing of this pleading; absent
4 the entry of a permanent injunction, Defendant's unlawful behavior will not cease and, in the
5 unlikely event that it voluntarily ceases, is likely to reoccur.

6 **COUNT II**

7 **Violation of the Washington Commercial Electronic Mail Act**
8 **(RCW Chapter 19.190)**
9 **(For Injunctive Relief Only)**
10 **AGAINST DEFENDANT EDDIE BAUER LLC**
11 **AND DEFENDANTS DOES 1 THROUGH 20**

12 64. Plaintiff realleges and incorporates by reference all paragraphs alleged
13 hereinbefore.

14 65. Plaintiff Harbers pleads this count in three separate capacities: in her individual
15 capacity, as a private attorney general seeking the imposition of public injunctive relief and/or
16 as a putative class representative serving on behalf of all others similarly situated.

17 66. The Washington Commercial Electronic Mail Act ("CEMA"), RCW 19.190,
18 creates an independent but limited private of right of action which can be asserted by, among
19 others, a person who is the recipient of a commercial electronic mail message which contains
20 false or misleading information in the subject line. RCW 19.190.030(1)(b). A plaintiff who
21 successfully alleges and proves such a violation may obtain, among other things, an injunction
22 against the person who initiated the transmission. RCW 19.190.090(1). It is Plaintiff's intent in
23 this count to plead an independent CEMA cause of action only to the limited extent that it is
24 recognized by law, e.g., when a plaintiff seeks injunctive relief. *Wright v. Lyft, Inc.*, 189 Wn.2d
25 718, 728 n. 3 (2017) ("we note that a plaintiff may bring an action to enjoin any CEMA
26 violation."); *Gragg v. Orange Cab Co.*, 145 F. Supp. 3d 1046, 1052 (W.D. Wash. 2015).

27 67. Defendant Eddie Bauer LLC has initiated the transmission of numerous
28 commercial electronic mail messages to Plaintiff Harbers (the "Emails"). The Emails were
electronic mail messages, in that they were each an electronic message sent to an electronic
mail address; the Emails from Eddie Bauer also referred to an internet domain, whether or not

1 displayed, to which an electronic mail message can or could be sent or delivered.

2 68. Eddie Bauer sent the Emails for the purpose of promoting goods or services for
3 sale or lease. Eddie Bauer was the original sender of the Emails.

4 69. Plaintiff Harbers received the Emails at her electronic mail address, which is the
5 destination, commonly expressed as a string of characters, at which she receives and to which
6 electronic mail may be sent or delivered.

7 70. Eddie Bauer initiated the transmission, conspired with another to initiate the
8 transmission and/or assisted the transmission of the Emails from a computer located in
9 Washington State. In the alternative and/or cumulatively, Eddie Bauer initiated the
10 transmission, conspired with another to initiate the transmission and/or assisted the
11 transmission of the Emails to one or more electronic mail addresses that Eddie Bauer knew, or
12 had reason to know, were held by a Washington State resident, i.e., Ms. Harbers and/or others
13 similarly situated.

14 71. At all relevant times, Eddie Bauer knew that the intended recipient
15 (Ms. Harbers) was a resident of the State of Washington because, without limitation, Eddie
16 Bauer possessed actual knowledge of Ms. Harbers' state of residence, Eddie Bauer possessed
17 constructive knowledge of Ms. Harbers' state of residence, information was available to Eddie
18 Bauer upon request from the registrant of the internet domain name contained in the recipient's
19 electronic mail address, and/or Eddie Bauer otherwise knew or should have known or had
20 reason to know that Ms. Harbers was a resident of the State of Washington.

21 72. The subject line of each Email contained "xx% Off" language and/or the words
22 "Everything" or "Your Purchase." None of the Emails had a subject line containing an asterisk
23 or other indication that the words in the subject line had a special or invented meaning.

24 73. In violation of CEMA and for the reasons alleged hereinabove, the subject line
25 of each Email contained false or misleading information.

26 74. The balance of the equities favors the entry of permanent injunctive relief
27 against Defendant Eddie Bauer. Plaintiff, the members of the Class and the general public will
28 be irreparably harmed absent the entry of permanent injunctive relief against Defendant.

1 Plaintiff, the members of the Class and the general public lack an adequate remedy at law. A
2 permanent injunction against Defendant is in the public interest. Defendant's unlawful behavior
3 is, based on information and belief, ongoing as of the date of the filing of this pleading; absent
4 the entry of a permanent injunction, Defendant's unlawful behavior will not cease and, in the
5 unlikely event that it voluntarily ceases, is likely to reoccur.

6 **PRAYER FOR RELIEF**

7 Plaintiff JENNIFER HARBERS, on behalf of herself individually, as a private attorney
8 general, and/or on behalf of the Class of all others similarly situated, hereby respectfully
9 requests that this Court order relief and enter judgment against Defendant Eddie Bauer LLC
10 and/or Defendants Does 1 through 20, inclusive, individually, jointly, severally and/or as
11 otherwise appropriate, as follows:

12 **As To The First Claim (Violation of the Washington Consumer Protection Act):**

13 A. For statutory damages of \$500 to be awarded to Plaintiff and to each member of
14 the Class for each instance in which a defendant initiated (or conspired with another to initiate
15 or assisted) the transmission of a commercial electronic mail message which contained false or
16 misleading information in the subject line (an amount of statutory damages which will be
17 proven at trial but which Plaintiff estimates will be at least \$25 million per violative email
18 multiplied by more than 43 violative emails) pursuant to, without limitation, RCW 19.190.040;

19 B. For an order that each Defendant be permanently enjoined from the unlawful
20 conduct alleged herein pursuant to, without limitation, RCW 19.86.090;

21 **As To The Second Claim (Violation of the Washington Commercial Electronic**
22 **Mail Act):**

23 C. For an order that each Defendant be permanently enjoined from the unlawful
24 conduct alleged herein pursuant to, without limitation, RCW 19.190.090(1);

25 **As To Each And Every Claim:**

26 D. For an order certifying the proposed Class and appointing Plaintiff and her
27 counsel to represent the Class;

1 E. For an order that each Defendant be permanently enjoined from the unlawful
2 conduct alleged herein;

3 F. For an order that the Court retain jurisdiction to police Defendants' compliance
4 with the permanent injunctive relief;

5 G. For post-judgment interest to the extent allowed by law;

6 H. For attorneys' fees to the extent allowed by law; and/or

7 I. For costs to the extent allowed by law.

8 DATED this 12th day of June, 2019.

9 Presented by:

10 HATTIS & LUKACS

11
12 By: 
13 Daniel M. Hattis

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24 Attorneys for Plaintiff Jennifer Harbers
25 and the Proposed Class
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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that, on the 12th day of June, 2019, at approximately 2:45 a.m., the document attached hereto was filed with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all counsel on record in the matter.

DATED this 12th day of June, 2019.

/s/ Daniel M. Hattis
Daniel M. Hattis, WSBA No. 50428

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