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ALAMEDA COUNTY

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CLERK OF
THE SUPERIOR COURT
By Shabra Iyamu, Deputy

CASE NUMBER:
RG20080746

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9 **CONSUMER ADVOCACY GROUP, INC.**

10 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

11 **COUNTY OF ALAMEDA**

12 **CONSUMER ADVOCACY GROUP, INC.,**
13 in the public interest,

14 Plaintiff,

15 v.

16 **GROUPON, INC.,** a Delaware Corporation;
17 and DOES 1-10,

18 Defendants.

CASE NO.

**COMPLAINT FOR PENALTY AND
INJUNCTION**

Violation of Proposition 65, the Safe
Drinking Water and Toxic Enforcement
Act of 1986 (*Health & Safety Code, §
25249.5, et seq.*)

**ACTION IS AN UNLIMITED CIVIL
CASE (exceeds \$25,000)**

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22 Plaintiff CONSUMER ADVOCACY GROUP, INC. alleges a cause of action against
23 defendants GROUPON, INC., and DOES 1-10 as follows:
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THE PARTIES

- 1
- 2 1. Plaintiff CONSUMER ADVOCACY GROUP, INC. ("Plaintiff" or "CAG") is an
- 3 organization qualified to do business in the State of California. CAG is a person within
- 4 the meaning of Health and Safety Code Section 25249.11, subdivision (a). CAG, acting
- 5 as a private attorney general, brings this action in the public interest as defined under
- 6 Health and Safety Code Section 25249.7, subdivision (d).
- 7 2. Defendant GROUPON, INC. ("GROUPON") is a Delaware Corporation qualified to do
- 8 business in Delaware and doing business in the State of California at all relevant times
- 9 herein.
- 10 3. Plaintiff is presently unaware of the true names and capacities of defendants DOES 1-10,
- 11 and therefore sues these defendants by such fictitious names. Plaintiff will amend this
- 12 Complaint to allege their true names and capacities when ascertained. Plaintiff is
- 13 informed, believes, and thereon alleges that each fictitiously named defendant is
- 14 responsible in some manner for the occurrences herein alleged and the damages caused
- 15 thereby.
- 16 4. At all times mentioned herein, the term "Defendants" includes GROUPON, and DOES
- 17 1-10.
- 18 5. Plaintiff is informed and believes, and thereon alleges that each of the Defendants at all
- 19 times mentioned herein have conducted business within the State of California.
- 20 6. Upon information and belief, at all times relevant to this action, each of the Defendants,
- 21 including DOES 1-10, was an agent, servant, or employee of each of the other
- 22 Defendants. In conducting the activities alleged in this Complaint, each of the
- 23 Defendants was acting within the course and scope of this agency, service, or
- 24 employment, and was acting with the consent, permission, and authorization of each of
- 25 the other Defendants. All actions of each of the Defendants alleged in this Complaint
- 26 were ratified and approved by every other Defendant or their officers or managing
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1 agents. Alternatively, each of the Defendants aided, conspired with and/or facilitated the
2 alleged wrongful conduct of each of the other Defendants.

- 3 7. Plaintiff is informed, believes, and thereon alleges that at all relevant times, each of the
4 Defendants was a person doing business within the meaning of Health and Safety Code
5 Section 25249.11, subdivision (b), and that each of the Defendants had ten (10) or more
6 employees at all relevant times.

7 JURISDICTION

- 8 8. The Court has jurisdiction over this lawsuit pursuant to California Constitution Article
9 VI, Section 10, which grants the Superior Court original jurisdiction in all causes except
10 those given by statute to other trial courts. This Court has jurisdiction over this action
11 pursuant to Health and Safety Code Section 25249.7, which allows enforcement of
12 violations of Proposition 65 in any Court of competent jurisdiction.
- 13 9. This Court has jurisdiction over Defendants named herein because Defendants either
14 reside or are located in this State or are foreign corporations authorized to do business in
15 California, are registered with the California Secretary of State, or who do sufficient
16 business in California, have sufficient minimum contacts with California, or otherwise
17 intentionally avail themselves of the markets within California through their
18 manufacture, distribution, promotion, marketing, or sale of their products within
19 California to render the exercise of jurisdiction by the California courts permissible
20 under traditional notions of fair play and substantial justice.
- 21 10. Venue is proper in the County of Alameda because one or more of the instances of
22 wrongful conduct occurred, and continues to occur, in the County of Alameda and/or
23 because Defendants conducted, and continue to conduct, business in the County of
24 Alameda with respect to the consumer product that is the subject of this action.

25 BACKGROUND AND PRELIMINARY FACTS

- 26 11. In 1986, California voters approved an initiative to address growing concerns about
27 exposure to toxic chemicals and declared their right "[t]o be informed about exposures to
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1 chemicals that cause cancer, birth defects, or other reproductive harm." Ballot Prop.,
2 Proposed Law, Gen. Elec. (Nov. 4, 1986) at p. 3. The initiative, The Safe Drinking
3 Water and Toxic Enforcement Act of 1986, codified at Health and Safety Code Sections
4 25249.5, *et seq.* ("Proposition 65"), helps to protect California's drinking water sources
5 from contamination, to allow consumers to make informed choices about the products
6 they buy, and to enable persons to protect themselves from toxic chemicals as they see
7 fit.

8 12. Proposition 65 requires the Governor of California to publish a list of chemicals known
9 to the state to cause cancer, birth defects, or other reproductive harm. *Health & Safety*
10 *Code* § 25249.8. The list, which the Governor updates at least once a year, contains over
11 700 chemicals and chemical families. Proposition 65 imposes warning requirements and
12 other controls that apply to Proposition 65-listed chemicals.

13 13. All businesses with ten (10) or more employees that operate or sell products in California
14 must comply with Proposition 65. Under Proposition 65, businesses are: (1) prohibited
15 from knowingly discharging Proposition 65-listed chemicals into sources of drinking
16 water (*Health & Safety Code* § 25249.5), and (2) required to provide "clear and
17 reasonable" warnings before exposing a person, knowingly and intentionally, to a
18 Proposition 65-listed chemical (*Health & Safety Code* § 25249.6).

19 14. Proposition 65 provides that any person "violating or threatening to violate" the statute
20 may be enjoined in any court of competent jurisdiction. *Health & Safety Code* §
21 25249.7. "Threaten to violate" means "to create a condition in which there is a
22 substantial probability that a violation will occur." *Health & Safety Code* § 25249.11(e).
23 Defendants are also liable for civil penalties of up to \$2,500.00 per day per violation,
24 recoverable in a civil action. *Health & Safety Code* § 25249.7(b).

25 15. Plaintiff identified certain practices of manufacturers and distributors of Sandals of
26 exposing, knowingly and intentionally, persons in California to Di-n-butyl Phthalate
27 ("DBP") without first providing clear and reasonable warnings of such to the exposed
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1 persons prior to the time of exposure. Plaintiff later discerned that Defendants engaged
2 in such practice.

3 16. On December 2, 2005, the Governor of California added DBP to the list of chemicals
4 known to the State to cause developmental and reproductive toxicity (*Cal. Code Regs.*
5 tit. 27, § 27001(c)). Pursuant to Health and Safety Code Sections 25249.9 and 25249.10,
6 twenty (20) months after addition of DBP to the list of chemicals known to the State to
7 cause reproductive and developmental toxicity, DBP became fully subject to Proposition
8 65 warning requirements and discharge prohibitions.

9 SATISFACTION OF PRIOR NOTICE

10 17. On or about August 11, 2020, Plaintiff gave notice of alleged violations of Health and
11 Safety Code Section 25249.6, concerning consumer products exposures subject to a
12 private action to GROUPON and to the California Attorney General, County District
13 Attorneys, and City Attorneys for each city containing a population of at least 750,000
14 people in whose jurisdictions the violations allegedly occurred, concerning Sandals.

15 18. Before sending the notice of alleged violations, Plaintiff investigated the consumer
16 products involved, the likelihood that such products would cause users to suffer
17 significant exposures to DBP, and the corporate structure of each of the Defendants.

18 19. Plaintiff's notice of alleged violation included a Certificate of Merit executed by the
19 attorney for the noticing party, CAG. The Certificate of Merit stated that the attorney for
20 Plaintiff who executed the certificate had consulted with at least one person with relevant
21 and appropriate expertise who reviewed data regarding the exposures to DBP, the subject
22 Proposition 65-listed chemical of this action. Based on that information, the attorney for
23 Plaintiff who executed the Certificate of Merit believed there was a reasonable and
24 meritorious case for this private action. The attorney for Plaintiff attached to the
25 Certificate of Merit served on the Attorney General the confidential factual information
26 sufficient to establish the basis of the Certificate of Merit.

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- 1 20. Plaintiff's notice of alleged violations also included a Certificate of Service and a
2 document entitled "The Safe Drinking Water & Toxic Enforcement Act of 1986
3 (Proposition 65) A Summary." *Health & Safety Code* § 25249.7(d).
- 4 21. Plaintiff is commencing this action more than sixty (60) days from the dates that Plaintiff
5 gave notice of the alleged violations to Groupon, and the public prosecutors
6 referenced in Paragraph 17.
- 7 22. Plaintiff is informed, believes, and thereon alleges that neither the Attorney General, nor
8 any applicable district attorney or city attorney has commenced and is diligently
9 prosecuting an action against the Defendants.

10 FIRST CAUSE OF ACTION

11 (By CONSUMER ADVOCACY GROUP, INC. and against Groupon, and
12 DOES 1-10 for Violations of Proposition 65, The Safe Drinking Water and Toxic
13 Enforcement Act of 1986 (*Health & Safety Code*, §§ 25249.5, *et seq.*))

14 Footwear

- 15 23. Plaintiff repeats and incorporates by reference paragraphs 1 through 22 of this complaint
16 as though fully set forth herein.
- 17 24. Each of the Defendants is, and at all times mentioned herein was, a manufacturer,
18 distributor, promoter, or retailer of Sandals, including but not limited to: Black Sandals
19 with Rhinestones; "Henry Ferrera ® Collection"; "Style No: Hype-118, Color: Black.
20 Size 11"; UPC 6 88946 95697 3".
- 21 25. Sandals contain DBP.
- 22 26. Defendants knew or should have known that DBP has been identified by the State of
23 California as a chemical known to cause developmental and reproductive toxicity and
24 therefore was subject to Proposition 65 warning requirements. Defendants were also
25 informed of the presence of DBP in Sandals within Plaintiff's notice of alleged violations
26 further discussed above at Paragraph 17.
- 27 27. Plaintiff's allegations regarding Sandals concerns "[c]onsumer products exposure[s],"
28 which "is an exposure that results from a person's acquisition, purchase, storage,

1 consumption, or other reasonably foreseeable use of a consumer good, or any exposure
2 that results from receiving a consumer service." *Cal. Code Regs. tit. 27, § 25602(b)*.

3 Sandals are consumer products, and, as mentioned herein, exposures to DBP took place
4 as a result of such normal and foreseeable consumption and use.

5 28. Plaintiff is informed, believes, and thereon alleges that between August 11, 2017 and the
6 present, each of the Defendants knowingly and intentionally exposed California
7 consumers and users of Sandals, which Defendants manufactured, distributed, or sold as
8 mentioned above, to DBP, without first providing any type of clear and reasonable
9 warning of such to the exposed persons before the time of exposure. Defendants have
10 distributed and sold Sandals in California. Defendants know and intend that California
11 consumers will use and consume Sandals, thereby exposing them to DBP. Defendants
12 thereby violated Proposition 65.

13 29. The principal routes of exposure are through dermal contact, ingestion and inhalation.
14 Persons sustain exposures by handling or wearing Sandals without wearing gloves or any
15 other personal protective equipment, or by touching bare skin or mucous membranes
16 with gloves after handling Sandals, as well as through direct and indirect hand to mouth
17 contact, hand to food contact, hand to mucous membrane, transdermal absorption from
18 the Sandals during wearing and use, as well as through environmental mediums that
19 carry the DBP once contained within the Sandals.

20 30. Plaintiff is informed, believes, and thereon alleges that each of Defendants' violations of
21 Proposition 65 as to Sandals have been ongoing and continuous, as Defendants engaged
22 and continue to engage in conduct which violates Health and Safety Code Section
23 25249.6, including the manufacture, distribution, promotion, and sale of Sandals, so that
24 a separate and distinct violation of Proposition 65 occurred each and every time a person
25 was exposed to DBP by Sandals as mentioned herein.

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- 1 31. Plaintiff is informed, believes, and thereon alleges that each violation of Proposition 65
2 mentioned herein is ever continuing. Plaintiff further alleges and believes that the
3 violations alleged herein will continue to occur into the future.
- 4 32. Based on the allegations herein, Defendants are liable for civil penalties of up to
5 \$2,500.00 per day per individual exposure to DBP from Sandals, pursuant to Health and
6 Safety Code Section 25249.7(b).
- 7 33. Plaintiff has engaged in good faith efforts to resolve the claims alleged herein prior to
8 filing this Complaint.


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10 **PRAYER FOR RELIEF**

11 Plaintiff demands against each of the Defendants as follows:

- 12 1. A permanent injunction mandating Proposition 65-compliant warnings;
13 2. Penalties pursuant to Health and Safety Code Section 25249.7, subdivision (b);
14 3. Costs of suit;
15 4. Reasonable attorney fees and costs; and
16 5. Any further relief that the court may deem just and equitable.

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18 Dated: November 19, 2020

YERUSHALMI & YERUSHALMI*

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21 _____
22 Reuben Yeroushalmi
23 Attorneys for Plaintiff,
24 CONSUMER ADVOCACY GROUP, INC.