

1 Reuben Yeroushalmi (SBN 193981)
2 **YEROUSHALMI & YEROUSHALMI***
3 9100 Wilshire Boulevard, Suite 240W
4 Beverly Hills, CA 90212
5 Telephone: (310) 623-1926
6 Facsimile: (310) 623-1930

7 Attorneys for Plaintiff,
8 CONSUMER ADVOCACY GROUP, INC.

9 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
10 **COUNTY OF ALAMEDA**

11 CONSUMER ADVOCACY GROUP, INC.,
12 in the public interest,

13 Plaintiff,

14 v.

15 Groupon, INC., a Delaware Corporation;
16 and DOES 1-10,

17 Defendants.

CASE NO. RG20080746

[PROPOSED] CONSENT JUDGMENT

Health & Safety Code § 25249.5 *et seq.*

Complaint Filed: November 20, 2020

18 **1. INTRODUCTION**

19 1.1 This Consent Judgment is entered into by and between Plaintiff, Consumer
20 Advocacy Group, Inc. (referred to as “CAG”) acting on behalf of itself and in the public interest,
21 and Defendant Groupon, Inc. (“Groupon” or “Settling Defendant”), each a party to the action
22 and collectively referred to as “Parties” or individually referred to as “Party.”

23 1.2 Defendants and Covered Products

24 1.2.1 CAG alleges that Groupon, Inc. is a Delaware Corporation which employs ten or
25 more persons. For purposes of this Consent Judgment only, Groupon is deemed a person in the
26 course of doing business in California and subject to the provisions of the Safe Drinking Water
27
28

1 and Toxic Enforcement Act of 1986, California Health & Safety Code §§ 25249.6 et seq.
2 (“Proposition 65”).

3 1.2.2 CAG alleges that Settling Defendant manufactures, sells, and/or distributes
4 consumer products in California. Groupon denies that it currently manufactures, sells, and/or
5 distributes products in California and asserts that it hosts and operates a marketing platform on
6 which consumer products are sold by third parties.

7 1.3 Listed Chemicals

8 1.3.1 Di-n-butyl Phthalate (“DBP”) has been listed by the State of California as a
9 chemical known to cause reproductive and developmental toxicity.

10 1.4 Notices of Violation

11 1.4.1 On or about August 11, 2020, CAG served a “60-Day Notice of Intent to Sue for
12 Violation of the Safe Drinking Water and Toxic Enforcement Act of 1986” (AG# 2020-02073)
13 (“Notice”) to Groupon and United Family Trading Corp., d/b/a Henry Ferrara Collection
14 (“Henry Ferrara”), a third-party seller and manufacturer of footwear products that contracted
15 with Groupon to supply products sold on Groupon’s platform. The Notice alleged violations of
16 Health & Safety Code § 25249.6 for failing to warn individuals in California of exposures to
17 DBP contained in certain Sandals that Henry Ferrara manufactured and supplied to customers
18 by direct-shipment. No public enforcer has commenced or diligently prosecuted the allegations
19 set forth in the Notice.

20 1.5 Complaints

21 1.5.1 On November 20, 2020, CAG filed a Complaint for civil penalties and injunctive
22 relief (“Complaint”) in Alameda County Superior Court, Case No. RG20080746 against
23 Groupon and DOES 1-10. The Complaint alleges, among other things, that Groupon violated
24 Proposition 65 for allegedly failing to give clear and reasonable warnings of alleged exposure to
25 Listed Chemicals from Covered Products. Groupon filed an Answer to the Complaint
26 specifically denying that it violated Proposition 65.

27 1.6 Consent to Jurisdiction

28 For purposes of this Consent Judgment only, the Parties stipulate that this Court has

1 jurisdiction over the allegations of violations contained in the Complaint, personal jurisdiction
2 over Groupon as to the acts alleged in the Complaint, that venue is proper in the County of
3 Alameda, and that this Court has jurisdiction to enter this Consent Judgment as a full settlement
4 and resolution of the allegations against Groupon contained in the Complaint, and of all claims
5 which were or could have been raised by any person or entity based in whole or in part, directly
6 or indirectly, on the facts alleged therein or arising therefrom or related thereto.

7 1.7 No Admission

8 This Consent Judgment resolves claims that are denied and disputed. The Parties enter into
9 this Consent Judgment pursuant to a full and final settlement of any and all claims between the
10 Parties for the purpose of avoiding prolonged litigation. Nothing in this Consent Judgment shall
11 be construed as an admission by the Parties of any material allegation in the Notice or the
12 Complaint, or of any fact, conclusion of law, issue of law or violation of law of any kind, including
13 without limitation, any admission concerning any alleged or actual violation of Proposition 65 or
14 any other statutory, regulatory, common law, or equitable doctrine, including but not limited to the
15 meaning of the terms “knowingly and intentionally expose” or “clear and reasonable warning” as
16 used in Health and Safety Code section 25249.6. Nothing in this Consent Judgment, nor
17 compliance with its terms, shall constitute or be construed as an admission by the Parties of any
18 fact, conclusion of law, issue of law, or violation of law, or of fault, wrongdoing, misconduct,
19 culpability, or liability by Groupon, its officers, directors, employees, or parent, subsidiary or
20 affiliated corporations, or be offered or admitted as evidence in any administrative or judicial
21 proceeding or litigation in any court, agency, or forum. Furthermore, nothing in this Consent
22 Judgment shall prejudice, waive or impair any right, remedy, argument, or defense the Parties may
23 have in any other or future legal proceeding, except as expressly provided in this Consent
24 Judgment.

25 **2. DEFINITIONS**

26 2.1 “Covered Products” means Sandals.

27 2.2 “Sandals” means Henry Ferrera ® Collection Sandals.

1 2.3 “Effective Date” means the date that this Consent Judgment is approved by the
2 Court.

3 2.4 “DBP” means Di-n-butyl Phthalate.

4 2.5 “Listed Chemicals” means DBP.

5 **3. INJUNCTIVE RELIEF/REFORMULATION**

6 3.1 After the Effective Date, Groupon shall not order any Covered Products for sale
7 into California, with any component that contains the Listed Chemical(s) in excess of 0.1%
8 (1,000 parts per million) by weight. For the purposes of this injunction, Groupon is not
9 considered the seller of, and shall not be responsible under this agreement for, products offered
10 exclusively by third parties on websites hosted by Groupon or its affiliates.

11 3.2 Any Covered Products that were ordered prior to the Effective Date by Groupon,
12 must be destroyed or caused to be destroyed by Groupon; or

13 3.2.1 If Groupon sells, distributed, or ships for sale into California any Covered
14 Products, it must contain a clear and reasonable warning, consistent with 27 CCR section 25600
15 *et seq.*, unless it contains no more than 0.1% by weight (1,000 ppm) of the Listed Chemical(s).
16 Any warnings provided pursuant to this Section 3.2 shall be affixed to the packaging of, or
17 directly on, or attached to the Covered Products, and be prominently placed with such
18 conspicuousness as compared with other words, statements, designs, or devices as to render it
19 likely to be read and understood by an ordinary individual under customary conditions before
20 purchase or use.

21 3.3 Covered Products already distributed to Downstream Releasees prior to the
22 Effective Date may continue to be sold through as is.

23 **4. SETTLEMENT PAYMENT**

24 4.1 Payment and Due Date: Within ten (10) business days of the Effective Date or
25 receipt of Forms W-9 from CAG, whichever is later, Defendant Releasees shall pay a total
26 of one hundred and eighty thousand dollars and zero cents (\$180,000.00) in full and
27 complete settlement of any and all claims for civil penalties, damages, attorney’s fees,
28 expert fees or any other claim for costs, expenses or monetary relief of any kind for

1 claims that were or could have been asserted in the Notices or Complaints identified in
2 Sections 1.4 and 1.5, as follows:

3 4.1.1 **Civil Penalty:** Defendant Releasees shall issue two separate checks totaling
4 twenty-eight thousand six hundred dollars and zero cents (\$28,600.00) as follows for alleged
5 civil penalties pursuant to Health & Safety Code § 25249.12:

6 (a) Defendant Releasees will issue one check made payable to the State of California's
7 Office of Environmental Health Hazard Assessment ("OEHHA") in the amount of twenty-one
8 thousand four hundred and fifty dollars and zero cents (\$21,450.00) representing 75% of the total
9 civil penalty and Defendant Releasees will issue a second check made payable to "Consumer
10 Advocacy Group, Inc." in the amount of seven thousand one hundred and fifty dollars and zero
11 cents (\$7,150.00) representing 25% of the total civil penalty.

12 (b) Separate 1099s shall be issued for each of the above payments: Defendant Releasees
13 will issue a 1099 to OEHHA, P.O. Box 4010, Sacramento, CA 95184 (EIN: 68-0284486) in the
14 amount of twenty-one thousand four hundred and fifty dollars and zero cents (\$21,450.00).
15 Defendant Releasees will also issue a 1099 to CAG in the amount of seven thousand one
16 hundred and fifty dollars and zero cents (\$7,150.00) and deliver it to CAG c/o Yeroushalmi &
17 Yeroushalmi, 9100 Wilshire Boulevard, Suite 240W, Beverly Hills, California 90212.

18 4.1.2 **Additional Settlement Payments:** Defendant Releasees shall issue a third check
19 for twenty-one thousand four hundred dollars and zero cents (\$21,400.00) made payable to
20 "Consumer Advocacy Group, Inc." pursuant to Health & Safety Code § 25249.7(b) and
21 California Code of Regulations, Title 11 § 3203(d). CAG will use this portion of the Total
22 Settlement Payment as follows, eighty percent (80%) for fees of investigation, purchasing and
23 testing for the Proposition 65 Listed Chemical in various products, and for expert fees for
24 evaluating exposures through various mediums, including but not limited to consumer product,
25 occupational, and environmental exposures to the Proposition 65 Listed Chemical, and the cost
26 of hiring consulting and retaining experts who assist with the extensive scientific analysis
27 necessary for those files in litigation and to offset the costs of future litigation enforcing
28 Proposition 65 but excluding attorney fees; twenty percent (20%) for administrative costs

1 incurred during investigation and litigation to reduce the public’s exposure to the Proposition 65
2 Listed Chemicals by notifying those persons and/or entities believed to be responsible for such
3 exposures and attempting to persuade those persons and/or entities to reformulate their products
4 or the source of exposure to completely eliminate or lower the level of the Proposition 65 Listed
5 Chemicals including but not limited to costs of documentation and tracking of products
6 investigated, storage of products, website enhancement and maintenance, computer and software
7 maintenance, investigative equipment, CAG’s member’s time for work done on investigations,
8 office supplies, mailing supplies and postage Within thirty (30) days of a request from the
9 Attorney General, CAG shall provide to the Attorney General copies of documentation
10 demonstrating how the above funds have been spent. CAG shall be solely responsible for
11 ensuring the proper expenditure of such additional settlement payment.

12 **4.1.3 Reimbursement of Attorney Fees and Costs:** Defendant Releasees shall issue
13 a fourth check in the amount of one hundred and thirty thousand dollars and zero cents
14 (\$130,000.00) made payable to “Yeroushalmi & Yeroushalmi” as complete reimbursement for
15 any and all reasonable investigation fees and costs, attorneys’ fees, expert fees, and any and all
16 other costs and expenses incurred as a result of investigating, bringing this matter to the Settling
17 Defendant’ attention, litigating, negotiating a settlement in the public interest, and seeking and
18 obtaining court approval of this Consent Judgment.

19 **4.1.4** Other than the payment to OEHHA described above, all payments referenced in
20 paragraphs 4.1.1, 4.1.2, and 4.1.3 above, shall be delivered to: Reuben Yeroushalmi,
21 Yeroushalmi & Yeroushalmi, 9100 Wilshire Blvd., Suite 240W, Beverly Hills, CA 90212. The
22 payment to OEHHA shall be delivered directly to the Office of Environmental Health Hazard
23 Assessment, OEHHA, 1001 I Street, Mail Stop 12-B Sacramento, California 95812, Attn: Mike
24 Gyurics. Groupon shall provide written confirmation to CAG of the payment to OEHHA.

25 **5. MATTERS COVERED BY THIS CONSENT JUDGMENT**

26 **5.1** This Consent Judgment is a full, final, and binding resolution between CAG, on
27 behalf of itself and in the public interest, and Groupon and its owners, officers, directors,
28 insurers, indemnitors, counsel, employees, parents, shareholders, divisions, subdivisions,

1 subsidiaries, partners, affiliates, sister companies, predecessors, and their successors and assigns
2 including the suppliers and manufacturers (including but not limited to Henry Ferrara) and all
3 other persons and entities who sell or distribute the Covered Products to Groupon (collectively,
4 “Defendant Releasees”), and all entities to whom Groupon directly or indirectly distributes or
5 sells Covered Products, including, but not limited to, downstream distributors, downstream
6 wholesalers, customers, retailers, marketplace hosts, franchisees, cooperative members,
7 licensees, and the successors and assigns of any of them, who may use, maintain, distribute or
8 sell Covered Products (“Downstream Defendant Releasees”), of all claims for alleged or actual
9 violations of Proposition 65 for alleged exposures to DBP from Covered Products manufactured,
10 distributed or sold by Groupon up through the Effective Date as set forth in the Notice and
11 Complaint. Groupon and Defendant Releasees’ compliance with this Consent Judgment shall
12 constitute compliance with Proposition 65 with respect to alleged exposures to DBP from
13 Covered Products sold by Defendant Releasees or Downstream Defendant Releasees after the
14 Effective Date. Nothing in this Section affects CAG’s right to commence or prosecute an action
15 under Proposition 65 against any person other than Settling Defendant, Defendant Releasees, or
16 Downstream Defendant Releasees. The scope of the release is limited to Henry Ferrara ®
17 Collection Sandals alleged to be sold or distributed for sale by Groupon.

18 5.2 CAG on behalf of itself, its past and current agents, representatives, attorneys,
19 successors, and/or assignees, hereby waives all rights to institute or participate in, directly or
20 indirectly, any form of legal action and releases all claims, including, without limitation, all
21 actions, and causes of action, in law or in equity, suits, liabilities, demands, obligations,
22 damages, costs, fines, penalties, losses, or expenses (including, but not limited to, investigation
23 fees, expert fees, and attorneys’ fees) of any nature whatsoever, whether known or unknown,
24 fixed or contingent (collectively “Claims”), against Defendant Releasees and Downstream
25 Defendant Releasees arising from any actual or alleged violation of Proposition 65 or any other
26 statutory or common law claim regarding the Covered Products manufactured, distributed or sold
27 by the Defendant Releasees through the Effective Date regarding any actual or alleged failure to
28 warn about exposure to DBP from Covered Products. In furtherance of the foregoing, CAG on

1 behalf of itself only, hereby waives any and all rights and benefits which it now has, or in the
2 future may have, conferred upon it with respect to Claims regarding the Covered Products
3 manufactured, distributed or sold by Defendant Releasees through the Effective Date arising
4 from any violation of Proposition 65 or any other statutory or common law regarding the failure
5 to warn about exposure to the Listed Chemicals from Covered Products by virtue of the
6 provisions of section 1542 of the California Civil Code, which provides as follows:

7 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS THAT THE
8 CREDITOR OR RELEASING PARTY DOES NOT KNOW OR SUSPECT TO
9 EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE
10 RELEASE, AND THAT, IF KNOWN BY HIM OR HER, WOULD HAVE
11 MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE
12 DEBTOR OR RELEASED PARTY.

13 CAG understands and acknowledges that the significance and consequence of this waiver of
14 California Civil Code section 1542 is that even if CAG suffers future damages arising out of or
15 resulting from, or related directly or indirectly to, in whole or in part, Claims arising from any
16 violation of Proposition 65 or any other statutory or common law regarding the Covered
17 Products manufactured, distributed or sold by the Released Parties through the Effective Date
18 regarding the failure to warn about actual or alleged exposure to the Listed Chemicals from the
19 Covered Products, CAG will not be able to make any claim for those damages, penalties or other
20 relief against Defendant Releasees and Downstream Defendant Releasees. Furthermore, CAG
21 acknowledges that it intends these consequences for any such Claims arising from any violation
22 of Proposition 65 or any other statutory or common law regarding the failure to warn about
23 exposure to the Listed Chemicals from the Covered Products as may exist as of the date of this
24 release but which CAG does not know exist, and which, if known, would materially affect their
25 decision to enter into this Consent Judgment, regardless of whether their lack of knowledge is the
26 result of ignorance, oversight, error, negligence, or any other cause.

1 **6. ENTRY OF CONSENT JUDGMENT**

2 6.1 CAG shall file a motion seeking approval of this Consent Judgment pursuant to
3 California Health & Safety Code § 25249.7(f). Upon entry of the Consent Judgment, CAG and
4 Defendant waive their respective rights to a hearing or trial on the allegations of the Complaint.

5 6.2 The Parties shall make all reasonable efforts possible to have the Consent
6 Judgment approved by the Court.

7 6.3 If this Consent Judgment is not approved in full by the Court: (a) this Consent
8 Judgment and any and all prior agreements between the Parties merged herein shall terminate
9 and become null and void, and the actions shall revert to the status that existed prior to the
10 execution date of this Consent Judgment; (b) no term of this Consent Judgment or any draft
11 thereof, or of the negotiation, documentation, or other part or aspect of the Parties' settlement
12 discussions, shall have any effect, nor shall any such matter be admissible in evidence for any
13 purpose in this Action, or in any other proceeding; and (c) the Parties agree to meet and confer to
14 determine whether to modify the terms of the Consent Judgment and to resubmit it for approval.

15 **7. MODIFICATION OF JUDGMENT**

16 7.1 This Consent Judgment may be modified only upon written agreement of the
17 Parties and upon entry of a modified Consent Judgment by the Court thereon, or upon motion of
18 any Party as provided by law and upon entry of a modified Consent Judgment by the Court.

19 7.2 Any Party seeking to modify this Consent Judgment shall attempt in good faith to
20 meet and confer with the other Party prior to filing a motion to modify the Consent Judgment.

21 **8. ENFORCEMENT OF JUDGMENT**

22 8.1 The terms of this Consent Judgment shall be enforced exclusively by the parties
23 hereto. The Parties may, by noticed motion or order to show cause before the Superior Court of
24 California, County of Alameda, giving the notice required by law, enforce the terms and
25 conditions contained herein. A Party may enforce any of the terms and conditions of this Consent
26 Judgment only after that Party first provides thirty (30) days' notice to the Party allegedly failing
27 to comply with the terms and conditions of this Consent Judgment and attempts to resolve such
28 Party's failure to comply in a good faith manner.

1 **9. RETENTION OF JURISDICTION**

2 9.1 This Court shall retain jurisdiction of this matter to implement and enforce the
3 terms of this Consent Judgment under Code of Civil Procedure section 664.6.

4 9.2 In any proceeding brought by either Party to enforce this Consent Judgment, the
5 prevailing party shall be entitled to recover its reasonable attorney's fees and costs.

6 **10. SERVICE ON THE ATTORNEY GENERAL**

7 10.1 CAG shall serve a copy of this Consent Judgment, signed by both parties, on the
8 California Attorney General so that the Attorney General may review this Consent Judgment
9 prior to its submittal to the Court for approval. The hearing on CAG's motion to approve this
10 Consent Judgment shall be no sooner than forty-five (45) days after the Attorney General has
11 received the aforementioned copy of this Consent Judgment, and in the absence of any written
12 objection by the Attorney General to the Consent Judgment, the Parties may then submit it to the
13 Court for approval,

14 **11. ENTIRE AGREEMENT**

15 11.1 This Consent Judgment contains the sole and entire agreement and understanding
16 of the Parties with respect to the entire subject matter hereof and any and all prior discussions,
17 negotiations, commitments and understandings related hereto. No representations, oral or
18 otherwise, express or implied, other than those contained herein have been made by any party
19 hereto. No other agreements not specifically referred to herein, oral or otherwise, shall be
20 deemed to exist or to bind any of the Parties.

21 **12. ATTORNEY FEES**

22 12.1 Except as specifically provided in Sections 4.1.3 and 9.1 and 9.2, each Party shall
23 bear its own attorneys' fees and costs in connection with the claims resolved in this Consent
24 Judgment.

25 **13. GOVERNING LAW**

26 13.1 The validity, construction, terms, and performance of this Consent Judgment shall
27 be governed by the laws of the State of California, without reference to any conflicts of law
28 provisions of California law.

1 13.2 In the event that Proposition 65 is repealed, preempted, or is otherwise rendered
2 inapplicable by reason of law generally, or if any of the provisions of this Consent Judgment are
3 rendered inapplicable or are no longer required as a result of any such repeal or preemption, or
4 rendered inapplicable by reason of law generally as to the Covered Products or Listed
5 Chemicals, then Groupon may provide written notice to CAG of any asserted change in the law,
6 and shall have no further obligations pursuant to this Consent Judgment with respect to, and to
7 the extent that, the Covered Products are so affected. Nothing in this Consent Judgment shall be
8 interpreted to relieve Groupon from any obligation to comply with any other pertinent state or
9 federal law or regulation.

10 13.3 The Parties, including their counsel, have participated in the preparation of this
11 Consent Judgment and this Consent Judgment is the result of the joint efforts of the Parties. This
12 Consent Judgment was subject to revision and modification by the Parties and has been accepted
13 and approved as to its final form by all Parties and their counsel. Accordingly, any uncertainty or
14 ambiguity existing in this Consent Judgment shall not be interpreted against any Party as a result
15 of the manner of the preparation of this Consent Judgment. Each Party to this Consent Judgment
16 agrees that any statute or rule of construction providing that ambiguities are to be resolved
17 against the drafting Party should not be employed in the interpretation of this Consent Judgment
18 and, in this regard, the Parties hereby waive California Civil Code section 1654.

19 **14. EXECUTION AND COUNTERPARTS**

20 14.1 This Consent Judgment may be executed in counterparts and by means of
21 facsimile or portable document format (pdf), which taken together shall be deemed to constitute
22 one document and have the same force and effect as original signatures.

23 **15. NOTICES**

24 15.1 Any notices under this Consent Judgment shall be by delivery of First-Class Mail.

25 15.1.1 If to CAG:

26 Reuben Yeroushalmi
27 reuben@yeroshalmi.com
28 Yeroushalmi & Yeroushalmi
 9100 Wilshire Boulevard, Suite 240W
 Beverly Hills, CA 90212

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

15.1.2 If to Defendant Groupon, Inc.:
Hazel Ocampo
ocampoh@gtlaw.com
Greenberg Traurig, LLP
18565 Jamboree Road, Suite 500
Irvine, CA 92612

16. AUTHORITY TO STIPULATE

16.1 Each signatory to this Consent Judgment certifies that he or she is fully authorized by the Party he or she represents to enter into this Consent Judgment and to execute it on behalf of the Party represented and legally to bind that party.

AGREED TO:	AGREED TO:
Date: _____, 2022	Date: <u>Nov 22, 2022</u> , 2022
_____	<u><i>Tracy A. O'Flaherty</i></u> <small>Tracy A. O'Flaherty (Nov 22, 2022 15:33 CST)</small>
Name: _____	Name: <u>Tracy A. O'Flaherty</u>
Title: _____	Title: <u>Vice President, Deputy General Counsel</u>
CONSUMER ADVOCACY GROUP, INC.	GROUPON, INC.

IT IS SO ORDERED.

Date: _____

HON. JULIA SPAIN
JUDGE OF THE SUPERIOR COURT

1 15.1.2 If to Defendant Groupon, Inc.:
2 Hazel Ocampo
3 ocampoh@gtlaw.com
4 Greenberg Traurig, LLP
5 18565 Jamboree Road, Suite 500
6 Irvine, CA 92612

7 **16. AUTHORITY TO STIPULATE**

8 16.1 Each signatory to this Consent Judgment certifies that he or she is fully authorized
9 by the Party he or she represents to enter into this Consent Judgment and to execute it on behalf
10 of the Party represented and legally to bind that party.

AGREED TO: Date: <u>November 21</u> , 2022 <u>Michael Marcus</u> Name: <u>Michael Marcus</u> Title: <u>Director</u> CONSUMER ADVOCACY GROUP, INC.	AGREED TO: Date: _____, 2022 _____ Name: _____ Title: _____ GROUPON, INC.
---	---

11 **IT IS SO ORDERED.**

12 Date: _____

13 _____
14 HON. JULIA SPAIN
15 JUDGE OF THE SUPERIOR COURT