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**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

KRISTEN SCHERTZER, on behalf of
herself and all others similarly situated,

Plaintiff,

vs.

ALPARGATAS USA, INC., d/b/a
Havaianas, a Delaware corporation, and
DOES 1- 50, inclusive,

Defendant.

Case No. '19CV394 LAB MSB

CLASS ACTION

COMPLAINT

- 1. Violation of California's Unfair Competition Laws ("UCL"); California Business & Professions Code Sections 17200, *et seq.***
- 2. Violation of California's False Advertising Laws ("FAL"); California Business & Professions Code Sections 17500, *et seq.***
- 3. Violations of California Consumer Legal Remedies Act ("CLRA"); Civ. Code § 1750, *et seq.***

IDEMAND FOR JURY TRIAL

1 Plaintiff KRISTEN SCHERTZER brings this action on behalf of herself and all
 2 others similarly situated against Defendant ALPARGATAS USA, INC., doing business as
 3 HAVAIANAS (“Defendant” or “Havaianas”), and states:

4 **I. NATURE OF ACTION**

5 1. “If everyone is getting a deal, is anyone really getting a deal?”¹ This class
 6 action targets Havaianas’ unlawful, unfair, and fraudulent business practice of advertising
 7 fictitious prices and corresponding phantom discounts on its Havaianas branded/or
 8 trademarked lines of merchandise. This practice of false reference pricing occurs when a
 9 retailer fabricates a fake regular, original, and/or former reference price, and then offers an
 10 item for sale at a deep “discounted” price. The result is a sham price disparity that misleads
 11 consumers into believing they are receiving a good deal and induces them into making a
 12 purchase. Retailers drastically benefit from employing a false reference pricing scheme and
 13 experience increased sales.

14 2. The California legislature and federal regulations prohibit this misleading
 15 practice. The law recognizes the reality that consumers often purchase merchandise
 16 marketed as being “on sale” purely because the proffered discount seemed too good to pass
 17 up. Accordingly, retailers have an incentive to lie to customers and advertise false sales.
 18 The resulting harm is tangible- the bargain hunter’s expectations about the product she
 19 purchased is that it has a higher perceived value and she may not have purchased the product
 20 but for the false savings.

21 3. Havaianas utilizes a false and misleading reference price in the marketing and
 22 selling of its Havaianas merchandise sold at its outlet stores. Havaianas advertises its
 23 merchandise for sale by attaching a price tag on the item that sets forth a fictitious,
 24 “reference price,” and then employs large signage immediately next to the items for sale
 25 that states, “ ____% Off,” indicating the items are on sale for a designated “ ____ Off.” See
 26

27 ¹ David Streitfeld, *It’s Discounted, but is it a Deal? How List Prices Lost Their Meaning*,
 28 New York Times, <https://www.nytimes.com/2016/03/06/technology/its-discounted-but-is-it-a-deal-how-list-prices-lost-their-meaning.html>, (March 6, 2016), last accessed April 28, 2017.

1 e.g. Exhibit A. The “___% Off” price, or sale price, is substantially discounted from the
2 “reference” price. *See id.*

3 4. However, the “reference” price is total fiction. The merchandise sold at
4 Havaianas outlet stores is created specifically for Havaianas outlet stores. Thus, the only
5 market price for the Havaianas outlet store merchandise is the price at which the
6 merchandise is sold in the Havaianas outlet stores.

7 5. The Havaianas outlet store merchandise is *never* offered for sale, nor actually
8 sold, at the represented “reference” price. Thus, the “reference” price is false and is used
9 exclusively to induce consumers into believing that the merchandise was once sold at the
10 “reference” price and from which the false and discount and corresponding sale price is
11 derived. Havaianas’ deceptive pricing scheme has the effect of tricking consumers into
12 believing they are receiving a significant deal by purchasing merchandise at a steep
13 discount, when in reality, consumers are paying for merchandise at its regular or original
14 retail price.

15 6. The advertised discounts are fictitious because the “reference” reference price
16 does not represent a *bona fide* price at which Havaianas previously sold a substantial
17 quantity of the merchandise for a reasonable period of time as required by the Federal Trade
18 Commission (“FTC”). In addition, the represented “reference” price was not the prevailing
19 market retail price within the three months immediately preceding the publication of the
20 advertised former “reference” price, as required by California law.

21 7. Through its false and misleading marketing, advertising, and pricing scheme,
22 Havaianas violated and continues to violate California and federal law prohibiting
23 advertising goods for sale as discounted from former prices that are false, and prohibiting
24 misleading statements about the existence and amount of price reductions. Specifically,
25 Havaianas violated and continues to violate: California’s Unfair Competition Law,
26 Business & Professions Code §§ 17200, *et seq.* (the “UCL”); California’s False Advertising
27 Law, Business & Professions Code §§ 17500, *et seq.* (the “FAL”); the California Consumer
28 Legal Remedies Act, California Civil Code §§ 1750, *et seq.* (the “CLRA”); and the Federal

1 Trade Commission Act (“FTCA”), which prohibits “unfair or deceptive acts or practices in
2 or affecting commerce” (15 U.S.C. § 45(a)(1)) and false advertisements (15 U.S.C. § 52(a)).

3 8. Plaintiff brings this action on behalf of herself and other similarly situated
4 consumers who have purchased one or more Havaianas merchandise at Defendant’s
5 Havaianas’ outlet store that were deceptively represented as discounted from false former
6 “reference” prices. Plaintiff seeks to halt the dissemination of this false, misleading, and
7 deceptive pricing scheme, to correct the false and misleading perception it has created in
8 the minds of consumers, and obtain redress for those who have purchased merchandise
9 tainted by this deceptive pricing scheme. Plaintiff also seeks to enjoin Havaianas from
10 using false and misleading misrepresentations regarding retail price comparisons in its
11 labeling and advertising permanently. Further, Plaintiff seeks to obtain damages, restitution,
12 and other appropriate relief in the amount by which Havaianas was unjustly enriched as a
13 result of its sales of merchandise offered a false discount.

14 9. Finally Plaintiff seeks reasonable attorneys’ fees pursuant to California Code
15 of Civil Procedure § 1021.5, as this lawsuit seeks the enforcement of an important right
16 affecting the public interest and satisfies the statutory requirements for an award of
17 attorneys’ fees.

18 **II. JURISDICTION AND VENUE**

19 10. This Court has original jurisdiction of this Action pursuant to the Class Action
20 Fairness Act, 28 U.S.C §1332 (d)(2). The matter in controversy, exclusive of interest and
21 costs, exceeds the sum or value of \$5,000,000 and at least some members of the proposed
22 Class have a different citizenship from Havaianas.

23 11. The Southern District of California has personal jurisdiction over Havaianas
24 because Havaianas is a corporation or other business entity authorized to conduct and does
25 conduct business in the State of California. Havaianas is registered with the California
26 Secretary of State to do sufficient business with sufficient minimum contacts in California,
27 and/or otherwise intentionally avails itself of the California market through the ownership
28 and operation of its outlet store in California.

12. Venue is proper under 28 U.S.C. § 1391 (b)(2) because Havaianas transacts substantial business in this District. A substantial part of the events giving rise to Plaintiff's claims arose here.

III. PARTIES

Plaintiff

13. Kristen Schertzer resides in San Diego, California. Plaintiff, in reliance on Havaianas' false and deceptive advertising, marketing and discounting pricing schemes, purchased a pair of flip flops from the Havaianas outlet store located at 5630 Paseo Del Norte Suite 100, Carlsbad, California 92008, on October 18, 2018. Ms. Schertzer examined several pairs of sandals and slip flops within the store. As she shopped, she noticed the accompanying in-store signage represented that the item she preferred was being offered for "40% Off." She examined the item and evaluated the price tag and the accompanying in-store signage. The flip flops, Havaianas Slim Animals Women's Sandal in Sand/Grey/Pink, were advertised on the price tag as having a reference price of \$28.00. The in-store signage represented that the flip flops were "40% Off" the reference price.

14. After observing the price tag on the item and the accompanying signage, Ms. Schertzer believed that she was receiving a significant discount on the item she had chosen. Because she liked the item and felt that the discounted price would likely not last, and that she was getting a significant bargain on the merchandise, she proceeded to the register and purchased the flip flops. Ms. Schertzer believed that she was purchasing authentic Havaianas merchandise that was previously available at the Havaianas retail store or other department stores. She paid a total of \$20.02.

15. However, the product was never offered for sale at the reference price listed on the price tag and certainly not within the 90 days preceding Ms. Schertzer's purchase. Plaintiff was damaged in her purchase because Defendant's false reference price discounting scheme inflated the true market value of the item she purchased. Plaintiff is susceptible to this reoccurring harm because she cannot be certain that Havaianas has corrected this deceptive pricing scheme and she desires to shop at Havaianas in the future.

1 Plaintiff does not have the resources on her own to determine whether Defendant is
2 complying with California and Federal law with respect to its retail pricing practices.

3 **Defendant**

4 16. Plaintiff is informed and believes, and upon such information and belief
5 alleges, Defendant Havaianas is a Delaware Corporation with its principal executive offices
6 located at 33 East 33rd Street, Suite 501, New York, New York 10016. Havaianas maintains
7 the Havaianas brand, a line of men and women's flip flops, sandals, wedges, espadrilles,
8 sneakers, and more. Havaianas operates Havaianas retail and outlet stores and the
9 havaianas.com website, and advertises, markets, and sells its merchandise in California and
10 throughout the United States.

11 17. Plaintiff does not know the true names or capacities of the persons or entities
12 sued herein as DOES 1-50, inclusive, and therefore sues such Defendants by such fictitious
13 names. Plaintiff is informed and believes, and upon such information and belief alleges,
14 that each of the DOE Defendants is in some manner legally responsible for the damages
15 suffered by Plaintiff and the Class members as alleged herein. Plaintiff will amend this
16 Complaint to set forth the true names and capacities of these Defendants when they have
17 been ascertained, along with appropriate charging allegations, as may be necessary.

18 **IV. FACTUAL BACKGROUND**

19 **The Fraudulent Sale Discounting Scheme**

20 18. Havaianas is a worldwide fashion brand, specializing in the sale of trendy
21 footwear, namely flip flops and sandals. The Havaianas brand is owned by parent company
22 Alpargatas USA, Inc., a company with a presence in more than 100 countries around the
23 world. Havaianas directly markets its merchandise to consumers in the State of California
24 and throughout the United States via its in-store advertisements and its e-commerce website
25 (www.havaianas.com). Havaianas sells its own branded merchandise at its retail stores,
26 outlet stores, and through its e-commerce website. This case involves only the Havaianas
27 branded merchandise sold at Havaianas outlet stores.

28 19. The Havaianas merchandise sold in the Havaianas outlet stores is exclusively

1 sold at the Havaianas outlet stores and it is not sold anywhere else. Thus, there is no other
2 market for the Havaianas outlet store merchandise other than at Defendant's Havaianas
3 outlet stores.

4 20. Havaianas engages in a scheme to defraud its customers by perpetually
5 discounting its merchandise in its outlet stores. Havaianas consistently advertises its
6 merchandise with a false reference price and corresponding sale price immediately next to
7 the item that states, "___% Off." The reference price conveys to the customer the purported
8 regular, or original, price of the item. The "___% Off" sale price conveys to the customer a
9 deeply discounted price at which the item is presently being offered for sale. The
10 "reference" price is conveyed to the consumer on the price tag attached to the item while
11 the "___% Off," or sale price, is advertised by large, colorful signage placed immediately
12 next to the item. *See e.g. Exhibit A.*

13 21. However, at no time is the Havaianas outlet store merchandise ever offered for
14 sale anywhere at the original price. The "reference" price is merely a false original price,
15 which Havaianas utilizes to deceptively manufacture a deeply discounted sale price referred
16 to as the "___% Off" price on the merchandise sold at the Havaianas Outlet retail stores
17 during the Class period.

18 22. This practice is not accidental. Rather, this practice is a fraudulent scheme
19 intended to deceive consumers into: 1) making purchases they otherwise would not have
20 made; and/or 2) paying substantially more for merchandise consumers believed was heavily
21 discounted and thus, worth more than its actual value.

22 23. Retailers, including Havaianas, understand that consumers are susceptible to a
23 good bargain, and therefore, Havaianas has a substantial interest in lying in order to generate
24 sales. A product's "reference" price matters to consumers because it serves as a baseline
25 upon which consumers perceive a product's value. In this case, Havaianas has marked its
26 merchandise with an original or false reference price which conveys to consumers,
27 including to Plaintiff, "the product's worth and the prestige that ownership of the product
28 conveys." *See Hinojos v. Kohl's Corp.*, 718 F.3d 1098, 1106 (9th Cir. 2013) (citing Dhruv

1 Grewal & Larry D. Compeau, Comparative Price Advertising: Informative or Deceptive?,
2 11 J. Pub. Pol’y & Mktg. 52, 55 (Spring 1992) (“By creating an impression of savings, the
3 presence of a higher reference price enhances subjects’ perceived value and willingness to
4 buy the product.”); *id.* at 56 (“[E]mpirical studies indicate that as discount size increases,
5 consumers’ perceptions of value and their willingness to buy the product increase, while
6 their intention to search for a lower price decreases.”).

7 24. Havaianas’ pricing advertisements uniformly include both the false reference
8 price on the price tag attached to the item with a corresponding placard, or sign, placed next
9 to the item that reads, “___% Off.” This uniform scheme intends to and does provide
10 misinformation to the customer. This misinformation communicates to consumers,
11 including Plaintiff, that the Havaianas products have a greater value than the advertised
12 discounted price.

13 25. As the Ninth Circuit recognizes, “[m]isinformation about a product’s ‘normal’
14 price is...significant to many consumers in the same way as a false product label would
15 be.” *See Hinojos*, 718 F.3d at 1106.

16 **Plaintiff’s Investigation**

17 26. Plaintiff’s investigation of Havaianas revealed that Havaianas outlet store
18 merchandise is priced uniformly. That is, Havaianas merchandise sold at Havaianas outlet
19 stores bears a price tag with a false reference price and a substantially discounted “___%
20 Off” sale price. Plaintiff’s counsel’s investigation confirmed that the merchandise
21 purchased by Ms. Schertzer was priced with a false reference price and a corresponding
22 discounted price for at least the 90-day period immediately preceding Plaintiff’s purchase.

23 27. Plaintiff’s investigation cataloged the pricing practices of the Havaianas’
24 outlet store located at the Carlsbad Premium Outlets, 5630 Paseo Del Norte, Carlsbad,
25 California 92008 (“Carlsbad”), for several months before and after Ms. Schertzer’s
26 purchases. The false reference price and corresponding discount price scheme was both
27 uniform and identical on almost all of the merchandise sold at Havaianas’ outlet store. The
28 only thing that changed was the requisite % Off on certain merchandise items.

28. The fraudulent pricing scheme applies to all Havaianas outlet store merchandise offered on sale at the Havaianas outlet store, including the shoes purchased by Plaintiff.

Plaintiff and the Class are Injured by Havaianas' Deceptive Pricing Scheme

29. The reference prices listed and advertised on Havaianas' outlet store products are fake reference prices, utilized only to perpetuate Havaianas' fake discount scheme.

30. Havaianas knows that its comparative price advertising is false, deceptive, misleading, and unlawful under California and federal law.

31. Havaianas fraudulently concealed from and intentionally failed to disclose to Plaintiff and other members of the Class the truth about its advertised discount prices and former reference prices.

32. At all relevant times, Havaianas has been under a duty to Plaintiff and the Class to disclose the truth about its false discounts.

33. Plaintiff relied upon Havaianas' artificially inflated "reference" price and false discounts when purchasing the flip flops from Havaianas. Plaintiff would not have made such purchase but for Havaianas' representations regarding the false "reference" price and the fictitious sales price of the merchandise. Plaintiff may in the future shop at Havaianas' outlet stores.

34. Plaintiff and the Class reasonably and justifiably acted and relied on the substantial price differences that Havaianas advertised, and made purchases believing that they were receiving a substantial discount on an item of greater value than it actually was. Plaintiff, like other Class members, was lured in, relied on, and was damaged by the deceptive pricing scheme that Havaianas carried out.

35. Havaianas intentionally concealed and failed to disclose material facts regarding the truth about false former price advertising in order to provoke Plaintiff and the Class to purchase merchandise in its Havaianas outlet stores.

V. CLASS ALLEGATIONS

36. Plaintiff brings this action on behalf of herself and all other similarly situated

Class members pursuant to Rule 23(a), (b)(2) and (b)(3) of the Federal Rules of Civil Procedure and seeks certification of the following Class against Havaianas for violations of California state laws:

All persons, within the State of California, from February 26, 2015 through the present (the “Class Period”), who purchased from Havaianas outlet stores one or more products at discounts from the advertised “reference” price and who have not received a refund or credit for their purchase(s).

Excluded from the Class are Havaianas, as well as its officers, employees, agents or affiliates, and any judge who presides over this action, as well as all past and present employees, officers and directors of Havaianas. Plaintiff reserves the right to expand, limit, modify, or amend this class definition, including the addition of one or more subclasses, in connection with her motion for class certification, or at any other time, based upon, *inter alia*, changing circumstances and/or new facts obtained during discovery.

37. ***Numerosity***: The class members are so numerous that joinder of all members is impracticable. Plaintiff is informed and believes that the proposed Class contains hundreds of thousands of individuals who have been damaged by Havaianas’ conduct as alleged herein. The precise number of Class members is unknown to Plaintiff.

38. ***Existence and Predominance of Common Questions of Law and Fact***: This action involves common questions of law and fact, which predominate over any questions affecting individual Class members. These common legal and factual questions include, but are not limited to, the following:

- a. Whether, during the Class Period, Havaianas used false “reference” price labels and falsely advertised price discounts on its Havaianas branded products sold in its retail outlet stores;
- b. Whether, during the Class Period, the “reference” prices advertised by Havaianas were the prevailing market prices for the respective Havaianas outlet store merchandise during the three months preceding the dissemination and/or publication of the advertised former prices;

- c. Whether Havaianas alleged conduct constitutes violations of the laws asserted;
- d. Whether Havaianas engaged in unfair, unlawful and/or fraudulent business practices under the laws asserted;
- e. Whether Havaianas engaged in false or misleading advertising;
- f. Whether Plaintiff and Class members are entitled to damages and/or restitution and the proper measure of that loss; and
- g. Whether an injunction is necessary to prevent Havaianas from continuing to use false, misleading or illegal price comparison.

39. **Typicality:** Plaintiff's claims are typical of the claims of the Class members because, *inter alia*, all Class members have been deceived (or were likely to be deceived) by Havaianas' false and deceptive price advertising scheme, as alleged herein. Plaintiff is advancing the same claims and legal theories on behalf of herself and all Class members.

40. **Adequacy:** Plaintiff will fairly and adequately protect the interests of the Class members. Plaintiff has retained counsel experienced in complex consumer class action litigation, and Plaintiff intends to prosecute this action vigorously. Plaintiff has no antagonistic or adverse interest to those of the Class.

41. **Superiority:** The nature of this action and the nature of laws available to Plaintiff and the Class make the use of the class action format a particularly efficient and appropriate procedure to afford relief to her and the Class for the wrongs alleged. The damages or other financial detriment suffered by individual Class members is relatively modest compared to the burden and expense that would be entailed by individual litigation of their claims against Havaianas. It would thus be virtually impossible for Plaintiff and Class members, on an individual basis, to obtain effective redress for the wrongs done to them. Absent the class action, Class members and the general public would not likely recover, or would not likely have the chance to recover, damages or restitution, and Havaianas will be permitted to retain the proceeds of its fraudulent and deceptive misdeeds.

42. All Class members, including Plaintiff, were exposed to one or more of

Havaianas’ misrepresentations or omissions of material fact claiming that former “reference” advertised prices were in existence. Due to the scope and extent of Havaianas’ consistent false “discount” price advertising scheme, disseminated in a years-long campaign to California consumers, it can be reasonably inferred that such misrepresentations or omissions of material fact were uniformly made to all members of the Class. In addition, it can be reasonably presumed that all Class members, including Plaintiff, affirmatively acted in response to the representations contained in Havaianas’ false advertising scheme when purchasing Havaianas outlet merchandise at Havaianas’ retail outlet store.

43. Havaianas keeps extensive computerized records of its customers through, *inter alia*, customer loyalty programs and general marketing programs. Havaianas has one or more databases through which a significant majority of Class members may be identified and ascertained, and it maintains contact information, including email and home addresses, through which notice of this action could be disseminated in accordance with due process requirements.

VI. CAUSES OF ACTION

FIRST CAUSE OF ACTION

Violation of California’s Unfair Competition Law (“UCL”) California Business and Professions Code § 17200, *et seq.*

44. Plaintiff repeats and re-alleges the allegations contained in every preceding paragraph as if fully set forth herein.

45. The UCL defines “unfair business competition” to include any “unlawful, unfair or fraudulent” act or practice, as well as any “unfair, deceptive, untrue or misleading” advertising. Cal. Bus. Prof. Code § 17200.

46. The UCL imposes strict liability. Plaintiff need not prove that Havaianas intentionally or negligently engaged in unlawful, unfair, or fraudulent business practices – but only that such practices occurred.

“Unfair” Prong

47. A business act or practice is “unfair” under the UCL if it offends an established

1 public policy or is immoral, unethical, oppressive, unscrupulous or substantially injurious
2 to consumers, and that unfairness is determined by weighing the reasons, justifications and
3 motives of the practice against the gravity of the harm to the alleged victims.

4 48. Havaianas' actions constitute "unfair" business practices because, as alleged
5 above, Havaianas engaged in misleading and deceptive price comparison advertising that
6 represented false "reference" prices and corresponding deeply discounted prices. The
7 discounted prices were nothing more than fabricated "reference" prices leading to phantom
8 markdowns. Havaianas' acts and practices offended an established public policy of
9 transparency in pricing, and engaged in immoral, unethical, oppressive, and unscrupulous
10 activities that are substantially injurious to consumers.

11 49. The harm to Plaintiff and Class members outweighs the utility of Havaianas'
12 practices. There were reasonably available alternatives to further Havaianas' legitimate
13 business interests other than the misleading and deceptive conduct described herein.

14 ***"Fraudulent" Prong***

15 50. A business act or practice is "fraudulent" under the UCL if it is likely to
16 deceive members of the consuming public.

17 51. Havaianas' acts and practices alleged above constitute fraudulent business acts
18 or practices as they have deceived Plaintiff and are highly likely to deceive members of the
19 consuming public. Plaintiff relied on Havaianas' fraudulent and deceptive representations
20 regarding its "reference" prices for products which Havaianas sells exclusively at its
21 Havaianas outlet stores. These misrepresentations played a substantial role in Plaintiff's
22 decision to purchase those products at steep discounts, and Plaintiff would not have
23 purchased those products without Havaianas' misrepresentations.

24 52. A business act or practice is "unlawful" under the UCL if it violates any other
25 law or regulation.

26 ***"Unlawful" Prong***

27 53. Havaianas' acts and practices alleged above constitute unlawful business acts
28 or practices as they have violated state and federal law in connection with their deceptive

pricing scheme. The Federal Trade Commission's Act ("FTCA") prohibits "unfair or deceptive acts or practices in or affecting commerce" (15 U.S.C. § 45(a)(1)) and prohibits the dissemination of any false advertisements. 15 U.S.C. § 52(a). Under the Federal Trade Commission, false former pricing schemes, similar to the ones implemented by Havaianas, are described as deceptive practices that would violate the FTCA:

(a) One of the most commonly used forms of bargain advertising is to offer a reduction from the advertiser's own former price for an article. If the former price is the actual, bona fide price at which the article was offered to the public on a regular basis for a reasonably substantial period of time, it provides a legitimate basis for the advertising of a price comparison. Where the former price is genuine, the bargain being advertised is a true one. If, on the other hand, the former price being advertised is not bona fide but fictitious – for example, where an artificial, inflated price was established for the purpose of enabling the subsequent offer of a large reduction – the "bargain" being advertised is a false one; the purchaser is not receiving the unusual value he expects. In such a case, the "reduced" price is, in reality, probably just the seller's regular price.

(b) A former price is not necessarily fictitious merely because no sales at the advertised price were made. The advertiser should be especially careful, however, in such a case, that the price is one at which the product was openly and actively offered for sale, for a reasonably substantial period of time, in the recent, regular course of her business, honestly and in good faith – and, of course, not for the purpose of establishing a fictitious higher price on which a deceptive comparison might be based.

16 C.F.R. § 233.1(a) and (b) (emphasis added).

54. In addition to federal law, California law also expressly prohibits false former pricing schemes. California's False Advertising Law, Bus. & Prof. Code §17501, ("FAL"), entitled "*Worth or value; statements as to former price*," states:

For the purpose of this article the worth or value of any thing advertised is the prevailing market price, wholesale if the offer is at wholesale, retail if the offer is at retail, at the time of publication of such advertisement in the locality wherein the advertisement is published.

No price shall be advertised as a former price of any advertised thing, unless the alleged former price was the prevailing market price as above defined

1 *within three months next immediately preceding the publication of the*
2 *advertisement* or unless the date when the alleged former price did prevail is
3 clearly, exactly and conspicuously stated in the advertisement.

4 Cal. Bus. & Prof. Code § 17501 (emphasis added).

5 55. As detailed in Plaintiff's Third Cause of Action below, the Consumer Legal
6 Remedies Act, Cal. Civ. Code § 1770(a)(9), ("CLRA"), prohibits a business from
7 "[a]dvertising goods or services with intent not to sell them as advertised," and subsection
8 (a)(13) prohibits a business from "[m]aking false or misleading statements of fact
9 concerning reasons for, existence of, or amounts of price reductions."

10 56. The violation of any law constitutes an "unlawful" business practice under the
11 UCL.

12 57. As detailed herein, the acts and practices alleged were intended to or did result
13 in violations of the FTCA, the FAL, and the CLRA.

14 58. Havaianas' practices, as set forth above, have misled Plaintiff, the proposed
15 Class, and the public in the past and will continue to mislead in the future. Consequently,
16 Havaianas' practices constitute an unlawful, fraudulent, and unfair business practice within
17 the meaning of the UCL.

18 59. Havaianas' violation of the UCL, through its unlawful, unfair, and fraudulent
19 business practices, are ongoing and present a continuing threat that Class members and the
20 public will be deceived into purchasing products based on price comparisons of arbitrary
21 and inflated "reference" prices and substantially discounted sale prices. These false
22 comparisons created phantom markdowns and lead to financial damage for consumers like
23 Plaintiff and the Class.

24 60. Pursuant to the UCL, Plaintiff is entitled to preliminary and permanent
25 injunctive relief and order Havaianas to cease this unfair competition, as well as
26 disgorgement and restitution to Plaintiff and the Class of all Havaianas' revenues associated
27 with its unfair competition, or such portion of those revenues as the Court may find
28

1 equitable.

2 **SECOND CAUSE OF ACTION**
3 **Violation of California's False Advertising Law ("FAL")**
4 **California Business & Professions Code § 17500, *et seq.***

5 61. Plaintiff repeats and re-alleges the allegations contained in every preceding
6 paragraph as if fully set forth herein.

7 62. Cal. Bus. & Prof. Code § 17500 provides:

8 It is unlawful for any...corporation...with intent...to dispose of...personal
9 property...to induce the public to enter into any obligation relating thereto, to
10 make or disseminate or cause to be made or disseminated...from this state
11 before the public in any state, in any newspaper or other publication, or any
12 advertising device, or by public outcry or proclamation, or in any other manner
13 or means whatever, including over the Internet, any statement...which is
14 untrue or misleading, and which is known, or which by the exercise of
15 reasonable care should be known, to be untrue or misleading..."

16 (Emphasis added).

17 63. The "intent" required by Section 17500 is the intent to dispose of property, and
18 not the intent to mislead the public in the disposition of such property.

19 64. Similarly, this section provides, "no price shall be advertised as a former price
20 of any advertised thing, unless the alleged former price was the prevailing market
21 price...within three months next immediately preceding the publication of the
22 advertisement or unless the date when the alleged former price did prevail is clearly,
23 exactly, and conspicuously stated in the advertisement." Cal Bus. & Prof. Code § 17501.

24 65. Havaianas' routine of advertising discounted prices from false "reference"
25 prices, which were never the prevailing market prices of those products and were materially
26 greater than the true prevailing prices, was an unfair, untrue, and misleading practice. This
27 deceptive marketing practice gave consumers the false impression that the products were
28 regularly sold on the market for a substantially higher price than they actually were;
therefore, leading to the false impression that the products sold on at the Havaianas' outlet
store were worth more than they actually were.

66. Havaianas misled consumers by making untrue and misleading statements and failing to disclose what is required as stated in the Code alleged above.

67. As a direct and proximate result of Havaianas' misleading and false advertisements, Plaintiff and Class members have suffered injury in fact and have lost money. As such, Plaintiff requests that this Court order Havaianas to restore this money to Plaintiff and all Class members, and to enjoin Havaianas from continuing these unfair practices in violation of the UCL in the future. Otherwise, Plaintiff, Class members, and the broader general public, will be irreparably harmed and/or denied an effective and complete remedy.

THIRD CAUSE OF ACTION
Violation of California's Consumers Legal Remedies Act ("CLRA"),
California Civil Code § 1750, *et seq.*

68. Plaintiff repeats and re-alleges the allegations contained in every preceding paragraph as if fully set forth herein.

69. This cause of action is brought pursuant to the CLRA, Cal. Civ. Code § 1750, *et seq.* Plaintiff and each member of the proposed Class are "consumers" as defined by Cal. Civ. Code § 1761(d). Havaianas sale of its merchandise in its retail outlet store to Plaintiff and the Class were "transactions" within the meaning of Cal. Civ. Code § 1761(e). The products purchased by Plaintiff and the Class are "goods" within the meaning of Cal. Civ. Code § 1761(a).

70. Havaianas violated and continues to violate the CLRA by engaging in the following practices proscribed by Cal. Civ. Code § 1770(a) in transactions with Plaintiff and the Class which were intended to result in, and did result in, the sale of its merchandise:

- a. Advertising goods or services with intent not to sell them as advertised; (a)(9);
- b. Making false or misleading statements of fact concerning reasons for, existence of, or amounts of price reductions; (a)(13).

71. Pursuant to § 1782(a) of the CLRA, on February 26, 2019, Plaintiff's counsel notified Havaianas in writing by certified mail of the particular violations of § 1770 of the

CLRA and demanded that it rectify the problems associated with the actions detailed above and give notice to all affected consumers of Havaianas' intent to act. If Havaianas fails to respond to Plaintiff's letter, fails to agree to rectify the problems associated with the actions detailed above, or fails to give notice to all affected consumers within 30 days of the date of written notice, as proscribed by Section 1782, Plaintiff will move to amend his/her Complaint to pursue claims for actual, punitive, and statutory damages, as appropriate against Havaianas. As to this cause of action, at this time, Plaintiff seeks only injunctive relief.

VII. PRAYER FOR RELIEF

72. Wherefore, Plaintiff, on behalf of herself and on behalf of the other members of the Class, requests that this Court award relief against Havaianas as follows:

- a. An order certifying the class and designating Kristen Schertzer as the Class Representative and her counsel as Class Counsel;
- b. Awarding Plaintiff and the proposed Class members damages;
- c. Awarding restitution and disgorgement of all profits and unjust enrichment that Havaianas obtained from Plaintiff and the Class members as a result of its unlawful, unfair, and fraudulent business practices described herein;
- d. Awarding declaratory and injunctive relief as permitted by law or equity, including: enjoining Havaianas from continuing the unlawful practices as set forth herein, and directing Havaianas to identify, with Court supervision, victims of its misconduct and pay them all money they are required to pay;
- e. Order Havaianas to engage in a corrective advertising campaign;
- f. Awarding attorneys' fees and costs; and
- g. For such other and further relief as the Court may deem necessary or appropriate.

VIII. DEMAND FOR JURY TRIAL

1 73. Plaintiff hereby demands a jury trial for all of the claims so triable.

2
3 Dated: February 26, 2019

**CARLSON LYNCH SWEET
KILPELA & CARPENTER, LLP**

4
5
6 /s/ Todd D. Carpenter

Todd D. Carpenter (CA 234464)
Alyshia K. Lord (CA 306555)
1350 Columbia Street, Ste. 603
San Diego, California 92101
Telephone: (619) 762-1910
Facsimile: (619) 756-6991
tcarpenter@carlsonlynch.com

7
8
9
10 *Attorneys for Plaintiff*

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

Kristen Schertzer, on behalf of herself and all others similarly situated,

(b) County of Residence of First Listed Plaintiff San Diego

(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number)

Todd D. Carpenter (CA Bar No.: 234464) 619-762-1910
1350 Columbia Street, Ste. 603
San Diego, CA 92101

DEFENDANTS

Alpargatas USA, Inc. d/b/a Havaianas

County of Residence of First Listed Defendant Delaware

(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

'19CV394 LAB MSB

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff
- ☐ 2 U.S. Government Defendant
- ☐ 3 Federal Question (U.S. Government Not a Party)
- ☒ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- | | PTF | DEF | | PTF | DEF |
|---|---------------------------------------|----------------------------|---|----------------------------|---------------------------------------|
| Citizen of This State | <input checked="" type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business In This State | <input type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| Citizen of Another State | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business In Another State | <input type="checkbox"/> 5 | <input checked="" type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

IV. NATURE OF SUIT (Place an "X" in One Box Only)

Click here for: [Nature of Suit Code Descriptions.](#)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excludes Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Personal Injury - Medical Malpractice	<input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 835 Patent - Abbreviated New Drug Application <input type="checkbox"/> 840 Trademark SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g))	<input type="checkbox"/> 375 False Claims Act <input type="checkbox"/> 376 Qui Tam (31 USC 3729(a)) <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 485 Telephone Consumer Protection Act <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 850 Securities/Commodities/Exchange <input checked="" type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 896 Arbitration <input type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision <input type="checkbox"/> 950 Constitutionality of State Statutes
REAL PROPERTY <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	CIVIL RIGHTS <input type="checkbox"/> 440 Other Civil Rights <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 448 Education	PRISONER PETITIONS Habeas Corpus: <input type="checkbox"/> 463 Alien Detainee <input type="checkbox"/> 510 Motions to Vacate Sentence <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty Other: <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition <input type="checkbox"/> 560 Civil Detainee - Conditions of Confinement	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 690 Other LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Management Relations <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Employee Retirement Income Security Act IMMIGRATION <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 465 Other Immigration Actions	FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609

V. ORIGIN (Place an "X" in One Box Only)

- ☒ 1 Original Proceeding
- ☐ 2 Removed from State Court
- ☐ 3 Remanded from Appellate Court
- ☐ 4 Reinstated or Reopened
- ☐ 5 Transferred from Another District (specify)
- ☐ 6 Multidistrict Litigation - Transfer
- ☐ 8 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):
28 U.S.C. section 1332(d)

Brief description of cause:

1) Violation of Cal. Bus. & Prof. 17200; 2) Violation of Cal. Bus. & Prof. 17500; 3) Violation of Cal. Civ. Code 1750

VII. REQUESTED IN COMPLAINT:

☒ CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P.

DEMAND \$

CHECK YES only if demanded in complaint:

JURY DEMAND: ☒ Yes ☐ No

VIII. RELATED CASE(S) IF ANY

(See instructions):

JUDGE

DOCKET NUMBER

DATE

02/26/2019

SIGNATURE OF ATTORNEY OF RECORD

/s/ Todd D. Carpenter

FOR OFFICE USE ONLY

RECEIPT #

AMOUNT

APPLYING IFP

JUDGE

MAG. JUDGE

INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS 44

Authority For Civil Cover Sheet

The JS 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

- I.(a) Plaintiffs-Defendants.** Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.
 - (b) County of Residence.** For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the location of the tract of land involved.)
 - (c) Attorneys.** Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section "(see attachment)".
- II. Jurisdiction.** The basis of jurisdiction is set forth under Rule 8(a), F.R.Cv.P., which requires that jurisdictions be shown in pleadings. Place an "X" in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.
- United States plaintiff. (1) Jurisdiction based on 28 U.S.C. 1345 and 1348. Suits by agencies and officers of the United States are included here.
- United States defendant. (2) When the plaintiff is suing the United States, its officers or agencies, place an "X" in this box.
- Federal question. (3) This refers to suits under 28 U.S.C. 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.
- Diversity of citizenship. (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below; **NOTE: federal question actions take precedence over diversity cases.**)
- III. Residence (citizenship) of Principal Parties.** This section of the JS 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.
- IV. Nature of Suit.** Place an "X" in the appropriate box. If there are multiple nature of suit codes associated with the case, pick the nature of suit code that is most applicable. Click here for: [Nature of Suit Code Descriptions](#).
- V. Origin.** Place an "X" in one of the seven boxes.
- Original Proceedings. (1) Cases which originate in the United States district courts.
- Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441.
- Remanded from Appellate Court. (3) Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.
- Reinstated or Reopened. (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.
- Transferred from Another District. (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.
- Multidistrict Litigation – Transfer. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Section 1407.
- Multidistrict Litigation – Direct File. (8) Check this box when a multidistrict case is filed in the same district as the Master MDL docket. **PLEASE NOTE THAT THERE IS NOT AN ORIGIN CODE 7.** Origin Code 7 was used for historical records and is no longer relevant due to changes in statute.
- VI. Cause of Action.** Report the civil statute directly related to the cause of action and give a brief description of the cause. **Do not cite jurisdictional statutes unless diversity.** Example: U.S. Civil Statute: 47 USC 553 Brief Description: Unauthorized reception of cable service
- VII. Requested in Complaint.** Class Action. Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P.
- Demand. In this space enter the actual dollar amount being demanded or indicate other demand, such as a preliminary injunction.
- Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.
- VIII. Related Cases.** This section of the JS 44 is used to reference related pending cases, if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases.

Date and Attorney Signature. Date and sign the civil cover sheet.

EXHIBIT A



Case 3:19-cv-00394-LAB-MSB Document 1-2 Filed 02/26/19 PageID.24 Page 3 of 3



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**CARLSON LYNCH SWEET
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alord@carlsonlynch.com

Attorneys for Plaintiff and Class Counsel

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

KRISTEN SCHERTZER, on behalf of
herself and all others similarly situated,
Plaintiff,

v.

ALPARGATAS USA, INC., d/b/a
Havaianas, a Delaware corporation, and
DOES 1-50, inclusive,
Defendant.

Case No.: '19CV394 LAB MSB

**DECLARATION IN SUPPORT OF
JURISDICTION**

I, Todd D. Carpenter, declare under penalty of perjury the following:

1. I am an attorney duly licensed to practice before all of the courts in the State of California. I am a partner and part-owner of Carlson Lynch Sweet Kilpela & Carpenter, LLP, and the counsel of record for Plaintiff in the above-entitled action.

2. Defendant Alpargatas USA, Inc., doing business as Havaianas, has done and is doing business in the County of San Diego. Such business includes the marketing, distributing, and sale of its sandals, flip flops, shoes, and accessories at its Havaianas retail outlet stores.

3. Plaintiff Kristen Schertzer purchased a pair of flip flops from a Havaianas outlet store in Carlsbad, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 26th day of February 2019 in San Diego, California.

/s/ Todd D. Carpenter
Todd D. Carpenter