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Los Angeles Superior Court

NOV 23 2011

John A. Clarke, Executive Officer/Clerk  
By A.E. LaFleur-Clayton, Deputy

6 Attorneys for Plaintiff,  
7 Consumer Advocacy Group, Inc.

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA

9 COUNTY OF LOS ANGELES – UNLIMITED

10 **BC474147**

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

13 Plaintiff,

14 v.

15 BEVMO HOLDINGS, LLC, a Delaware  
16 Limited Liability Company; BEVERAGES &  
17 MORE, INC., a Delaware Corporation;  
18 BEVMO INTERMEDIATE HOLDINGS,  
19 INC., a Delaware Corporation; and DOES 1-  
20 100

21 Defendants.

CASE NO.:

COMPLAINT FOR VIOLATIONS 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)

22 Plaintiff, CONSUMER ADVOCACY GROUP, INC. alleges, on information and belief,  
23 as follows:

- 24 1. Plaintiff CONSUMER ADVOCACY GROUP, INC. (“Plaintiff”) is a corporation  
25 qualified to do business in the State of California, and brings this action in the public  
26 interest as defined under Health and Safety Code section 25249.7(d).
- 27 2. Defendant BEVMO HOLDINGS, LLC is a Delaware limited liability company.
- 28 3. Defendant BEVERAGES & MORE, INC. is an entity incorporated in the State of  
Delaware.

**COPY**

- 1 4. Defendant BEVMO INTERMEDIATE HOLDINGS, INC. is an entity incorporated in the  
2 State of Delaware.
- 3 5. Plaintiff is presently unaware of the true names and capacities of defendants DOES 1-  
4 100, and therefore sues these defendants by such fictitious names. Plaintiff will amend  
5 this complaint to allege their true names and capacities when ascertained. Plaintiff is  
6 informed, believes, and thereon alleges that each fictitiously named defendant is  
7 responsible in some manner for the occurrences herein alleged and the damages caused  
8 thereby.
- 9 6. At all times mentioned herein, the term "Defendants" includes Bevmo Holdings, LLC,  
10 Beverages & More, Inc., Bevmo Intermediate Holdings, Inc., and Does 1-100.
- 11 7. Plaintiff is informed and believes, and thereon alleges that each of the Defendants at all  
12 times mentioned herein have conducted business within the State of California.
- 13 8. At all times relevant to this action, each of the Defendants, including Does 1-100, was an  
14 agent, servant, or employee of each of the other Defendants. In conducting the activities  
15 alleged in this Complaint, each of the Defendants was acting within the course and scope  
16 of this agency, service, or employment, and was acting with the consent, permission, and  
17 authorization of each of the other Defendants. All actions of each of the Defendants  
18 alleged in this Complaint were ratified and approved by every other Defendant or their  
19 officers or managing agents. Alternatively, each of the Defendants aided, conspired with  
20 and/or facilitated the alleged wrongful conduct of each of the other Defendants.
- 21 9. Plaintiff is informed, believes, and thereon alleges that at all relevant times, each of the  
22 Defendants was a person doing business within the meaning of Health and Safety Code  
23 section 25249.11, subdivision (b), and that each of the Defendants had ten (10) or more  
24 employees at all relevant times.

25 **JURISDICTION**

- 26 10. The Court has jurisdiction over this lawsuit pursuant to California Constitution Article  
27 VI, Section 10, which grants the Superior Court original jurisdiction in all causes except  
28

1 those given by statute to other trial courts. This Court has jurisdiction over this action  
2 pursuant to Health and Safety Code section 25249.7, which allows enforcement of  
3 violations of Proposition 65 in any Court of competent jurisdiction.

4 11. This Court has jurisdiction over Defendants named herein because Defendants either  
5 reside or are located in this State or are foreign corporations authorized to do business in  
6 California, are registered with the California Secretary of State, or who do sufficient  
7 business in California, have sufficient minimum contacts with California, or otherwise  
8 intentionally avail themselves of the markets within California through their manufacture,  
9 distribution, promotion, marketing, or sale of their products within California to render  
10 the exercise of jurisdiction by the California courts permissible under traditional notions  
11 of fair play and substantial justice.

12 12. Venue is proper in the County of Los Angeles because one or more of the instances of  
13 wrongful conduct occurred, and continues to occur, in the County of Los Angeles and/or  
14 because Defendants conducted, and continue to conduct, business in the County of Los  
15 Angeles with respect to the consumer product that is the subject of this action.

16 **BACKGROUND AND PRELIMINARY FACTS**

17 13. In 1986, California voters approved an initiative to address growing concerns about  
18 exposure to toxic chemicals and declared their right “[t]o be informed about exposures to  
19 chemicals that cause cancer, birth defects, or other reproductive harm.” Ballot Pamp.,  
20 Proposed Law, Gen. Elec. (Nov. 4, 1986) at p. 3. The initiative, The Safe Drinking  
21 Water and Toxic Enforcement Act of 1986, codified at Health and Safety Code sections  
22 25249.5, *et seq.* (“Proposition 65”), helps to protect California’s drinking water sources  
23 from contamination, to allow consumers to make informed choices about the products  
24 they buy, and to enable persons to protect themselves from toxic chemicals as they see  
25 fit.

26 14. Proposition 65 requires the Governor of California to publish a list of chemicals known to  
27 the state to cause cancer, birth defects, or other reproductive harm. *Health & Safety Code*  
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1 § 25249.8. The list, which the Governor updates at least once a year, contains over 700  
2 chemicals and chemical families. Proposition 65 imposes warning requirements and  
3 other controls that apply to Proposition 65-listed chemicals.

4 15. Plaintiff is informed, believes, and thereon alleges that tobacco smoke and  
5 environmental tobacco smoke contain the following chemicals, listed under Proposition  
6 65 as known to the State of California to cause cancer or reproductive toxicity  
7 (“Constituent Chemicals”):

8 **Carcinogens**

9

CHEMICAL	DATE OF ADDITION TO LIST
(4-Aminodiphenyl)	2/27/1987
Dibenz[a,h]acridine	1/1/1988
Chrysene	1/1/1990
Chromium (hexavalent compounds)	2/27/1987
Captan	1/1/1990
Cadmium	5/1/1997
Benzo[k]fluoranthene	7/1/1987
Benzo[j]fluoranthene	7/1/1987
Benzo[b]fluoranthene	7/1/1987
Benzo[a]pyrene	7/1/1987
Benzene	2/27/1987
Benz[a]anthracene	7/1/1987
Arsenic (inorganic arsenic compounds)	2/27/1987
Aniline	1/1/1990
Acrylonitrile	1/1/1987
Acetamide	1/1/1990
Acetaldehyde	4/1/1988
7H-Dibenzo[c,g]carbazole	1/1/1988

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1	4-Aminobiphenyl	2/27/1987
2	2-Nitropropane	1/1/1988
3	2-Naphthylamine	2/27/1987
4	1-Naphthylamine	10/1/1989
5	1,3-Butadiene	4/1/1988
6	1, 1 -Dimethylhydrazine (UDMH)	10/1/1989
7	(4-Aminodiphenyl)	2/27/1987
8	Urethane	1/1/1988
9	<b>Reproductive Toxicity</b>	
10		
11	<b>CHEMICAL</b>	<b>DATE OF ADDITION TO LIST</b>
12	Arsenic (inorganic Oxides)	5/1/1997
13	Benzene	12/26/1997
14	Carbon disulfide	7/1/1989
15	Lead	2/27/1987
16	Toluene	1/1/1991
17	Urethane	10/1/1994
18	Cadmium	5/1/1997
19	Carbon monoxide	7/1/1989
20	Nicotine	4/1/1990
21	1,3-Butadiene	5/16/2004

22 16. The aforementioned dates for each listed chemical were each more than twenty (20)  
23 months before CAG served this Notice.

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

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

9 **SATISFACTION OF PRIOR NOTICE**

- 10 19. On or about March 31, 2011 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 Defendants, identified in the notice as “Bevmo Holdings, LLC,”  
13 “Beverages & More, Inc.,” and “Bevmo Intermediate Holdings, Inc.” and to the  
14 California Attorney General, County District Attorneys, and City Attorneys for each city  
15 containing a population of at least 750,000 people in whose jurisdictions the violations  
16 allegedly occurred, concerning Individually Wrapped Cigars.
- 17 20. Before sending the notice of alleged violation, Plaintiff investigated the sale of the  
18 consumer products involved by Defendants, the likelihood that such products would  
19 cause users to suffer significant exposures to the Constituent Chemicals, and the  
20 corporate structure of each of the Defendants. As a result of this investigation, Plaintiff  
21 identified violations o Proposition 65 as to each of the Defendants.
- 22 21. Plaintiff’s notice of alleged violation included a Certificate of Merit executed by the  
23 attorney for the noticing party, CAG. The Certificate of Merit stated that the attorney for  
24 Plaintiff who executed the certificate had consulted with at least one person with relevant  
25 and appropriate expertise who reviewed data regarding the exposures to the Constituent  
26 Chemicals, respectively, which are the subject Proposition 65-listed chemicals of this  
27 action. Based on that information, the attorney for Plaintiff who executed the Certificate  
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1 of Merit believed there was a reasonable and meritorious case for this private action. The  
2 attorney for Plaintiff attached to the Certificate of Merit served on the Attorney General  
3 the confidential factual information sufficient to establish the basis of the Certificate of  
4 Merit.

5 22. Plaintiff's notice of alleged violations also included a Certificate of Service and a  
6 document entitled "The Safe Drinking Water & Toxic Enforcement Act of 1986  
7 (Proposition 65) A Summary." *Health & Safety Code* § 25249.7(d).

8 23. Plaintiff is commencing this action more than sixty (60) days from the dates that Plaintiff  
9 gave notice of the alleged violations to Defendants and the public prosecutors referenced  
10 in Paragraph 19.

11 24. Plaintiff is informed, believes, and thereon alleges that neither the Attorney General, nor  
12 any applicable district attorney or city attorney has commenced and is diligently  
13 prosecuting an action against the Defendants.

14 **FIRST CAUSE OF ACTION**

15 **(BY CONSUMER ADVOCACY GROUP, INC. AGAINST BEVMO HOLDINGS,**  
16 **LLC, BEVERAGES & MORE, INC., BEVMO INTERMEDIATE HOLDINGS, INC.,**  
17 **AND DOES 1-100, FOR VIOLATIONS OF THE STATE OF CALIFORNIA'S**  
18 **PROPOSITION 65 (HEALTH & SAFETY CODE §§ 25249.5, et. seq.))**

19 25. Plaintiff repeats and incorporates by reference paragraphs 1 through 24 of this complaint  
20 as though fully set forth herein.

21 26. Plaintiff is informed and believes and thereon alleges that Defendants knowingly and  
22 intentionally sold, and thereby exposed consumers to, Individually Wrapped Cigars  
23 which contained, and the consumption of which exposed purchasers thereof to, the  
24 Constituent Chemicals known to the State of California to cause cancer and reproductive  
25 toxicity, as set forth in Health and Safety Code sections 25249.5, *et seq.* (sometimes  
26 referred to throughout as Proposition 65), and the related California Code of Regulations  
27 title 27 sections 25000 through 27001.  
28

- 1 27. Defendants knowingly and intentionally distributed and/or sold Individually Wrapped  
2 Cigars while failing to provide Proposition 65-Compliant Warnings at locations  
3 throughout the State of California.
- 4 28. Defendants actually removed the individual cigars or Individually Wrapped Cigars from  
5 packages that may or may not have had Proposition 65-Compliant Warnings and sold the  
6 cigars individually to consumers in order to maximize profit and thereby deprived  
7 consumers from the opportunity to inspect the packages that the individual cigars or  
8 Individually Wrapped Cigars came in, that may or may not have had Proposition 65-  
9 Compliant Warnings. This conduct deprived consumers from being given a clear and  
10 reasonable Proposition 65-Compliant Warning when purchasing cigars, including but not  
11 limited to individual cigars and Individually Wrapped Cigars.
- 12 29. Purchasers of cigars, including but not limited to individual cigars and Individually  
13 Wrapped Cigars sold by these Defendants place the cigars in their mouths, lit them and  
14 smoked them at the consumers' homes, places of work, and places of leisure, and in  
15 doing so, are and were exposed via inhalation, ingestion, and dermal contact to the  
16 Constituent Chemicals that are known to the State of California to cause cancer and/or  
17 reproductive toxicity.
- 18 30. At all times mentioned herein, Defendants are liable as retailers and distributors for  
19 knowingly and intentionally selling, distributing, and exposing consumers and/or  
20 customers to Individually Wrapped Cigars, which contained, and the consumption of  
21 which exposed purchasers thereof to, the Constituent Chemicals known to the State of  
22 California to cause cancer and/or reproductive toxicity while failing to provide  
23 Proposition 65-Compliant Warnings.
- 24 31. Defendants knowingly and intentionally exposed their customers and the general public  
25 to the carcinogens and reproductive toxicants when Defendants sold the cigars, including  
26 but not limited to individual cigars and Individually Wrapped Cigars to Purchasers  
27 throughout the State of California without providing Proposition 65-Compliant Warnings  
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1 thereby exposing their customers and the general public to the Constituent Chemicals  
2 known to the State of California to cause cancer and/or reproductive toxicity.

3 32. At all times mentioned herein Defendants knew that the consumption and foreseeable use  
4 of cigars, including but not limited to individual cigars and Individually Wrapped Cigars  
5 sold and distributed by them exposed customers to the Constituent Chemicals known to  
6 the State of California to cause cancer and/or reproductive toxicity and harm. At all  
7 times relevant to this action, the same Defendants knew and intended that the normal and  
8 foreseeable use of the tobacco products would expose their customers to tobacco smoke  
9 and tobacco related chemicals through inhalation, dermal contact, and ingestion.  
10 Therefore, Defendants knowingly and intentionally exposed their customers to the  
11 Constituent Chemicals found in Individually Wrapped Cigars, which are known to the  
12 State of California to cause cancer and/or reproductive toxicity.

13 33. The purchasers of the tobacco products, including but not limited to cigars, individual  
14 cigars, and Individually Wrapped Cigars were exposed to the Constituent Chemicals  
15 without being given the warnings required by Health and Safety Code section 25249.6 in  
16 clear and conspicuous language placed, such that an ordinary retail customer would  
17 reasonably notice it, on the Individually Wrapped Cigars, containers and display boxes of  
18 Individually Wrapped Cigars and other tobacco products, and their contents if sold  
19 separately, that states that the product contains/produces chemicals known to the State of  
20 California to cause cancer, birth defects, and/or other reproductive harm.

21 34. The routes of exposure of the above Proposition 65-listed chemicals were and are by  
22 inhalation, ingestion, and dermal contact.

23 35. Individuals exposed to the chemicals suffered, and continue to suffer, irreparable harm  
24 due to their being exposed to the above-listed chemicals without prior clear and  
25 reasonable warning.

26 36. Plaintiff is informed, believes, and thereon alleges that of Defendants' violations of  
27 Proposition 65 arising from the sale and distribution of tobacco products, including but  
28 not limited to cigars, individual cigars, and Individually Wrapped Cigars without

1 Proposition 65-Compliant Warnings, have been ongoing and continuous to the date of the  
2 signing of this complaint, so that a separate and distinct violation of Proposition 65  
3 occurred each and every time a person was exposed to the Proposition 65-Listed  
4 chemicals above.

5 37. Plaintiff is informed, believes, and thereon alleges that each violation of Proposition 65  
6 mentioned herein is ever continuing.

7 **PRAYER FOR RELIEF**

8 WHEREFORE, Plaintiff requests against the Defendants as follows:

- 9 1. A permanent injunction pursuant to California Health and Safety Code section  
10 25249.7(a), and the equitable powers of the Court;  
11 2. Penalties pursuant to Health and Safety Code section 25249.7(b) in the amount of  
12 \$2,500.00 per day per violation;  
13 3. Cost of suit;  
14 4. Reasonable attorney's fees and costs; and  
15 5. Any further relief that the Court may deem just and equitable.

16  
17 Dated: November 21 / 11

YEROUSHALMI & ASSOCIATES

18 BY: \_\_\_\_\_

19 Reuben Yeroushalmi  
20 Attorneys for Plaintiff,  
21 Consumer Advocacy Group, Inc.  
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