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12 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

13 **COUNTY OF ALAMEDA**

14 **CONSUMER ADVOCACY GROUP, INC.,**
15 **in the public interest,**

16 Plaintiff,

17 v.

18 **TAKARA SAKE USA, INC., a California**
19 **Corporation; RETAILER SERVICES &**
20 **SYSTEMS, INC. DBA TOTAL WINE &**
21 **MORE , a Maryland Corporation; and DOES**
22 **1-20;**

23 Defendants.

24 **CASE NO. RG15777687**

25 **COMPLAINT FOR PENALTY AND**
26 **INJUNCTION**

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

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

29 Plaintiff CONSUMER ADVOCACY GROUP, INC. alleges a cause of action against
30 Defendants TAKARA SAKE USA, INC., RETAILER SERVICES & SYSTEMS, INC. DBA
31 TOTAL WINE & MORE and DOES 1-20 as follows:

32 **THE PARTIES**

33 1. Plaintiff CONSUMER ADVOCACY GROUP, INC. ("Plaintiff" or "CAG") is an
34 organization qualified to do business in the State of California. CAG is a person within
35 the meaning of Health and Safety Code section 25249.11, subdivision (a). CAG, acting

36 **ENDORSED**
37 **FILED**
38 **ALAMEDA COUNTY**

39 **JUL 13 2015**

40 **CLERK OF THE SUPERIOR COURT**
41 **By MARGARET J. DOWN**
42 **Dputy**

1 as a private attorney general, brings this action in the public interest as defined under
2 Health and Safety Code section 25249.7, subdivision (d).

3 2. Defendant TAKARA SAKE USA, INC. ("TAKARA"), is a California Corporation doing
4 business in the State of California at all relevant times herein.

5 3. Defendant RETAILER SERVICES & SYSTEMS, INC. DBA TOTAL WINE & MORE
6 ("TOTAL WINE & MORE"), is a Maryland Corporation doing business in the State of
7 California at all relative times herein.

8 4. Plaintiff is presently unaware of the true names and capacities of defendants DOES 1-20,
9 and therefore sues these defendants by such fictitious names. Plaintiff will amend this
10 complaint to allege their true names and capacities when ascertained. Plaintiff is
11 informed, believes, and thereon alleges that each fictitiously named defendant is
12 responsible in some manner for the occurrences herein alleged and the damages caused
13 thereby.

14 5. At all times mentioned herein, the term "Defendants" includes TAKARA, TOTAL
15 WINE & MORE and DOES 1-20.

16 6. Plaintiff is informed and believes, and thereon alleges that each of the Defendants at all
17 times mentioned herein have conducted business within the State of California.

18 7. Upon information and belief, at all times relevant to this action, each of the Defendants,
19 including DOES 1-20, was an agent, servant, or employee of each of the other
20 Defendants. In conducting the activities alleged in this Complaint, each of the
21 Defendants was acting within the course and scope of this agency, service, or
22 employment, and was acting with the consent, permission, and authorization of each of
23 the other Defendants. All actions of each of the Defendants alleged in this Complaint
24 were ratified and approved by every other Defendant or their officers or managing agents.
25 Alternatively, each of the Defendants aided, conspired with and/or facilitated the alleged
26 wrongful conduct of each of the other Defendants.

27 8. Plaintiff is informed, believes, and thereon alleges that at all relevant times, each of the
28 Defendants was a person doing business within the meaning of Health and Safety Code

1 section 25249.11, subdivision (b), and that each of the Defendants had ten (10) or more
2 employees at all relevant times.

3 JURISDICTION

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

21 BACKGROUND AND PRELIMINARY FACTS

- 22 12. In 1986, California voters approved an initiative to address growing concerns about
23 exposure to toxic chemicals and declared their right "[t]o be informed about exposures to
24 chemicals that cause cancer, birth defects, or other reproductive harm." Ballot Pamp.,
25 Proposed Law, Gen. Elec. (Nov. 4, 1986) at p. 3. The initiative, The Safe Drinking
26 Water and Toxic Enforcement Act of 1986, codified at Health and Safety Code sections
27 25249.5, *et seq.* ("Proposition 65"), helps to protect California's drinking water sources
28 from contamination, to allow consumers to make informed choices about the products

1 they buy, and to enable persons to protect themselves from toxic chemicals as they see
2 fit.

3 13. Proposition 65 requires the Governor of California to publish a list of chemicals known to
4 the state to cause cancer, birth defects, or other reproductive harm. *Health & Safety Code*
5 § 25249.8. The list, which the Governor updates at least once a year, contains over 700
6 chemicals and chemical families. Proposition 65 imposes warning requirements and
7 other controls that apply to Proposition 65-listed chemicals.

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

14 15. Proposition 65 provides that any person "violating or threatening to violate" the statute
15 may be enjoined in any court of competent jurisdiction. *Health & Safety Code* § 25249.7.
16 "Threaten to violate" means "to create a condition in which there is a substantial
17 probability that a violation will occur." *Health & Safety Code* § 25249.11(e).

18 Defendants are also liable for civil penalties of up to \$2,500.00 per day per violation,
19 recoverable in a civil action. *Health & Safety Code* § 25249.7(b).

20 16. On February 27, 1987, the Governor of California added lead to the list of chemicals
21 known to the State to cause reproductive toxicity (Cal. Code Regs. tit. 27, § 27001(c)).
22 lead is known to the State to cause developmental, female, and male reproductive
23 toxicity. Pursuant to Health and Safety Code sections 25249.9 and 25249.10, twenty (20)
24 months after addition of lead to the list of chemicals known to the State to cause
25 reproductive toxicity, lead became fully subject to Proposition 65 warning requirements
26 and discharge prohibitions.

27 17. On October 1, 1992, the Governor of California added lead and lead compounds to the
28 list of chemicals known to the State to cause cancer (Cal. Code Regs. tit. 27, § 27001(b)).

1 Pursuant to Health and Safety Code sections 25249.9 and 25249.10, twenty (20) months
2 after addition of lead and lead compounds to the list of chemicals known to the State to
3 cause cancer, lead and lead compounds became fully subject to Proposition 65 warning
4 requirements and discharge prohibitions.

5 18. Plaintiff identified certain practices of manufacturers and distributors of lead and lead
6 compounds ("LEAD")-bearing products of exposing, knowingly and intentionally,
7 persons in California to the Proposition 65-listed chemicals of such products without first
8 providing clear and reasonable warnings of such to the exposed persons prior to the time
9 of exposure. Plaintiff later discerned that Defendants engaged in such practice.

10 **SATISFACTION OF PRIOR NOTICE**

11 19. On or about November 3, 2014 Plaintiff gave notice of alleged violations of Health and
12 Safety Code section 25249.6, concerning consumer products exposures subject to a
13 private action to TAKARA, TOTAL WINE & MORE and to the California Attorney
14 General, County District Attorneys, and City Attorneys for each city containing a
15 population of at least 750,000 people in whose jurisdictions the violations allegedly
16 occurred, concerning the product Sake, containing LEAD.

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

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

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

4 23. Plaintiff is commencing this action more than sixty (60) days from the dates that Plaintiff
5 gave notices of the alleged violation to TAKARA, TOTAL WINE & MORE and the
6 public prosecutors referenced in Paragraph 19.

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

10 **FIRST CAUSE OF ACTION**

11 **(By CONSUMER ADVOCACY GROUP, INC. and against TAKARA, TOTAL WINE &
12 MORE and DOES 1-20 for Violations of Proposition 65, The Safe Drinking Water and
13 Toxic Enforcement Act of 1986 (*Health & Safety Code*, §§ 25249.5, *et seq.*))**

14 **Sake**

15 25. Plaintiff CONSUMER ADVOCACY GROUP, INC. repeats and incorporates by
16 reference paragraphs 1 through 24 of this complaint as though fully set forth herein. Each
17 of the Defendants is, and at all times mentioned herein was, a manufacturer, distributor,
18 promoter, or retailer of Unfiltered Sake, which includes but is not limited to "Sho Chiku
19 Bai Nigori Unfiltered Sake, Silky Mild", 15% Alcohol By Volume, 750mL (25.4 FL.
20 OZ.), "SCB, Licenced by TaKaRa Japan, Since 1851" "Product Of USA", "Produced
21 and Bottled by Takara Sake USA Inc." "UPC: 0 86395 09455 8" ("SAKE").

22 26. SAKE contains LEAD.

23 27. Defendants knew or should have known that LEAD has been identified by the State of
24 California as a chemical known to cause cancer and reproductive toxicity and therefore
25 was subject to Proposition 65 warning requirements. Defendants were also informed of
26 the presence of LEAD in SAKE within Plaintiff's notice of alleged violations further
27 discussed above at Paragraph 19.

28 28. Plaintiff's allegations regarding SAKE concern "[c]onsumer products exposure[s],"
which "is an exposure that results from a person's acquisition, purchase, storage,

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

3 SAKE is a consumer product, and, as mentioned herein, exposures to lead took place as a
4 result of such normal and foreseeable consumption and use.

5 29. Plaintiff is informed, believes, and thereon alleges that between November 3, 2011, and
6 the present, each of the Defendants knowingly and intentionally exposed their California
7 consumers of SAKE, which Defendants manufactured, distributed, or sold as mentioned
8 above, to LEAD without first providing any type of clear and reasonable warning of such
9 to the exposed persons before the time of exposure. Defendants have distributed and sold
10 SAKE in California. Defendants know and intend that California consumers will use and
11 consume SAKE, thereby exposing them to LEAD. Defendants thereby violated
12 Proposition 65.

13 30. The principal routes of exposure are through ingestion, dermal contact and inhalation.
14 Persons sustain exposures by eating and consuming SAKE, handling SAKE without
15 wearing gloves or any other personal protective equipment, or by touching bare skin or
16 mucous membranes with gloves after handling SAKE, as well as through direct and
17 indirect hand to mouth contact, hand to mucous membrane, or breathing in particulate
18 matter dispersed from SAKE.

19 31. Plaintiff is informed, believes, and thereon alleges that each of Defendants’ violations of
20 Proposition 65 as to SAKE have been ongoing and continuous to the date of the signing
21 of this complaint, as Defendants engaged and continue to engage in conduct which
22 violates Health and Safety Code section 25249.6, including the manufacture, distribution,
23 promotion, and sale of SAKE, so that a separate and distinct violation of Proposition 65
24 occurred each and every time a person was exposed to lead by SAKE as mentioned
25 herein.

26 32. Plaintiff is informed, believes, and thereon alleges that each violation of Proposition 65
27 mentioned herein is ever continuing. Plaintiff further alleges and believes that the
28 violations alleged herein will continue to occur into the future.

1 33. Based on the allegations herein, Defendants are liable for civil penalties of up to
2 \$2,500.00 per day per individual exposure to lead from SAKE, pursuant to Health and
3 Safety Code section 25249.7(b).

4 34. Plaintiff has engaged in good faith efforts to resolve the claims alleged herein prior to
5 filing this Complaint.

6 **PRAYER FOR RELIEF**

7 Plaintiff demands against each of the Defendants as follows:

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

13
14 Dated: July 8, 2015

YEROUSHALMI & YEROUSHLAMI

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16 BY: 

17 Reuben Yeroushalmi
18 Attorney for Plaintiff,
19 Consumer Advocacy Group, Inc.
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