

1 Reuben Yeroushalmi (SBN 193981)
Daniel D. Cho (SBN 105409)
2 Ben Yeroushalmi (SBN 232540)
YEROUSHALMI & ASSOCIATES
3 9100 Wilshire Boulevard, Suite 610E
Beverly Hills, California 90212
4 Telephone: (310) 623-1926
Facsimile: (310) 623-1930
5

6 Attorneys for Plaintiff
CONSUMER ADVOCACY GROUP, INC.

7
8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 COUNTY OF LOS ANGELES – CENTRAL DISTRICT

10
11 CONSUMER ADVOCACY GROUP,

12 Plaintiff,

13 v.

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

19 Defendants.

Case No. BC474147

CONSENT JUDGMENT [PROPOSED]

Health & Safety Code § 25249.5 *et seq.*

Dept.: 69

Judge: Hon. Ramona G. See

20 **1. INTRODUCTION**

21 1.1 This Consent Judgment is entered into by and between plaintiff, Consumer
22 Advocacy Group, Inc. (referred to as “CAG”) acting on behalf of itself and in the interest of the
23 public and defendant Beverages & More, Inc. (“Bevmo”) with each a Party to the action and
24 collectively referred to as “Parties.”

25 1.1 Bevmo employs ten or more persons, is a person in the course of doing business
26 for purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, California Health
27 & Safety Code §§ 25249.6 *et seq.* (“Proposition 65”), and sells Individually Wrapped Cigars.
28 CAG alleges that tobacco smoke and environmental tobacco smoke contain the following

1 “constituent chemicals” including Acetaldehyde, Acetamide, Acrylonitrile, 4-Aminobiphenyl, (4-
2 aminodiphenyl), Aniline, Ortho-Anisidine, Arsenic (inorganic arsenic compounds),
3 Benz[a]anthracene, Benzene, Benzo[b]fluoranthene, Benzo[j]fluoranthene, Benzo[k]fluoranthene,
4 Benzo[a]pyrene, 1,3-Butadiene, Cadmium, Captan, Chromium (hexavalent compounds),
5 Chrysene, Dichlorodiphenyltrichloroethane (DDT), Dibenz[a,h]acridine, Dibenz[aj]pyrene,
6 Dibenzo[a,i]pyrene, Dibenzo[a,l]pyrene, 1,1 Dimethylhydrazine (UDMH), Formaldehyde (gas),
7 Hydrazine, Lead and lead compounds, 1-Naphthylamine, Nickel and certain nickel compounds,
8 2-Nitropropane, N-Nitrosodi-n-butylamine, N-Nitrosodiethanolamine, N-Nitrosodiethylamine, N-
9 Nitrosomethylethylamine, N-Nitrosomorpholine, N-Nitrosornicotine, N-Nitrosopiperidine, N-
10 Nitrosopyrrolidine, Ortho-Toluidine, Tobacco Smoke, Urethane (Ethyl carbamate), Arsenic
11 (inorganic Oxides), Carbon disulfide, Carbon monoxide, Lead, Nicotine, Toluene, and Urethane)
12 (collectively “Noticed Chemicals”) that are known to the State of California to cause cancer
13 and/or birth defects or other reproductive harm.

14 **1.2 Notice of Violation.**

15 On March 31, 2011, CAG served Bevmo, and various public enforcement agencies, with a
16 document entitled “60-Day Notice of Violation” (“March 31, 2011 Notice”) that provided the
17 recipients with notice of alleged violations of Health & Safety Code § 25249.6 for failing to warn
18 individuals in California of exposures to Noticed Chemicals contained in Individually Wrapped
19 Cigars sold by Bevmo. No public enforcer has commenced or diligently prosecuted the
20 allegations set forth in the March 31, 2011 Notice.

21 **1.3 Complaint.**

22 1.4 On November 23, 2011, CAG filed a Complaint for civil penalties and injunctive
23 relief in Los Angeles, Superior Court, Case No. BC474147 (the “Action”), against Bevmo and
24 other entities. CAG alleges in the Action that Bevmo violated Proposition 65 by failing to give
25 clear and reasonable warnings of exposure to Noticed Chemicals from Bevmo. In particular,
26 CAG alleges in the Action that Proposition 65 requires a warning notice on each Individually
27 Wrapped Cigar offered to consumers.
28

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

1.5 No Admission.

This Consent Judgment resolves claims that are denied and disputed. In particular, Bevmo denies that Proposition 65 requires that each Individually Wrapped Cigar must bear a warning notice and contends that the warning notices contained on the boxes in which Individually Wrapped Cigars are displayed and sold are adequate to meet any potentially applicable requirements of Proposition 65. CAG does not agree with this contention. The Parties enter into this Consent Judgment pursuant to a full and final settlement that compromises CAG's claims against Bevmo for the purpose of avoiding prolonged litigation over the Parties' respective positions regarding the application of Proposition 65 to the sale of Individually Wrapped Cigars. This Consent Judgment shall not constitute an admission with respect to any material allegation of the Complaint, each and every allegation of which Bevmo denies, nor may this Consent Judgment or compliance with it be used as evidence of any wrongdoing, misconduct, culpability or liability on the part of Bevmo.

1.6 Consent to Jurisdiction.

For purposes of this Consent Judgment, the Parties stipulate that this Court has jurisdiction over the allegations of violations contained in the Complaint and personal jurisdiction over Bevmo as to the acts alleged in the Complaint, that venue is proper in the County of Los Angeles and that this Court has jurisdiction to enter this Consent Judgment as a full settlement and resolution of the allegations contained in the Complaint and of all claims which were or could have been raised by any person or entity based in whole or in part, directly or indirectly, on the facts alleged therein or arising therefrom or related to.

2. DEFINITIONS

2.1 "Covered Products" means cigars distributed to, or sold by, Bevmo.

2.2 "Covered Property" means Bevmo stores in the State of California.

2.3 "Individually Wrapped Cigars" means cigars that are individually wrapped in cellophane, a tube, or some other container for sale to consumers.

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

4.2 **Payment In Lieu of Civil Penalties:** Bevmo shall pay \$5,000 in lieu of civil penalties to “Consumer Advocacy Group, Inc.” CAG will use the payment for such projects and purposes related to environmental protection, worker health and safety, or reduction of human exposure to hazardous substances (including administrative and product testing costs arising from such projects).

4.3 **Reimbursement of Attorneys Fees and Costs:** Bevmo shall pay \$75,000 to “Yeroushalmi & Associates” as reimbursement for the investigation fees and costs, expert fees, attorney fees, and other litigation costs and expenses for all work performed through the approval of this Consent Judgment.

4.4 **Civil Penalty:** Bevmo shall issue two separate checks for a total amount of fifteen thousand dollars (\$15,000) as penalties pursuant to Health & Safety Code § 25249.12: (a) one check made payable to the State of California’s Office of Environmental Health Hazard Assessment (OEHHA) in the amount of \$11,250.00, representing 75% of the total penalty; and (b) one check to Consumer Advocacy Group, Inc. in the amount of \$3,750, representing 25% of the total penalty. Two separate 1099s shall be issued for the above payments: The first 1099 shall be issued to OEHHA, P.O. Box 4010, Sacramento, CA 95184 (EIN: 68-0284486). The second 1099 shall be issued to CAG and delivered to: Yeroushalmi & Associates, 9100 Wilshire Boulevard, Suite 610E, Beverly Hills, California 90212

4.5 Payments shall be delivered to: Reuben Yeroushalmi, Yeroushalmi & Associates, 9100 Wilshire Blvd., Suite 610E, Beverly Hills, CA 90212.

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

5.1 This Consent Judgment is a full, final, and binding resolution between CAG on behalf of itself and in the public interest, on the one hand, and Bevmo and its officers, directors, insurers, employees, parents, shareholders, divisions, subdivisions, subsidiaries, partners, affiliates (including, without limitation, Bevmo Holdings, LLC and Bevmo Intermediate Holdings, Inc.), sister companies, and each of the foregoing entity’s and/or person’s successors and assigns (“Defendant Releasees”), and each of their suppliers, customers, distributors,

1 wholesalers, retailers, or any other person in the course of doing business, and the successors and
2 assigns of any of them who may use, maintain, distribute or sell Covered Products (“Upstream
3 Defendant Releasees”), and all persons and entities who are downstream in the stream of
4 commerce from Bevmo who sell or distribute the Covered Products (“Downstream Defendant
5 Releasees”), on the other hand, for all claims for violations of Proposition 65 up through the
6 Effective Date based on exposure to Noticed Chemicals from Covered Products distributed to, or
7 sold by, Bevmo, as set forth in the Notice. Bevmo’s and the Defendant Releasees’ compliance
8 with this Consent Judgment shall constitute compliance with Proposition 65 with respect to
9 Noticed Chemicals from the Covered Products as set forth in the Notice.

10 5.2 CAG on behalf of itself, its past and current agents, representatives, attorneys,
11 successors, and/or assignees, hereby waives all rights to institute or participate in, directly or
12 indirectly, any form of legal action and releases all claims, including, without limitation, all
13 actions, and causes of action, in law or in equity, suits, liabilities, demands, obligations, damages,
14 costs, fines, penalties, losses, or expenses (including, but not limited to, investigation fees, expert
15 fees, and attorneys’ fees) of any nature whatsoever, whether known or unknown, fixed or
16 contingent regarding the failure to warn about exposure to Noticed Chemicals in the Covered
17 Products distributed to, or sold by, Bevmo (collectively “Claims”), against Bevmo, Defendant
18 Releasees, Upstream Defendant Releasees, and Downstream Defendant Releasees. In furtherance
19 of the foregoing, as to alleged exposures from Covered Products, CAG hereby waives any and all
20 rights and benefits which it now has, or in the future may have, conferred upon it with respect to
21 the Claims by virtue of the provisions of section 1542 of the California Civil Code, which
22 provides as follows:

23 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE
24 CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS FAVOR AT
25 THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM,
26 MUST HAVE MATERIALLY AFFECTED HIS SETTLEMENT WITH THE
27 DEBTOR.

28 CAG understands and acknowledges that the significance and consequence of this waiver of
California Civil Code section 1542 is that even if CAG suffers future damages arising out of or

1 resulting from, or related directly or indirectly to, in whole or in part, the Claims, CAG will not
2 be able to make any claim for those damages against Bevmo, the Defendant Releasees, the
3 Upstream Defendant Releasees or the Downstream Defendant Releasees. Furthermore, CAG
4 acknowledges that it intends these consequences for any such Claims as may exist as of the date
5 of this release but which CAG does not know exist, and which, if known, would materially affect
6 their decision to enter into this Consent Judgment, regardless of whether their lack of knowledge
7 is the result of ignorance, oversight, error, negligence, or any other cause.

8 5.3 Effective upon entry of this Consent Judgment, defendants Bevmo Holdings, LLC
9 and Bevmo Intermediate Holdings, Inc. are dismissed from this action with prejudice.

11 **6. ENFORCEMENT OF JUDGMENT**

12 The terms of this Consent Judgment shall be enforced exclusively by the parties hereto.
13 Subject to this Section 6, the Parties may, by noticed motion or order to show cause before the
14 Superior Court of California, Los Angeles County, giving the notice required by law, enforce the
15 terms and conditions contained herein. A Party may enforce any of the terms and conditions of
16 this Consent Judgment only after that Party first provides 30 days notice to the Party allegedly
17 failing to comply with the terms and conditions of this Consent Judgment (a “Notice of
18 Violation”), attempts to resolve such Party’s failure to comply in an open and good faith manner,
19 and the alleged violation has not been rectified within 30 days of such Party’s receipt of the
20 Notice of Violation. The Notice of Violation shall include for each Covered Product: the date(s)
21 the alleged violation(s) was observed and the location at which the Covered Product was offered
22 for sale.

23 **7. ENTRY OF CONSENT JUDGMENT**

24 7.1 CAG shall file a motion seeking approval of this Consent Judgment pursuant to
25 California Health & Safety Code § 25249.7(f). Upon entry of the Consent Judgment, CAG and
26 Bevmo waive their respective rights to a hearing or trial on the allegations of the Complaint.

27 7.2 If this Consent Judgment is not approved by the Court, (a) this Consent Judgment
28 and any and all prior agreements between the parties merged herein shall terminate and become

1 null and void, and the actions shall revert to the status that existed prior to the execution date of
2 this Consent Judgment; (b) no term of this Consent Judgment or any draft thereof, or of the
3 negotiation, documentation, or other part or aspect of the Parties' settlement discussions, shall
4 have any effect, nor shall any such matter be admissible in evidence for any purpose in this
5 Action, or in any other proceeding; and (c) the Parties agree to meet and confer to determine
6 whether to modify the terms of the Consent Judgment and to resubmit it for approval.

7 **8. MODIFICATION OF JUDGMENT**

8 8.1 This Consent Judgment may be modified only upon written agreement of the
9 Parties and upon entry of a modified Consent Judgment by the Court thereon, or upon motion of
10 any party as provided by law and upon entry of a modified Consent Judgment by the Court.

11 8.2 Any Party seeking to modify this Consent Judgment shall attempt in good faith to
12 meet and confer with the other Party prior to filing a motion to modify the Consent Judgment.

13 **9. RETENTION OF JURISDICTION**

14 9.1 This Court shall retain jurisdiction of this matter to implement and enforce the
15 terms of this Consent Judgment, pursuant to Section 664.6 of the California Code of Civil
16 Procedure.

17 **10. DUTIES LIMITED TO CALIFORNIA**

18 10.1 This Consent Judgment shall have no effect on Covered Products sold by Bevmo
19 to consumers outside the State of California.

20 **11. SERVICE ON THE ATTORNEY GENERAL**

21 11.1 CAG shall serve a copy of this Consent Judgment, signed by both parties, on the
22 California Attorney General so that the Attorney General may review this Consent Judgment
23 prior to its submittal to the Court for approval. No sooner than forty five (45) days after the
24 Attorney General has received the aforementioned copy of this Consent Judgment, and in the
25 absence of any written objection by the Attorney General to the terms of this Consent Judgment,
26 the parties may then submit it to the Court for approval.

27 **12. ATTORNEY FEES**

28

1 12.1 Except as specifically provided in Section 4, each Party shall bear its own costs
2 and attorney fees in connection with the Action and the negotiation, preparation and filing of this
3 Consent Judgment.

4 **13. ENTIRE AGREEMENT**

5 13.1 This Consent Judgment contains the sole and entire agreement and understanding
6 of the Parties with respect to the entire subject matter hereof and any and all prior discussions,
7 negotiations, commitments and understandings related hereto. No representations, oral or
8 otherwise, express or implied, other than those contained herein have been made by any party
9 hereto. No other agreements not specifically referred to herein, oral or otherwise, shall be
10 deemed to exist or to bind any of the Parties.

11 **14. GOVERNING LAW**

12 14.1 The validity, construction and performance of this Consent Judgment shall be
13 governed by the laws of the State of California, without reference to any conflicts of law
14 provisions of California law.

15 14.2 The Parties, including their counsel, have participated in the preparation of this
16 Consent Judgment, and this Consent Judgment is the result of the joint efforts of the Parties. This
17 Consent Judgment was subject to revision and modification by the Parties and has been accepted
18 and approved as to its final form by all Parties and their counsel. Accordingly, any uncertainty or
19 ambiguity existing in this Consent Judgment shall not be interpreted against any Party as a result
20 of the manner of the preparation of this Consent Judgment. Each Party to this Consent Judgment
21 agrees that any statute or rule of construction providing that ambiguities are to be resolved against
22 the drafting Party should not be employed in the interpretation of this Consent Judgment and, in
23 this regard, the Parties hereby waive California Civil Code § 1654.

24 **15. EXECUTION AND COUNTERPARTS**

25 15.1 This Consent Judgment may be executed in counterparts and by means of
26 facsimile or portable document format (pdf), which taken together shall be deemed to constitute
27 one document.
28

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

16. NOTICES

16.1 Any notices under this Consent Judgment shall be by personal delivery or First Class Mail.

If to CAG:

Reuben Yeroushalmi
9100 Wilshire Boulevard, Suite 610E
Beverly Hills, CA 90212
(310) 623-1926

If to Bevmo:

Beverages & More, Inc.
1401 Willow Pass Road
Concord, CA 94520

With a copy to:

Douglas Winthrop, Esq.
Arnold & Porter LLP
Three Embarcadero Center, 10th Floor
San Francisco, CA 94111

17. AUTHORITY TO STIPULATE

17.1 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:

Date: February __, 2013

Name: MICHEL SASSOON

Title: EXECUTIVE DIRECTOR
CONSUMER ADVOCACY GROUP,
INC.



1 AGREED TO:

2 Date: February 14, 2013

3 Name: Daniel T. Carter
DANIEL T. CARTER

4 Title: EXECUTIVE VICE PRESIDENT
BEVERAGES & MORE, INC.

5

6 IT IS SO ORDERED.

7

Date: _____

JUDGE OF THE SUPERIOR COURT

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28