

1 ROBERT J. STEIN III, SBN: 212495
rstein@adorno.com
2 W. MICHAEL HENSLEY, SBN: 90437
mhensley@adorno.com
3 MARC D. ALEXANDER, SEN 100J30
malexander@adorno.com
4 ALVARADOSMITH,
A Professional Corporation
5 1 MacArthur Place, Suite 200
Santa Ana, California 92707
6 Tel: (714) 852-6800
Fax: (714) 852-6899

7 ANDREW J. OGILVIE, SBN: 57932
8 ajogil@kabolaw.com
KEMNITZER ANDERSON BARRON OGILVIE &
9 BREWER, LLP
445 Bush Street, 6th Floor
10 San Francisco, California 94108
415-861-2265
11 Attorneys for Plaintiff
12 PETER R. GRAY, JR. and the Proposed Class

13 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
14 **FOR THE COUNTY OF SAN FRANCISCO, CIVIC CENTER COURTHOUSE**

16 PETER R. GRAY, JR. on behalf of himself and
all others similarly situated,

17 Plaintiffs,

18 v.

19 BEVERAGES & MORE, INC., DBA BEVMO,
20 a Delaware corporation,

21 Defendant.

ENDORSED
FILED
Superior Court of California
County of San Francisco

MAR 23 2012

CLERK OF THE COURT
BY: MICHAEL RAY RAY
Deputy Clerk

ALVARADOSMITH
A PROFESSIONAL CORPORATION
SANTA ANA

FAXED

CASE NO.: CGC-09-493678

CLASS ACTION

FIRST AMENDED CLASS ACTION
COMPLAINT FOR VIOLATION OF
CALIFORNIA CIVIL CODE SECTION
1750 ET SEQ. (CLRA) AND
CALIFORNIA BUSINESS &
PROFESSIONS CODE SECTION 17200
ET SEQ. (UCL) AND SECTION 17500, ET
SEQ. (FAL)

NATURE OF THE CASE

1
2 1. This case is brought as a class action on behalf of a class of California consumers
3 against Beverages & More, Inc., dba BevMo (“BevMo”) for deceptively marketing wine at its “5¢
4 sales” by representing to consumers that if they paid paying BevMo’s regular, usual, or “ClubBev!”
5 price for the first bottle they would get a second, identical, bottle for only 5¢. However, BevMo
6 marked up the price of the first bottle, so consumers were not actually paying BevMo’s regular price,
7 nor getting the approximately 50% discount represented by BevMo. In fact, for some bottles of
8 wine, BevMo marked up the price so much that it actually cost more to buy two bottles during the 5¢
9 sale. For example, during a 5¢ sale, in July 2009, BevMo advertised and sold Vago Rojo
10 Tempranillo-Malbec for \$19.99 a bottle (thus consumers would paid a total of \$20.04 for two
11 bottles), an apparent savings of \$19.94. (Exhibit B, p.1). As soon as the 5¢ sale ended, however,
12 BevMo’s price for the same wine dropped from \$19.99 to \$6.99, meaning that consumers could buy
13 two bottles for \$13.98—i.e., \$6.06 (30%) less than they would have paid during the 5¢ sale.
14 (Exhibit B, p.2) This practice of using a fictitious, marked up, or otherwise misleading price for the
15 first bottle is a deceptive, unfair and illegal practice, in violation of California’s Consumer Legal
16 Remedies Act (“CLRA”) and Unfair Competition Law, Business & Professions Code section 17200,
17 et seq. (“UCL”). These advertisements for the sale also violate the California False Advertising
18 Law, Business & Professions Code section 17500, et seq. (“FAL”). BevMo’s conduct also violates
19 the Federal Trade Commission Act, and regulations promulgated thereunder, which provides an
20 addition it violates the UCL. Accordingly, Plaintiffs’ complaint seeks restitution, damages, and
21 injunctive relief, as well as attorneys’ fees and costs, on behalf of Plaintiff and the class.

THE PARTIES

22
23 2. Plaintiff and putative class representative PETER R. GRAY, JR., is over 18 years of
24 age and resides in San Francisco, California.

25 3. Defendant BEVERAGES & MORE, INC. (dba BevMo) is a Delaware corporation
26 with its headquarters in Concord, California. According to its website, BevMo is the “leading
27 alcoholic beverage–lifestyle superstore retailer in the western United States and among the largest in
28 the country.”

1 8. **The 382 Class.** Counts I and II of this action may be properly maintained as a class
2 action pursuant to California Code of Civil Procedure section 382.

3 9. **Ascertainability.** The proposed class readily meets Code of Civil Procedure section
4 382's ascertainability requirement which is determined by examining the class definition, the size of
5 the class, and the means of identifying the class members.

6 10. **The 382 Class Definition.** Pursuant to Code of Civil Procedure section 382, Plaintiff
7 seeks certification of a class ("the 382 Class") defined as:

8 all persons who during the period starting October 21, 2005 and
9 continuing through February 9, 2010 order certifying the class,
10 purchased wine at BevMo's 5¢ sale where, within the thirty days prior
11 to the beginning of the 5¢ sale, BevMo either: (i) sold the same wine
12 for less than the price at which it sold the first bottle wine during the
13 5¢ sale, or (ii) did not sell the wine. The class shall be limited to
14 people who either purchased the wine from a BevMo store located in
15 the State of California or ordered wine from BevMo's internet site and
16 made the payment from a billing address in the State of California.
17 Excluded from the class are Defendant, any entities in which
18 Defendant has a controlling interest or which have a controlling
19 interest in Defendant, and the officers, directors, employees, affiliates,
20 and attorneys of Defendant.

21 11. **Numerosity.** The class consists of, at least, tens of thousands of members residing
22 throughout the State of California.

23 12. **Identification of Class Members.** Based on information and belief the vast majority
24 members of the class can be identified directly from BevMo's records. BevMo requires purchasers
25 to be members of its "ClubBev!" in order to purchase at the 5¢ sale "discounts." As such, BevMo
26 will have electronic records for each person who purchased during its 5¢ sales. Further,
27 independently of the "ClubBev!" records, BevMo will have other records of the purchases, such as
28 and credit card, debit card, and check transactions records.

 13. **Community of Interest.** There is a well-defined community of interest among the
class members. Like all members of the class, Plaintiff was wrongfully charged a marked-up price,
in excess of BevMo's actual regular price, for wine he purchased during the 5¢ sale.

///

///

1 14. The factual basis of BevMo's misconduct is common to all members of the class and
2 represents a common practice of wrongful conduct resulting in injury to all members of the class and
3 enrichment to BevMo.

4 15. There are numerous questions of law and fact common to Plaintiff and members of
5 the class, and those questions predominate over any questions that may affect individual members of
6 the class. These common questions of law and fact include, *inter alia*:

- 7 a) Determining the regular price for the first bottles of wine sold at BevMo's
8 5¢ sales.
- 9 b) Determining whether BevMo marked-up the regular price of the first
10 bottles wine for its 5¢ sales.
- 11 c) Determining what representations BevMo made regarding the discounts
12 provided during its 5¢ sales.
- 13 d) Determining if BevMo misrepresented the price of the first bottle wine it
14 sold during its 5¢ sales, or otherwise misrepresented the amount of the
15 discount consumers would receive during the 5¢ sales.
- 16 e) Determining whether BevMo's conduct as alleged in this Complaint, was
17 unfair, unlawful, deceptive, or otherwise in violation of the UCL or FAL.
- 18 f) Determining whether BevMo acquired any money from Plaintiff and class
19 members as a result of its violations of the UCL.
- 20 g) Determining whether class members are entitled to any restitution,
21 injunction of any other form of relief under the UCL or FAL.
- 22 h) Determining the proper methodology to calculate the amount of
23 restitution, or any other relief, owed to Plaintiff and each member of the
24 class.
25
26

27 ///

28 ///

1 the same goods at the "regular price." In fact, one of the examples used by the FTC is a "1¢ sale."
2 16 C.F.R. §251.1(a)(2). The FTC explains that, because consumers regard such offers "to be a
3 special bargain, all such offers must be made with extreme care so as to avoid any possibility that
4 consumers will be misled or deceived." *Id.*; See also 16 C.F.R. §233.4 (discussed below). When a
5 consumer is told he gets something free (or for 5¢) if he purchases an identical good, the retailer has
6 led the consumer to believe he is paying "no more than the regular price" for the initial product and
7 getting the second one for free (or 5¢). 16 C.F.R. §251.1(b)(1). "Thus, a purchaser has a right to
8 believe that the merchant will not directly and immediately recover, in whole or in part, the cost of
9 the free merchandise or service by marking up the price of the article which must be purchased." *Id.*

10 22. To avoid any uncertainty on this point, the FTC has codified the meaning of "regular
11 price":

12 (2) The term regular when used with the term price, means the
13 price, in the same quantity, quality and with the same service,
14 at which the seller or advertiser of the product or service has
15 openly and actively sold the product or service in the
16 geographic market or trade area in which he is making a "free"
17 or similar offer in the most recent and regular course of
18 business, for a reasonably substantial period of time, i.e., a 30-
19 day period. For consumer products or services which fluctuate
20 in price, the "regular" price shall be the lowest price at which
21 any substantial sales were made during the aforesaid 30-day
22 period. Except in the case of introductory offers, if no
23 substantial sales were made, in fact, at the "regular" price, a
24 "free" or similar offer would not be proper.

25 16 CFR §251.1(b)(2).

26 23. Similarly, 16 C.F.R. §233.4, titled "Bargain offers based upon the purchase of other
27 merchandise," provides that for such promotions, including a "1¢ sale," it is "important" that "care
28 be taken not to mislead the consumer." 16 C.F.R. §233.4(a). To this end, the regulation provides
that consumers are likely to be "deceived" where a retailer "increased his regular price of the article
required to be bought." *Id.* at §233.4(b).

BEVMO MISREPRESENTS THE REGULAR PRICE OF THE FIRST BOTTLE

24 24. BevMo actively advertises its 5¢ sale through various means including, but not
25 limited to, direct mail, emails promoting the 5¢ sale, internet/WebPages, traditional print media,

1 vigorous point of sale displays, and television and radio advertisements. As part of its extensive
2 advertising campaign, BevMo represents that the price customers pay for the first bottle using a
3 variety of terms interchangeably such as “regular price”, “ClubBev!” price, and “full price,” to wit,
4 attached as Exhibit B (p.1) is a copy of a July 24, 2009, advertisement from BevMo’s website for
5 Vago Rojo Tempranillo-Malbec, at a “regular price” of \$19.99 with the representation “5-cent sale!
6 Buy one at regular price and get a second bottle for only 5-cents. Attached as Exhibit C, is a copy of
7 an advertisement for 5¢ sale indicating the first bottles are sold at the “ClubBev!” prices. Attached
8 as Exhibit D is another BevMo 5¢ sale advertisement saying “Buy One, Wine, Get the Second Bottle
9 for 5¢!”

10 25. \$19.99 was not BevMo’s actual regular price at which it sold a bottle of Vago Rojo
11 Tempranillo-Malbec. Beginning the day after the 5¢ sale ended, BevMo offered the same bottle for
12 \$6.99 (see website ad of July 28, 2009, attached as Exhibit B, p.2). BevMo’s markup of this bottle
13 to \$19.99 represented a 185% increase from its regular price of \$6.99.

14 26. BevMo increases the price of the first bottles of wine for its 5¢ sale for most bottles it
15 includes as part of the sale. The price for the first bottle that consumers have to pay in order to get a
16 second bottle for 5¢ is almost always more than the price at which the customer could have
17 purchased the same wine from BevMo immediately prior to, or after, the 5¢ sale. Although Plaintiff
18 believes that the FTC’s definition of “regular” price should apply, and be dispositive, to avoid any
19 confusion on this issue, Plaintiff asserts that in addition to, and independent of, the FTC’s definition
20 of “regular price,” the prices represented (and charged) by BevMo for the first bottle of wine were
21 not the true regular price for the wine, in that (among other reasons) the regular price was not the
22 price paid for the majority, or even a substantial percentage, of the purchases of those wines at
23 BevMo prior to and after the 5¢ sale.

24 27. The fact that from time to time BevMo used nomenclature other than the term
25 “regular” as the adjective describing the price of the first bottle does not diminish, and actually
26 enhances, the misleading and deceptive nature of BevMo’s 5¢ sales. Taken as a whole, the 5¢ sales
27 constitute a continuous scheme to mislead and deceive consumers into believing they are getting a
28 bigger discount than they in fact received.

1 28. By marking-up the price of the wines to make customers believe they are getting a
2 bigger discount than they are actually receiving (or, in some cases they are not receiving any
3 discount, but actually paying more), BevMo wrongly induced consumers to purchase wine they
4 would not have purchased, or to purchase in larger quantities and or at higher prices than they would
5 have otherwise purchased.

6 29. Consumers have been harmed, and BevMo has been unjustly enriched, in at least, the
7 amount of money that consumers pay in excess of the actual regular price for the first bottle of wine.

8 **REPRESENTATIVE PLAINTIFF'S PURCHASES AND CLRA DEMAND**

9 30. Proposed class representative Peter Gray's purchases are typical of BevMo's 5¢ sale
10 customers. Mr. Gray has often purchased wine at BevMo's 5¢ sale believing that, based on
11 BevMo's representations, he was paying the regular price—i.e., the price he would have paid
12 BevMo prior to or after the 5¢ sale—and getting a second identical bottle for only 5¢ (plus
13 applicable taxes).

14 31. On March 20, 2009, Mr. Gray purchased four bottles of wine, advertised as being
15 included in the 5¢ sale, from BevMo's "superstore" located at 1301 Van Ness Avenue, San
16 Francisco, California. Mr. Gray purchased two bottles of Challis Lane Chardonnay and two bottles
17 of Washington Hills Rainier Red.

18 32. During the 5¢ sale, BevMo represented that its regular prices were \$7.99 for the
19 Challis Lane Chardonnay and \$9.99 for the Washington Hills Rainier Red. Accordingly, Mr. Gray
20 was charged, and paid, these prices plus 5¢ each for the two additional bottles, plus tax.

21 33. In fact, BevMo's regular prices for the wines purchased by Mr. Gray were
22 substantially less than the price charged by BevMo for the first bottles during the 5¢ sale. BevMo
23 regularly sold the Challis Lane Chardonnay for \$5.99 and the Washington Hills Rainier Red for
24 \$6.99. Thus, for the 5¢ sale, BevMo marked-up the wines 43% and 33%, respectively, from the
25 regular price at which Mr. Gray could have purchased those bottles at times other than during the 5¢
26 sale.

27 34. Based on BevMo's advertising materials, including, but not limited to, materials
28 mailed to Mr. Gray, and point of sale materials, Mr. Gray believed, and relied upon, BevMo's

1 representations that he would only be paying BevMo's true regular price for the initial bottles of
2 wine, meaning that he would be paying the same price for the first bottle of wine during the 5¢ sale
3 as he could have paid BevMo for that wine before or after the 5¢ sale. If Mr. Gray had known that
4 BevMo increased the regular prices of the wine for the 5¢ sale, he would not have purchased the
5 wine from BevMo.

6 35. Accordingly, Mr. Gray was actually injured as a result of BevMo's conduct, as
7 alleged in this Complaint, in an amount not less than the difference between what he paid for the two
8 regular price (first) bottles of wine (a total of \$17.98 plus tax) and what he should have paid if
9 BevMo had sold the first bottles at the actual regular price at which BevMo sold the wine except
10 during the 5¢ sale (a total of \$12.98 plus tax). Plaintiff has suffered additional actual injuries, for the
11 same reasons arising from other purchases he has made at BevMo's 5¢ sales during the four years
12 prior to filing the Complaint. Although Plaintiff recalls making such purchases, the specific
13 information regarding the dates, types of wine, and prices for those transactions is in the possession,
14 custody and control of BevMo.

15 36. On or about August 27, 2009, Mr. Gray sent a CLRA demand letter (certified mail
16 with return receipt) to the attention of the manager at the BevMo Store where he purchased the
17 aforementioned bottles of wine, located at 1301 Van Ness Avenue, San Francisco, California. The
18 letter was received by BevMo on September 3, 2009. On September 25, 2009, BevMo's counsel
19 (Howard Rice Nemerovski Canady Falk & Rabkin) sent a response to Mr. Gray, rejecting his request
20 that BevMo reimburses him and all class members, and ceases its illegal conduct. In that letter,
21 BevMo acknowledged that it did in fact sell the wine at the prices identified by Mr. Gray during and
22 immediately after the 5¢ Sale – i.e., (respectively) \$7.99 and \$5.99 for the Challis Lane
23 Chardonnay, and \$9.99 and \$6.99 for the Washington Hills Ranier Red. BevMo, however, asserted
24 that the higher prices were its "regular" prices, while the lower prices were its "ClubBev!" prices.
25 Plaintiff asserts that this distinction is legally irrelevant, and the regular prices were in fact the lower
26 (\$7.99 and \$5.99) prices, as per the FTC regulations and the facts that (i) the vast majority of each
27 particular wine is sold at the lower prices, (ii) the 5¢ sale is only available to "Club Bev!" members
28 so that the regular price they would otherwise pay is the "Club Bev!" price, and (iii) tellingly,

1 BevMo has actually, affirmatively, advertised the 5¢ sale prices for the first bottles of wine as the
2 “ClubBev!” price. See Attached Exhibit C. Further, BevMo’s distinction is also factually irrelevant,
3 since a consumer must be a “ClubBev!” member¹ in order to purchase at the 5¢ Sale. See e.g.,
4 Exhibit C at page 4, BevMo advertisement promoting its Fall 2009 5¢ Sale and stating “Must be a
5 Club Bev! member.” Accordingly, all of the purchases made at the 5¢ Sale are believed to have
6 been made by “ClubBev!” members, like Mr. Gray, and the regular price they would have paid for
7 the wine (but for BevMo’s markup for the 5¢ Sale) would have been the lower (“ClubBev!”) price.

8 **COUNT I**

9 **Violation of Business & Professions Code Section 17200 et seq.**

10 37. Plaintiff realleges and incorporates fully by this reference paragraphs 1 through 36 as
11 if fully set forth in this paragraph.

12 38. At all relevant times, California Business & Professions Code section 17200 et seq.
13 (the “UCL”) was in full force and effect.

14 39. The UCL section 17200, prohibits the use of “any unlawful, unfair or fraudulent
15 business act or practice and unfair, deceptive, untrue or misleading advertising and any act
16 prohibited by Business & Professions Code section 17500 et seq.”

17 40. California Business & Professions Code §17500 provides, in relevant part, that:

18 It is unlawful for any person, firm, corporation or association or
19 any employee thereof with intent directly or indirectly to dispose
20 of real or personal property to perform services, professional or
21 otherwise, or anything of any nature whatsoever or to induce the
22 public to enter into any obligation relating thereto, to make or
23 disseminate or cause to be made or disseminated before the public
24 in this state, or to make or disseminate or cause to be made or
25 disseminated from this state before the public in any state, in any
26 newspaper or other publication, or any advertising device, or by
27 public outcry or proclamation, or in any other manner or means
28 whatever, including over the internet, any statement, concerning
that real or personal property or those services, professional or
otherwise, or concerning any circumstance or matter of fact
connected with the proposed performance or disposition thereof,
which is untrue or misleading, and which is known, or which by

¹ Like many local supermarket membership cards, the “ClubBev!” membership is free of charge, and can be created at the point of sale. Thus any “ClubBev!” discount is available to any consumer at the time of purchase.

1 the exercise of reasonable care should be known, to be untrue or
2 misleading, or for any person, firm or corporation to so make or
3 disseminate or cause to be so made or disseminated any such
4 statement as part of a plan or scheme with the intent not to sell
that personal property or those services, professional or otherwise,
so advertised at the price stated therein, or as so advertised.

5 41. Section 17203 of the UCL empowers the court to enjoin any conduct, or proposed
6 conduct, that violates the UCL. Additionally the "Court may make such orders. . . as may be
7 necessary to restore to any person in interest any money or property, real or personal, which may
8 have been acquired by means of such unfair competition." Additionally, class actions under the
9 UCL are governed by Code of Civil Procedure section 382.

10 42. The UCL is viewed as having five substantive prongs:

- 11 (i) unlawful business acts or practices;
- 12 (ii) unfair business acts or practices;
- 13 (iii) fraudulent business acts or practices;
- 14 (iv) unfair, deceptive, or misleading advertising; and
- 15 (v) any conduct that violates Business & Professions Code section 17500 et seq.

16 Although a Plaintiff only needs to establish a violation of any one of these prongs to
17 prevail on a UCL claim, as explained in this Complaint, BevMo's conduct violates each of these
18 prongs.

19 43. BevMo's conduct constitutes an "act or practice" under the UCL. BevMo conducts
20 its 5¢ sales several times per year, usually for periods of two to four weeks at a time, and sells wine
21 to at least tens of thousands of consumers during each 5¢ sale.

22 44. **Unlawful business acts or practices.** BevMo's conduct of marking up the regular
23 prices of its wine for its 5¢ sales is an unlawful practice. The practice violates, at a minimum 16
24 C.F.R. §§233.1, 233.4 and 251.1 and violates section 5 of the FTC Act, 15 U.S.C. §45 (prohibiting
25 unfair or deceptive acts or practices) and §43 (a) of the Lanham Act, 15 U.S.C. §1125(a) (prohibiting
26 false or misleading representations of fact). As set forth in Count III, BevMo's conduct also violates
27 the CLRA. As such, the conduct violates the UCL.

28 ///

1 45. **Unfair business acts or practices.** BevMo's marking up of the regular prices of its
2 wine for its 5¢ sales is an unfair practice. As recognized by FTC regulations, or viewed
3 independently of the regulations, representing to consumers that if they buy a product at regular
4 price, they can get a second, identical, product for only 5¢ is an unfair practice where the seller
5 marks up the regular price to offset the discount that consumers are led to believe they are getting.
6 In addition to depriving consumers from their benefit of the bargain, it also induces them to make
7 purchases which they would not have otherwise made, to pay more for the purchases than they
8 would otherwise pay, or to make purchases from BevMo which they may have otherwise made from
9 a competitor. BevMo's conduct causes substantial injury (believed to be in the millions of dollars)
10 to consumers. The conduct is not outweighed by any countervailing benefits to consumers from
11 BevMo marking up and misrepresenting the prices for the first bottles of wine at its 5¢ sales. Due to
12 the deceptive nature of the conduct, consumers could not have reasonably avoided being injured.

13 46. **Fraudulent business acts or practices.** BevMo's conduct of marking up its regular
14 prices for its 5¢ sales is a fraudulent business practice. As alleged in this Complaint, and as
15 recognized by the FTC regulations cited, marking up regular prices in connection with the 5¢ sales is
16 likely to deceive consumers (and did, in fact, deceive Plaintiff) into believing they are getting a
17 larger discount than the discount (if any) that they actually received.

18 47. **Unfair Deceptive, Untrue or Misleading Advertising.** As alleged in this
19 Complaint, BevMo's advertisements for its 5¢ sales are unfair, deceptive, untrue, or misleading.
20 Although plaintiff is not relying exclusively on the FTC Act regulations, and they specifically
21 recognize that where a seller increases its regular price in connection with a 1¢ sale "the consumer
22 may be deceived." 16 C.F.R. §233.4(b). Further, BevMo's conduct clearly constitutes "advertising"
23 as that term is used in the UCL. BevMo's advertisements include traditional mass media
24 advertisements, direct mailers, and emails promoting the 5¢ sale, extensive promotion on
25 Defendant's website, and extensive point of sale promotional material, including large displays at all
26 of its stores. BevMo's advertisements are likely to deceive, and have deceived, consumers,
27 including Plaintiff.

28 ///

1 55. Defendant used various forms of media to advertise, call attention to, or otherwise
2 publicize its 5¢ sales including, but not limited to, traditional mass media advertising, direct mail,
3 email of advertising material, its Website, and point of sale materials and displays.

4 56. Defendant's public disseminations contained statements which were untrue or
5 misleading in that they represented to consumers that they could purchase a bottle of wine for only
6 5¢ if they purchased an identical bottle at BevMo's regular price. As alleged in this Complaint, the
7 price charged to Plaintiff and class members by BevMo for the first bottle of wine was not BevMo's
8 regular price, but was, in fact, substantially more than BevMo's regular price.

9 57. Defendant knew, or in the exercise of reasonable care, should have known, that its
10 advertising was misleading or untrue. Defendant was fully aware of the fact that it increased its
11 regular price for bottles of wine during its 5¢ sale. Further, Defendant knew or should have known,
12 of the FTC regulations defining the term "regular price" (16 C.F.R. §251.1(b)(2), see ¶ 18-23,
13 *supra*. In any event, Defendant knew, or should have known, that by representing to consumers that
14 they would pay BevMo's regular price for the first bottle of wine and only 5¢ for a second bottle,
15 consumers would believe they were getting a 50% discount (save 5¢) from the price they would have
16 paid BevMo for the same two bottles of wine if it were not for the 5¢ sale.

17 58. For the reasons previously alleged, BevMo publically disseminated advertising with
18 the intent not to sell the wine on the price terms as stated in the advertisement—i.e., not to sell the
19 first bottles at their regular prices.

20 59. As a direct result of Defendant's untrue and/or misleading disseminations, and
21 advertisements of goods without the intent to sell them on the price terms as advertised, Defendant
22 wrongfully acquired money from Plaintiff and the members of the class, to which it was not entitled.
23 Specifically, Defendant wrongfully acquired money in the amount of the differential between its
24 regular price for the first bottles of wine and the price that and the price it charged Plaintiff and the
25 class members for those bottles in connection with their purchases during the 5¢ sales. Nothing in
26 this paragraph shall be construed as a limitation on any restitution that Plaintiff and the class
27 members may seek, or be awarded, in this case.

28 ///

COUNT III

Violation of the Consumer Legal Remedies Act

60. Plaintiff realleges and reincorporates fully by this reference, paragraphs I through 7, and 18 through 59 as if fully set forth in this paragraph.

61. At all relevant times, the CLRA was in full force and effect.

62. The CLRA, at Civil Code section 1770(a), provides:

a) The following methods of competition and unfair or deceptive acts or practices undertaken by any person in a transaction intended to result or which results in the sale or lease of goods or services to any consumer are unlawful:

* * *

(13) Making false or misleading statements of fact concerning reasons for, existence of, or amounts of price reductions.

63. Section 1780 of the CLRA authorizes private citizens to bring an action for any violation of section 1770, and to obtain actual damages, injunctive relief, restitution of property, punitive damages, and "any other relief that the court deems proper." Additionally, section 1780(d) requires the court to award costs and attorneys fees to a prevailing Plaintiff.

64. Bottles of wine are "goods" as that term is defined in Civil Code section 1761(a).

65. BevMo is a "person" as that term is defined in Civil Code section 1761(c).

66. Plaintiff is a "consumer" as that term is defined in Civil Code section 1761(d).

67. BevMo's sale of wine to Plaintiff is a "transaction" as that term is defined in Civil Code section 1761(e).

68. **The CLRA Class.** This action may be properly maintained as a class action pursuant to the CLRA, California Civil Code section 1781(b).

69. **The CLRA Class Definition.** Pursuant to the CLRA, Plaintiff seeks certification of a class (the "CLRA Class") defined as:

all consumers who, during the period starting October 21, 2006 and continuing through February 9, 2010, purchased wine at BevMo's 5¢ sale where, within the thirty days prior to the beginning of the 5¢ sale BevMo either: (i) sold the same wine for less than the "regular" price at which it sold the wine during the 5¢ sale, or (ii) did not sell the wine. The class shall be limited to consumers who either purchased the wine from a BevMo store located in the State of California or ordered wine from BevMo's internet site and made the payment from

1 a billing address in the State of California. Excluded from the class
2 are Defendant, any entities in which Defendant has a controlling
3 interest or which have a controlling interest in Defendant, and the
4 officers, directors, employees, affiliates and attorneys of Defendant.

5 70. The CLRA has its own class certification provision, California Civil Code section
6 1781(b), which provides:

- 7 b) The court shall permit the suit to be maintained on behalf of all
8 members of the represented class if all of the following conditions
9 exist:
- 10 1) It is impracticable to bring all members of the class
11 before the Court.
 - 12 2) The questions of law or fact common to the class are
13 substantially similar and predominate over the
14 questions affecting the individual members.
 - 15 3) The claims or defenses of the representative Plaintiffs
16 are typical of the claims or defenses of the class.
 - 17 4) The representative Plaintiffs will fairly and adequately
18 protect the interests of the class.

19 71. **Numerosity.** It is impracticable to bring all of the class members before the court.
20 The proposed class consists of, at least, tens of thousands of members residing throughout the State
21 of California.

22 72. **Commonality.** Common questions of law or fact are substantially similar for all
23 class members and predominate over any individual questions. These common questions include:

- 24 a) Determining BevMo's regular price for the wine sold at BevMo's 5¢ sales.
- 25 b) Determining whether BevMo marked-up the regular price of the wine for
26 its 5¢ sales.
- 27 c) Determining what representations BevMo made regarding its discounts
28 during its 5¢ sales.
- d) Determining if BevMo otherwise misrepresented the amount of the
discount consumers were receiving during the 5¢ sales.
- e) Determining whether BevMo's conduct, as alleged in this Complaint,
violated the CLRA.

- 1 f) Determining whether consumers were injured as a result of BevMo's
2 conduct, as alleged in this complaint.
3 g) Determining the proper methodology to calculate the amount of damages
4 incurred by each class member as a result of BevMo's conduct, as allege
5 in this complaint.

6 73. **Typicality.** Mr. Gray's claims are typical of the claims of the class. As set forth in
7 greater details above, Mr. Gray purchased four bottles of wine at BevMo's 5¢ sale, believing that he
8 was paying BevMo's regular price—i.e., the price he would normally pay at BevMo—for the first
9 bottle and on 5¢ for the second bottle. Mr. Gray later discovered that the prices he paid for the first
10 bottles of wine he purchased during the 5¢ sale were not, in fact, BevMo's regular prices for those
11 bottles; rather BevMo marked-up 33% to 43% during the 5¢ sale.

12 74. **Adequacy.** Mr. Gray and his counsel will vigorously and adequately represent the
13 class. Mr. Gray is aware of his duties and responsibilities as a class representative and is committed
14 to fulfilling those obligations. Mr. Gray has retained counsel with vast experience in class actions,
15 including consumer class actions under California law.

16 75. As alleged in this Complaint, BevMo made false or misleading statements of fact
17 concerning the existence or amounts of the price reduction for the wine sold at its 5¢ sales.
18 Specifically, BevMo stated that consumers could buy a bottle of wine for only 5¢ if they purchased
19 another, identical, bottle at BevMo's regular price. Thus, BevMo represented that consumers were
20 receiving a discount of 50% off its regular prices (plus 5¢). In fact, because BevMo marked-up its
21 regular price, the price reduction received by Plaintiff, and class members, was materially less than
22 represented by BevMo. In some cases, class members did not even receive any discount, but
23 actually paid more for the two bottles of wine than they would have paid if they purchased both
24 bottles at BevMo's regular price.

25 76. As a result of BevMo's false or misleading statements of fact concerning the
26 existence and amounts of the price reductions for the wine sold at the 5¢ sales, Plaintiff and the class
27 members have been damaged in that they paid more for their purchases than they would have paid if
28

1 77. BevMo had only charged them its actual regular prices for the wine (and sold them a
2 second bottle for 5¢) as it represented it was doing.

3 **PRAYER FOR RELIEF**

4 **WHEREFORE**, Plaintiff individually, and on behalf of members of the proposed classes,
5 prays for judgment and relief against Defendant as follows:

- 6 A. For an order certifying the “382 Class” and “CLRA Class”, as alleged in this
7 Complaint, and appointing Plaintiff and his counsel to represent each of those classes;
8 B. Ordering Defendant to provide notice to the class;
9 C. Pursuant to California Business & Professions Code section 17203, for a declaration
10 that Defendant has engaged in unlawful, unfair, and deceptive business acts and
11 practices in violation of the UCL;
12 D. Pursuant to California Business & Professions Code section 17203, for an order
13 requiring Defendant to account for all money realized from Plaintiff and members of
14 the 382 Class as a result of its violations of the UCL, and requiring Defendant to
15 provide restitution and/or disgorgement of the monies it improperly obtained to
16 Plaintiff and members of the 382 Class, in an amount to be determined according to
17 proof;
18 E. Pursuant to California Business & Professions Code section 17203 for a preliminary
19 and/or permanent injunction enjoining Defendant from violating the UCL by means
20 of its conduct (or similar conduct) as alleged in this Complaint;
21 F. Pursuant to California Civil Code section 1780(a)(2) a permanent injunction
22 enjoining Defendant from violating the CLRA by means of its conduct (or similar
23 conduct) as alleged in this Complaint;
24 G. Pursuant to California Civil Code section 1780(a), an order against Defendant
25 awarding Plaintiff and the CLRA class their actual damages (in an amount to be
26 determined according to proof), restitution of all money or property obtained by
27 Defendant in violation of the CLRA, punitive damages, and any other relief the Court
28 deems proper;

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

- H. Pursuant to California Civil Code section 1780(d), and any other statutory or common law basis that may be applicable, an order requiring Defendant to pay Plaintiff and his counsel reasonable attorney's fees, costs and expenses;
- I. For an award to Plaintiff and his counsel for reimbursement and payment of their costs, disbursements, and reasonable attorney's fees and expenses as allowed by statute, the common fund doctrine, the substantial benefit doctrine, private attorney general statute or other authority, in law or equity, authorizing or requiring payment of such fees, costs, disbursements and expenses;
- J. For an award of pre-and post-judgment interest; and
- K. Granting any and all such additional relief as the Court may deem just and proper.

DATED: March 23, 2012

ALVARADOSMITH, APC
And
KEMNITZER ANDERSON BARRON OGILVIE &
BREWER, LLP,

By: 

ROBERT J. STEIN, III
W. MICHAEL HENSLEY
MARC D. ALEXANDER
ANDREW J. OGILVIE
Attorneys for Plaintiff
PETER R. GRAY, JR. and the Proposed Class

EXHIBIT A

1 ROBERT J. STEIN, SBN: 212495
rstein@adorno.com
2 W. MICHAEL HENSLEY, SBN: 90437
mhensley@adorno.com
3 ADORNO YOSS ALVARADO & SMITH
1 MacArthur Place, Suite 200
4 Santa Ana, California 92707
714-852-6800 / Fax: 714-852-6899
5

6 ANDREW J. OGILVIE, SBN: 57932
ajogil@kabolaw.com
7 San Francisco, California 94108
415-861-2265

8 Attorneys for Plaintiff
9 PETER R. GRAY, JR. and the Proposed Class

10 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
11 **FOR THE COUNTY OF SAN FRANCISCO, CIVIC CENTER COURTHOUSE**

12 PETER R. GRAY, JR. on behalf of himself and
13 all others similarly situated,

14 Plaintiffs,

15 v.

16 BEVERAGES AND MORE INC., DBA
17 BEVMO, a Delaware corporation,

18 Defendant.

CASE NO.:

CLASS ACTION

DECLARATION OF PETER R. GRAY,
JR. REGARDING PROPER VENUE FOR
CLRA CLAIMS

19
20
21
22
23 I, Peter R. Gray, Jr., declare and state:

24
25 1. I am the individually named plaintiff and putative class representative in the above-
26 captioned case. I know all of the following facts of my own personal knowledge and, if called as a
27 witness, could and would testify hereto.
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

2. I reside in San Francisco, County. I purchased wines at Defendant BevMo's 5 cent sale, as referenced in the Complaint and the subject of this action, from its "superstore" located at 1301 Van Ness Avenue, San Francisco.

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

Executed this 13 day of October, 2009 in San Francisco, California.


Peter R. Gray, Jr.

ADORNO YOSS ALVARADO & SMITH
ATTORNEYS AT LAW
SANTA ANA

EXHIBIT B



Shopping Basket

Checkout

Customer Service

My ClubBev!

Wine

Welcome Customer. You have 0 item(s) in your Shopping Basket

Checkout

Track an Order

FAQ

Search Item # or keywords

Go

EARN A 5% REWARD!

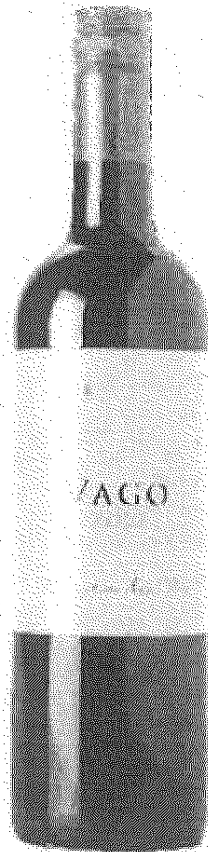
Pick Up Your Order in 1 Hour!

My current choice is

Ship

to CA

BevMo Home > Wine > 5 Cent Sales > Red Wine > Vago Rojo Tempranillo-Malbec



Vago Rojo Tempranillo-Malbec (750 ML)
Price: \$19.99



140 available 1

Add to basket

5-cent Sale!

Buy one at regular price and get a second for only 5-cents.

88 PTS WILFRED WONG. A finely constructed effort, the ch '06 Vago Rojo exhibits ripe flavors that are accented with a minerality; excellent with grilled beef.

SKU:82171

Sign in to add this product to your Wine Cellar or :

Product Information

Company : Vago

Vintage* : 2006

Type : Malbec

Country : Argentina

* We monitor our inventory to provide accurate information on the products we vintage will sell out or be replaced after your order is placed. We reserve the right to alternate vintage unless you indicate substitution is not allowed.

Customers who bought this Product also bought



Tapiz Malbec '08
Reg. \$16.99
ClubBev \$11.99

Show all Wine Glasses

Ratings & Awards

ClubBev: Sign in to rate this item

Wilfred Wong Rating : 88



Shopping Basket Checkout Customer Service My ClubBev!

Welcome **Customer**. You have 0 item(s) in your Shopping Basket Checkout Track an Order FAQ

Search Item # or keywords

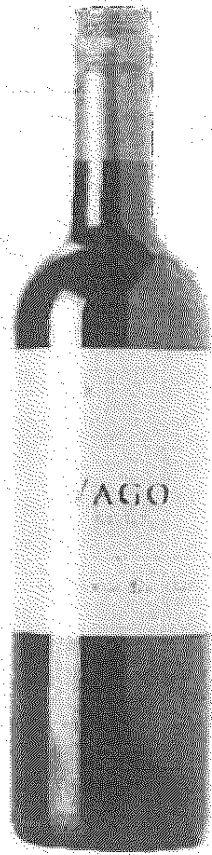


Pick Up Your Order in 1 Hour!

My current choice is

Ship to CA

BevMo Home > Vago Rojo Tempranillo-Malbec



Vago Rojo Tempranillo-Malbec (750 ML)
Regular Price: ~~\$19.99~~ ClubBev: \$6.99

120 available 1

Add to Basket

88 PTS WILFRED WONG. A finely constructed effort, the ch '06 Vago Rojo exhibits ripe flavors that are accented with a minerality; excellent with grilled beef.

SKU:82171

Sign in to add this product to your Wine Cellar or :

Product Information

Company : Vago

Vintage* : 2006

Type : Malbec

Country : Argentina

* We monitor our inventory to provide accurate information on the products w
vintage will sell out or be replaced after your order is placed. We reserve the r
alternate vintage unless you indicate substitution is not allowed.

Customers who bought this Product also bought



Tapiz Malbec '08
Reg. ~~\$16.99~~
ClubBev \$11.99

Show all Wine Glasses

Ratings & Awards

ClubBev: Sign in to rate this item

Wilfred Wong Rating : 88

EXHIBIT C

FALL 2009

BevMo!



\$7.99 ClubBev!
Challis Lane
Old Vine Zinfandel
California '07
 90 PTS WILFRED WONG
 Excellent; packs wonderful berry fruit into a medium-bodied design, the way dinner-wine Zin used to be made.
SECOND BOTTLE FOR 5¢

\$14.99 ClubBev!
Hahn Estates
Syrah
Central Coast '07
 DOUBLE GOLD MEDAL 2009 SF CHRONICLE WINE COMP Front-loaded with plenty of ripe-fruit flavors; a tasty, top American red.
SECOND BOTTLE FOR 5¢

\$17.99 ClubBev!
William Hill Estate
Chardonnay
Napa Valley '06
 91 PTS WILFRED WONG
 A compact wine with excellent drive and apple flavor; packs its wonderful palate presence with pure varietal character; finishes well.
SECOND BOTTLE FOR 5¢

\$18.99 ClubBev!
Francis Coppola
Pavilion Chardonnay
Santa Lucia '08
 89 PTS WILFRED WONG
 Nectarine aromas turn to a sunburst of fuzzy peach flavors that are bright, intriguing, and very good.
SECOND BOTTLE FOR 5¢

\$16.99 ClubBev!
Tapiz
Malbec
Mendoza '08
 90 PTS WILFRED WONG
 Ripe and round, immediately pleasing; plenty of black-fruit goodness; fine, lasting finish.
SECOND BOTTLE FOR 5¢



HERE'S A HOT TIP!

The 5¢ Sale Preview starts Wednesday, 9/30.
 Shop early. Shop often.

MORE THAN 150 WINES!

BevMo!
WINE SALE
50¢

BUY ONE WINE, GET THE



\$10.99 ClubBev!
Columbia Crest Grand Estates Riesling Columbia Valley '07
88 PTS. BEST BUY, WINE ENTHUSIAST
Ripe-fruit flavors of grapes, apples, and oranges in equal proportion, balance is just about perfect.
SECOND BOTTLE FOR 50¢

\$12.99 ClubBev!
Gnarly Head Chardonnay California '07
GOLD MEDAL 2009 CA STATE FAIR WINE COMP Taming the varietal can't be done, so just drink this rich, layered Chardonnay; a superb wine that is absolutely versatile.
SECOND BOTTLE FOR 50¢

\$12.99 ClubBev!
Beringer Sauvignon Blanc Napa Valley '06
87 PTS WINE SPECTATOR
Distinctive, pungent tropical and citrus flavors and aromas; additional qualities of tangy herb, passion fruit, and gooseberry.
SECOND BOTTLE FOR 50¢

\$14.99 ClubBev!
Wildhurst Reserve Chardonnay Lake County '06
SILVER MEDAL 2008 LONG BEACH GRAND CRU WINE COMP
Tastes rich, age-core-fruit flavors that seem to last forever; suave and sophisticated.
SECOND BOTTLE FOR 50¢

\$11.99 ClubBev!
Donovan-Parke Chardonnay California '06
86 PTS WILFRED WONG
Blows the competition out of the water! Flavors of lemon rind and crisp apple steady the palate.
SECOND BOTTLE FOR 50¢

MORE
150 V

\$7.99 ClubBev!
Weston Estate Winery Chardonnay California '07
85 PTS WILFRED WONG
Clean, fresh, light, and well balanced; a solid example of California's skill with this well-traveled varietal.
SECOND BOTTLE FOR 50¢

\$12.99 ClubBev!
Stanza Gewürztraminer Monterey '08
90 PTS WILFRED WONG
Big boned with flavors of spice and peaches; long and rich with a note of sweetness.
SECOND BOTTLE FOR 50¢

\$15.99 ClubBev!
Cinzano Spumante Asti
87 PTS WILFRED WONG
A fresh, zesty spumante ready to put a little fun in your life; good sweetness, delightfully aromatic, and a fine quaffer.
SECOND BOTTLE FOR 50¢

\$8.99 ClubBev!
Talus Chardonnay California
Comes across as one of Lodi's top white wine efforts with plenty of satisfying ripe-fruit flavors.
SECOND BOTTLE FOR 50¢

\$13.99 ClubBev!
Wildhurst Reserve Sauvignon Blanc Lake County '05
SILVER MEDAL 2007 CA STATE FAIR WINE COMP A clear cut above the rest of the field; nicely focused on its fine dried-citrus, melon flavors.
SECOND BOTTLE FOR 50¢

\$16.99 ClubBev!
Tapiz Chardonnay Mendoza '08
91 PTS WILFRED WONG
Vivid and brilliant, it sends the thrill of nectarine and mineral throughout the palate; excellent weight is enhanced by superb balance.
SECOND BOTTLE FOR 50¢

\$9.99 ClubBev!
Jacob's Creek Brut Australia NV
86 PTS WINE SPECTATOR
Bright and lively with smoked apple and fresh-baked bread flavors; crisp, with a wonderful balance on the finish.
SECOND BOTTLE FOR 50¢

\$14.99 ClubBev!
Michael Pozzan Chardonnay Napa Valley '07
87 PTS WILFRED WONG
Takes a rounder route than the previous vintage, showing beautiful ripeness and a pleasing fleshy aftertaste.
SECOND BOTTLE FOR 50¢

\$18.99 ClubBev!
Dry Creek Vineyard Chardonnay Russian River Valley '06
88 PTS CALIFORNIA GRAPEVINE
Attractive, earthy, floral, citrus, and pear aromas with hints of hazelnut and vanilla; crisp, spiced-apple flavors; lingering.
SECOND BOTTLE FOR 50¢

\$9.99 ClubBev!
Trinity Oaks Pinot Grigio California '08
GOLD MEDAL, BEST OF CLASS, 2009 LA INTL WINE & SPIRITS COMP
Wonderful; this sprightly Pinot Grigio is easily one of America's best white wine values.
SECOND BOTTLE FOR 50¢

\$14.99 ClubBev!
Napa Valley Vineyards Chardonnay Napa Valley '07
85 PTS WILFRED WONG
An easy wine to like; soft-spoken, serious ripe-fruit flavors have a softness that soothes the palate; textured aftertaste.
SECOND BOTTLE FOR 50¢

\$24.99 ClubBev!
Bannus Reserve Chardonnay Sonoma Coast '06
91 PTS WILFRED WONG
Finely tuned, elegantly structured; minerally, tart-apple flavors. A California Chard of balance and grace.
SECOND BOTTLE FOR 50¢

SECOND BOTTLE FOR 50¢



\$16.99 ClubBev!
MontGras Reserva Cabernet-Syrah Colchagua Valley '08
 91 PTS WILFRED WONG
 Deep ruby color; rich, black-fruited, tannic aroma, medium to full bodied rounded on the palate; dry, medium acidity, very good balance.

SECOND BOTTLE FOR 50¢

\$17.99 ClubBev!
Qupé Syrah Central Coast '07
 86 PTS WILFRED WONG
 An unflinching rascal, yet hard to put down, this richly flavored Syrah delivers plenty of red- and black-fruit flavors and a delicious finish.

SECOND BOTTLE FOR 50¢



\$21.99 ClubBev!
William Hill Estate Cabernet Sauvignon Napa Valley '05
 88 PTS WILFRED WONG
 A piquant, well-balanced Cabernet with flavors of bright red fruit and dusty herbs, taking us back to the fine Napa Valley Cabs of yesteryear.

SECOND BOTTLE FOR 50¢

\$29.99 ClubBev!
Sterling Limited Release Meritage Napa County '06
 88 PTS WILFRED WONG
 A dandy depiction of a Meritage; black fruit and earth, well layered and intricate.

SECOND BOTTLE FOR 50¢

\$16.99 ClubBev!
Shiloh Road Cabernet Sauvignon Napa Valley '06
 90 PTS WILFRED WONG
 One of California's greatest Cabernet values, this beautifully ripened wine delivers a bounty of ripe-fruit aromas and flavors, long and silky on the palate.

SECOND BOTTLE FOR 50¢

THAN WINES

\$8.99 ClubBev!
Jacob's Creek Shiraz SE Australia '07
 BRONZE MEDAL 2009 RIVERSIDE INTL WINE COMP
 Bright, tasing, and finely ripened; shows tasty, black-fruit flavors that ride all the way to the finish.

SECOND BOTTLE FOR 50¢

\$15.99 ClubBev!
Stanza Petite Sirah Lodi '07
 89 PTS WILFRED WONG
 A thrilling red that surrounds the palate with a dollop of multi-dimensional, fully ripened grapey flavors.

SECOND BOTTLE FOR 50¢

\$22.99 ClubBev!
Valley of the Moon Cabernet Sauvignon Sonoma County '06
 90 PTS WINE & SPIRITS
 Mouth-fused bouquet of ripe cherry, vanilla, and charred oak, accessible cherry fruit with well-integrated tannins and acids.

SECOND BOTTLE FOR 50¢

\$9.99 ClubBev!
Round Hill Merlot California '06
 BRONZE MEDAL 2009 SF CHRONICLE WINE COMP
 Pulls no punches, a fine, red-fruited wine with a pleasant softness on the palate.

SECOND BOTTLE FOR 50¢

\$16.99 ClubBev!
Donovan-Parke Pinot Noir California '08
 90 PTS WILFRED WONG
 Well structured and strong with pretty black-fruit flavors; stays long and tasty to the finish.

SECOND BOTTLE FOR 50¢

\$24.99 ClubBev!
Michael Pozzan Cabernet Sauvignon Knights Valley '07
 89 PTS WILFRED WONG
 A wonderful Knights Valley Cabernet. Fine black fruit with a dusting of cocoa and sweet earth; lively aftertaste.

SECOND BOTTLE FOR 50¢

\$12.99 ClubBev!
Gnarly Head Merlot California '05
 BRONZE MEDAL 2008 CA STATE FAIR WINE COMP
 A solid-drinking Merlot with straightforward ripe-berry flavors that linger nicely into the finish.

SECOND BOTTLE FOR 50¢

\$16.99 ClubBev!
Lalonde Malbec Mendoza '07
 91 PTS WILFRED WONG
 A rich, fine red that lingers long and lovingly on the palate; round, stands up well in the aftertaste; try with a grilled rib eye.

SECOND BOTTLE FOR 50¢

\$24.99 ClubBev!
Wattle Creek Triple Play Red California '05
 89 PTS WILFRED WONG
 Syrah, king of the Rhône varietals, dominates this vintage. Grapes with exceptional intensity were selected to create this unique blend.

SECOND BOTTLE FOR 50¢

\$14.99 ClubBev!
Zig Zag Zinfandel Mendocino '06
 89 PTS WILFRED WONG
 Totally user friendly and absolutely first rate, brightly fruited with pretty raspberry flavors, round and delectable on the palate.

SECOND BOTTLE FOR 50¢

\$18.99 ClubBev!
Francis Coppola Petite Sirah California '07
 87 PTS WILFRED WONG
 Deep and rich, with aromas that are fruity and a bit meaty. Full flavored, round, and soft on the palate; smooth and satisfying.

SECOND BOTTLE FOR 50¢

\$27.99 ClubBev!
Torii Mor Winery Pinot Noir Oregon '07
 90 PTS WILFRED WONG
 Nicely balanced and pretty, red fruited with some unobtrusive black fruit that sneaks in; lacy aftertaste.

SECOND BOTTLE FOR 50¢

BevMo! 1470 Enea Circle, Suite 1600
Concord, CA 94520



**IT'S HOT, HOT, HOT.
The 5¢ Sale Preview
starts Wednesday, 9/30.**

CA

Please drink responsibly.

Postmaster: Please deliver 9/26-9/29

GREAT NEW ADDITIONS TO YOUR FAVORITE SALE

\$12.99 ClubBev!
**Benziger
Chardonnay
Sonoma County '06**
87 PTS WILFRED WONG
Boasting a combination of ripe peach and sweet
creaminess, this appealing Chard zings on the
palate with fine vitality, pleasing, crisp aftertaste.
SECOND BOTTLE FOR 5¢

\$11.99 ClubBev!
**Penfolds Koonunga Hill
Shiraz
South Australia '06**
87 PTS WILFRED WONG
Fine, easy-drinking red that's soft but
sturdy; smooth tannins give it additional
structure.
SECOND BOTTLE FOR 5¢



\$7.99 ClubBev!
**Barefoot
Sparkling Chardonnay
California NV**
DOUBLE GOLD MEDAL 2009 SF INTL
WINE COMP. Wow, what a nice wine!
A user-friendly, easygoing, superbly
balanced bubbly with a lively finish.
SECOND BOTTLE FOR 5¢

\$16.99 ClubBev!
**Norton Barrel Select
Malbec
Mendoza '06**
80 PTS WILFRED WONG
Persistent and totally enveloping, ripe-fruited,
inky; penetrates the palate with exceptional
black-fruit qualities.
SECOND BOTTLE FOR 5¢

\$10.99 ClubBev!
**Columbia Crest Grand Estates
Pinot Grigio
Columbia Valley '07**
86 PTS WILFRED WONG
Aromas of peach, orange blossom, and citrus
lead to fruit-forward flavors of pear with citrus
overtones and vibrant acidity.
SECOND BOTTLE FOR 5¢



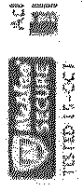
STARTING 9/30, VISIT BevMo.com FOR A COMPLETE LIST OF 5¢ SALE WINES.

Limited to supplies on hand. Vintages subject to change. All bottles are 750ml unless otherwise noted. We reserve the right to correct any typographical errors.
5¢ Sale: Must be a ClubBev! member, and valid on select wines only. Second bottle must be the same as the bottle purchased at full price. Prices and sale
effective for a limited time only.

EXHIBIT D



Shopping Basket Checkout Customer Service My ClubBev! Sign In



Welcome Customer. You have 0 item(s) in your Shopping Basket Checkout Track an Order FAQ

Search item # or keywords Ship to CA

NEW

Vineyard Partners

WINE

- 5-cent Sale
- Cabernet Sauvignon
- Champagne/Sparkling
- Chardonnay
- Gewurztraminer
- Merlot
- Other Reds
- Other Whites
- Pinot Noir
- Riesling
- Rose/Blush
- Sauvignon Blanc
- Syrah/Shiraz
- Zinfandel

- USA
- France
- Italy
- More...

SPIRITS

- Bourbon
- Brandy
- Gin
- Liqueur
- Other Whiskies
- Prepared Cocktails
- Rum
- Scotch

BevMo! 5c WINE SALE

Buy One Wine, Get the Second Bottle for 5c!

[View All 5c Wines >](#)

Over 200 wines! Check out some of the exceptional wines in the 5c sale >

Second bottle must be the same as the bottle purchased at full price*. ClubBev! membership required.

5c RED WINES > **5c WHITE WINES >** **5c VINEYARD PARTNERS >**

Shop all 5c Red Wines! Shop all 5c White Wines! Shop all 5c Vineyard Partners Wines!

Tequila
Vodka

BEER

Big Breweries
Ciders
Imported Beers
Malt Beverages

GIFTS

Accessories
Beer Gifts
Luxurious Spirits
Wine & Champagne
Wine Baskets & Trios

& MORE!

Appliances
Bar Mixers
Bar Mixes
Barware
Beverages
Candy
Caviar
Cigars
Cool Items
Games
Gift Cards
Giftwrap
Glassware
Gourmet Foods
Olde Time Sodas
Paper/Plastic
Serving & Entertaining

Most Popular Links:

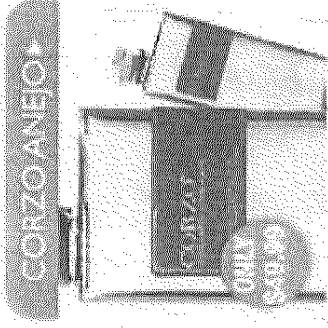
Highly-rated Craft Brews on ClubBev
Premium Spirits
90-Pt Wines!
Hot Brands Under \$10



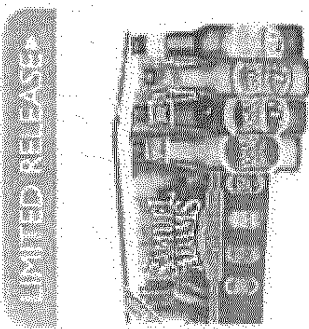
Cazadores Tequila Reposado
1.75ltr only \$49.99 ClubBev!



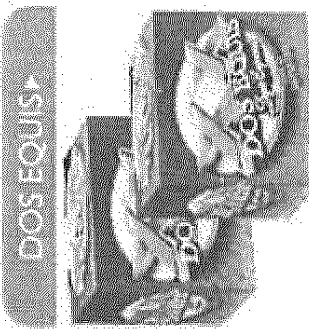
El Jimador Anejo Tequila only
\$29.99 ClubBev!



Corzo Anejo Tequila only
\$49.99!



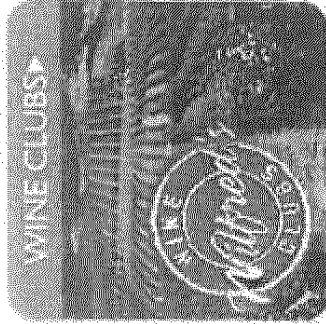
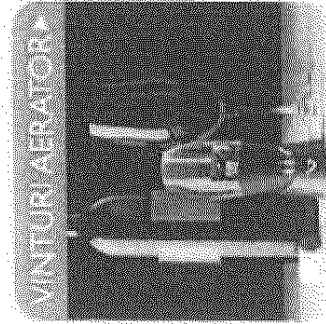
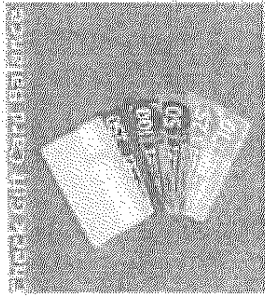
Sam Adams Breweries' Selection
(24-PK) Brewer's Selection
limited release!



Select Dos Equis 12-pks only
\$11.99 ClubBev!



Anderson Peanut Butter Pretzel
Nuggels (24 OZ) only \$6.99
ClubBev!



Wine needs to breathe: Vinturi Wine Aerator. Only \$39.99!

Satisfy your craving for extra savings in every department!

Over 3,900 of the world's best wines, Champagne, and Ports. One tour guide. Join Wilfred's Wine Clubs today and pick up at your local BevMo!

Sign up to receive our e-newsletter, and much more! Send us your email address [here](#).

- Employment
- Customer Service
- My ClubBev!
- About Us
- Terms of Use
- Privacy Statement
- FAQ's



ABOUT SSL CERTIFICATES

Copyright © 2000-2009 BevMo.com. All rights reserved. See our [Privacy Statement](#). Website design and hosting by [VisionOne, Inc.](#)

morgan02

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

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF ORANGE

Peter R. Gray, Jr. v. Beverages & More, Inc.

Superior Court of San Francisco, Case No. CCC 09-493678

I am employed in the County of Orange, State of California. I am over the age of 18 years and not a party to the within action. My business address is **ALVARADOSMITH, 1 MacArthur Place, Santa Ana, CA 92707.**

On **March 23, 2012**, I served the foregoing document described as **FIRST AMENDED CLASS ACTION COMPLAINT FOR VIOLATION OF CALIFORNIA CIVIL CODE SECTION 1750 ET SEQ. (CLRA) AND CALIFORNIA BUSINESS & PROFESSIONS CODE SECTION 17200 ET SEQ. (UCL) AND SECTION 17500, ET SEQ. (FAL** on the interested parties in this action.

by placing the original and/or a true copy enclosed in (a) sealed envelope(s), addressed as follows:

SEE ATTACHED SERVICE LIST

BY REGULAR MAIL: I deposited such envelope in the mail at 1 MacArthur Place, Santa Ana, California. The envelope was mailed with postage fully prepaid.

I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. It is deposited with the U.S. Postal Service on that same day in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one (1) day after date of deposit for mailing in affidavit.

BY THE ACT OF FILING OR SERVICE, THAT THE DOCUMENT WAS PRODUCED ON PAPER PURCHASED AS RECYCLED.

BY FACSIMILE MACHINE [COURTESY COPY]: I Tele-Faxed a copy of the original document to the facsimile numbers. **LISTED ON THE ATTACHED SERVICE LIST.**

BY OVERNIGHT MAIL: I deposited such documents at the Overnite Express or Federal Express Drop Box located at 1 MacArthur Place, Santa Ana, California 92707. The envelope was deposited with delivery fees fully prepaid.

BY PERSONAL SERVICE: I caused such envelope(s) to be delivered by hand to the addressee(s) **LISTED ON THE ATTACHED SERVICE LIST.**

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

(Federal) I declare that I am employed in the office of a member of the Bar of this Court, at whose direction the service was made.

Executed on **MARCH 23, 2012**, at Santa Ana, California.


SANDRA MCLEOD

SERVICE LIST

Peter R. Gray, Jr. v. Beverages & More, Inc.
Superior Court of San Francisco, Case No. CCC 09-493678

ANDREW J. OGILVIE, ANDERSON OGILVIE & BREWER LLP 600 CALIFORNIA STREET, 18 TH FLOOR SAN FRANCISCO, CALIFORNIA 94108	Attorneys for Plaintiff Peter R. Gray, Jr. and the proposed class 415-651-1950 415-956-3233 (fax) Email: andy@aoblawyers.com
DOUGLAS A. WINTHROP SARAH J. GIVAN D'LONRA C. ELLIS HOWARD RICE NEMEROVSKI CANADY FAUK & RABKIN THREE EMBARCADERO CENTER, 7TH FLOOR SAN FRANCISCO, CALIFORNIA 94111-4024	Attorneys for Defendant Beverages & More, Inc. 415-434-1600 415-677-6262 (fax)

ALVARADO SMITH
A PROFESSIONAL CORPORATION
SANTA ANA

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

First Legal Support Services

Los Angeles	(213) 250-1111	• Fax (213) 250-1197
Direct line to legal	(213) 250-9111	• Fax (213) 250-1197
Los Angeles (West)	(310) 277-9111	• Fax (310) 277-9153
Direct line to legal	(310) 277-7101	• Fax (310) 277-9153
Inland Empire	(951) 779-1110	• Fax (951) 779-0100
San Diego	(619) 237-9111	• Fax (619) 237-1361
San Francisco	(415) 626-3111	• Fax (415) 626-1331
Santa Ana	(714) 541-1110	• Fax (714) 541-8182
Sacramento	(916) 444-5111	• Fax (916) 443-3111
Las Vegas	(702) 871-4002	• Fax (702) 366-0768
Phoenix	(602) 248-9700	• Fax (602) 248-9727

COURT FILING / COURT RESEARCH FORM	web address: firstlegalsupport.com	CONTROL NO. 9446711	DATE: 3-23-12
FIRM NAME: AlvaradoSmith 1 MacArthur Place, Suite 200 Santa Ana, CA 92707 PHONE: (714) 852-6800 FAX: (714) 852-6899 ATTY / Sandra McLeod EXT: 6872	DESTINATION / COURT: SAN FRANCISCO COUNTY SUPERIOR COURT CIVIC CENTER COURTHOUSE		
CLIENT MATTER / ATTY. CODE: NRJS1212.1	DOCUMENTS FIRST AMENDED COMPLAINT		
CASE NO: CGC-09-493678	HEARING SET FOR: _____ AT _____ DEPT/DIV _____		
Short Title of Case: Gray v. Beverages & More			

PLEASE NOTE ANY SPECIFIC OR TIMELY FILING REQUIREMENTS			
COURT RESEARCH	ON DEMAND FILINGS		COURT RUN
<input type="checkbox"/> ASAP RESEARCH (Immediate) <input type="checkbox"/> SAME DAY RESEARCH (Allow full day to obtain) <input type="checkbox"/> NEXT DAY RESEARCH (Allow two days to obtain)	<input type="checkbox"/> SPEC FILE (Immediate) <input type="checkbox"/> ASAP FILE (Within 1 hour)	<input type="checkbox"/> RUSH FILE (Within 2 hours) <input type="checkbox"/> REG FILE (Within 4 hours)	<input checked="" type="checkbox"/> SAMEDAY (Filings Only)* <input type="checkbox"/> NEXTDAY (Filings Only)* *Per Agreement
<input type="checkbox"/> FILE <input type="checkbox"/> RESEARCH COPY REQUEST	<input type="checkbox"/> ISSUE <input type="checkbox"/> CERTIFIED COPY	<input type="checkbox"/> SUBMIT <input type="checkbox"/> FORM REQUEST	OTHER: Complete by:
SPECIAL INSTRUCTIONS: Please file today (3-23-12 is DEADLINE) and return conformed copy. Call if any questions or concerns.			
THANK YOU SANDRA MCLEOD (714) 852-6872			