

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

INTERNATIONAL BOTTLED WATER
ASSOCIATION, et al.,

Plaintiffs,

vs.

DAVID A. PATERSON, in his official capacity as
Governor of the State of New York, et al.,

Defendants.

No.

DECLARATION OF DANIEL FRIEDRICH

I, Daniel Friedrich, hereby declare as follows:

1. I am over the age of 18 years. I am competent to make this declaration and do so of my own volition.

2. I am Vice President of Customer Development for Nestlé Waters North America, Inc. (“Nestlé”). I am responsible for commercial planning, sales communication, forecasting, and customer service. I have 29 years experience in the consumer product goods industry in finance, marketing, sales, and general management.

3. Nestlé Waters North America, Inc. is a member of the International Bottled Water Association (“IBWA”). IBWA is a trade association that represents the interests of the bottled water industry.

Nestlé Waters North America, Inc.

4. Nestlé produces and distributes many well-known bottled water brands, including Deer Park, Poland Spring, and Nestlé Pure Life.

5. Nestlé Waters North America, Inc. is more than a \$4 billion business, with wholesale sales in New York State of approximately \$650 million. Nestlé's New York State business consists of retail sales in convenient single serve bottles, bulk containers, and cooler bottles delivered to homes and offices.

Nestlé's Product Distribution System

6. Like many bottled water producers and distributors, Nestlé distributes products to retailers through a "warehouse" model whereby our products are shipped not directly to retail stores but through third party warehouse systems, including broadline wholesalers, distributors, and retail customer-owned warehouses. This is in contrast to a direct to store delivery system which is typical for all products currently in the bottle bill recycling system. In almost all instances, Nestlé products are shipped through these third party warehouses, from where they are shipped to retail outlets along with the majority of other consumer products found in these retail outlets. These warehouses service many states and carry over 45,000 items, from a wide variety of manufacturers. A manufacturer must pay for each unique item that is in this warehouse system. Further, because items in these warehouses are not segregated by state, but instead are shipped from the central warehouses to retail outlets in multiple states based on demand and inventory needs of individual retail outlets, a state specific label would require the manufacturer to have two versions of every item for sale throughout each warehouse.

7. The market warehouse system is a very efficient system—it allows products to reach the retailer at the lowest distribution cost and has the advantage of a much reduced environmental footprint versus a direct to store delivery system. The primary disadvantage of the warehouse system is a loss of ownership control of our product at the warehouse delivery point.

8. By contrast, many carbonated soft drink and beer companies distribute their products using their own direct to store delivery systems. This distribution approach is controlled by the manufacturer from the bottling facility all the way to the retail outlet and onto the shelves. These direct to store delivery systems favored by soda and beer companies are generally used in limited geographic areas where the company knows exactly which product and how much of it went to each retailer. The primary advantage of this distribution system is control of distribution to the retail outlets and control of shelf merchandising at the retail outlet. The primary disadvantage is the higher cost—both dollar and environmental—versus the market warehouse system.

The Amended Bottle Bill's Requirements

9. The recent amendment to the New York State Returnable Container Act, or “Bottle Bill,” has imposed requirements that are impossible or extremely burdensome and expensive for Nestlé to meet. It also creates disadvantages for comprehensive recycling, cost advantages for sugared, non-carbonated water products as compared to water, and favors private label over branded products. A recycling law should not create marketplace disparities among competitors, force companies to meet impossible deadlines, and harm current curbside recycling programs. However, this legislation does all these things.

10. First, the original Bottle Bill applied only to carbonated soft drinks, mineral water, soda water, beer, other malt beverages, and wine coolers. The amendment expands the Bottle Bill by replacing the terms “mineral water” and “soda water” with the word “water.” “Water” is then defined as “any beverage identified through the use of letters, words, or symbols on its product label as a type of water, including any flavored water or nutritionally enhanced water, provided, however, that ‘water’ does not include any beverage identified as a type of

water to which a sugar has been added.” Under this definition, all of Nestlé’s bottled water products are “water” and are subject to the Bottle Bill’s requirements.

11. The amended Bottle Bill also requires a special, New York-exclusive Universal Product Code (“UPC”). UPCs are the bar codes found on most commercial products sold in the United States. Using an optical bar code reader and related computer software, a wealth of information about a product, including its name, package size, flavor, and pricing can be retrieved simply by scanning the product’s UPC. UPCs are used by product manufacturers and distributors for shipping, receiving products, and tracking sales volume and are also used by retailers to automate checkout processes, manage point-of-sale information, and track inventory.

12. The amended Bottle Bill requires Nestlé to comply with all its provisions no later than June 1, 2009.

Impact of the New York-Exclusive UPC Requirement

13. The New York-exclusive UPC requirement will severely harm Nestlé.

14. First, Nestlé will incur significant additional costs by needing to create over 50 new Stock Keeping Units (SKUs) with the New York-exclusive UPC. The cost in additional inventory space, manufacturing complexity, and label changes is estimated at \$6.7 million.

15. Second, many of Nestlé’s customers—wholesalers, distributors, and large retailers—will be unable or unwilling to accommodate both the bottled water products bound for states other than New York and the specially-labeled products bound for New York. These distributors have limited storage and shipping space and logistically are unable to accommodate separate New York-exclusive products. As a result, Nestlé will be forced to discontinue many of the products sold through these customers, reducing sales in New York and surrounding states by over 30%.

16. If a customer is able to handle dual inventories of Nestlé products they will price these products higher to fund the increased complexity in their distribution system which will result in an additional estimated 20% decline in sales.

17. As a result of these changes, Nestlé will lose goodwill with its distributors, retail partners, and consumers. If the New York-exclusive UPC provision takes effect, Nestlé estimates that it will lose approximately \$150 million of its business in New York to other beverage products that are not covered by the Bottle Bill and thus will not have to separate their New York-bound products and use the New York-exclusive UPC, and to companies who use a direct store delivery system and thus can implement the New York-exclusive UPC at far less cost than Nestlé and other companies using a market distribution system.

Impact of the Exception for Sugared Still Water

18. The Bottle Bill's definition of "water" also harms Nestlé. That definition exempts "any beverage identified as a type of water to which a sugar has been added" and consequently provides a competitive advantage to many of Nestlé's competitors.

19. Sugared still water products account for roughly 4% of the beverage market. These products are typically marketed as types of sports drinks, vitamin waters, flavored waters, and energy drinks. All of these sugared still water products could be considered "water to which a sugar has been added."

20. Nestlé estimates that the additional compliance costs associated with the Bottle Bill (excluding the increased cost resulting from the five cent deposit) will increase the cost of a case (24-pack) of Nestlé's bottled water products by \$1.20 per case (a 30% increase in the retail price of a case). Especially in difficult economic times, a price increase like this will cripple the business.

21. Nestlé's sugared water competitors, by contrast, are not required to comply with any of the Bottle Bill's provisions and will not incur any additional costs as a result of the law. It is ironic and bad policy to levy this burden on ordinary bottled water but not on sugared water products in light of the issues we face with obesity in this state.

22. The additional costs incurred by Nestlé but not by Nestlé's sugared water competitors likely will cause Nestlé to lose market share both in New York and in other states. Retailers also may be more willing to carry sugared water products than ordinary bottled water products because those retailers will not be burdened by consumers redeeming sugared water bottles at their stores. For example, one major home improvement retail chain informed Nestlé that it intends to discontinue sales of Nestlé's Poland Spring bottled water in its New York stores as a result of the Bottle Bill, but will continue to sell certain beverages from competitors that are excluded under the Bottle Bill's definition of water. In total, Nestlé estimates that it could lose approximately 15% of its market share, or roughly \$75 million in sales, to sugared beverages not covered by the Bottle Bill.

Impact of the June 1, 2009 Compliance Date

23. The amended Bottle Bill takes effect, with respect to Nestlé, on June 1, 2009.

24. In order to comply with the Bottle Bill's requirements before June 1, 2009, Nestlé must (1) design new labels for its bottled water products sold in New York; (2) apply to the New York Commissioner of Taxation for registration as a Deposit Initiator under the law; (3) implement a new labeling process for its bottled water products offered for sale solely in New York; (4) implement an entirely new distribution system that ensures that New York-labeled bottles are offered for sale exclusively in New York, which will require negotiations and agreements with over 480 third-party distributors; (5) create a process to handle redemption of

bottles and contract with an agent to pick up these bottles from all of the approximately 20,000 retail outlets in New York State in which Nestlé's bottled water products are offered for sale. This last step is particularly difficult because, given the nature of Nestlé's market distribution system, Nestlé cannot easily identify all the retail outlets to which its products are distributed.

25. Nestlé cannot complete all of these steps by June 1, 2009. Accordingly, if the Bottle Bill takes effect as scheduled on June 1, 2009, Nestlé will be temporarily forced to cease the sale of its bottled water products in New York State. This will result in permanent loss of substantial market share, immediate and permanent loss of goodwill with its customers, and loss of hundreds of millions of dollars in sales.

26. Nestlé estimate that the earliest date by which it could be prepared to fully comply with the law is October 1, 2009. A date which would allow the new systems to be properly negotiated and tested is May 1, 2010.

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

Dated: May 16, 2009



Daniel Friedrich