

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

INTERNATIONAL BOTTLED WATER  
ASSOCIATION; NESTLÉ WATERS NORTH  
AMERICA, INC; and POLAR CORP. d/b/a POLAR  
BEVERAGES,

Plaintiffs,

vs.

DAVID A. PATERSON, in his official capacity as  
Governor of the State of New York; ANDREW M.  
CUOMO, in his official capacity as Attorney General of  
the State of New York; ALEXANDER B. GRANNIS, in  
his official capacity as Commissioner of the New York  
State Department of Environmental Conservation;  
PATRICK HOOKER, in his official capacity as  
Commissioner of the New York Department of  
Agriculture and Markets; and ROBERT L. MEGNA, in  
his official capacity as Commissioner of the New York  
State Department of Taxation and Finance,

Defendants.

No.

**DECLARATION OF MICHAEL J. MULRAIN**

I, Michael J. Mulrain, 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 Chief Financial Officer and Secretary of Polar Corp. ("Polar") and its wholly-owned subsidiary, Adirondack Beverages Corp. ("Adirondack") (unless otherwise indicated, the collective business is referred to herein as "Polar"). I am responsible for all financial matters of Polar and have over 15 years of experience in the beverage industry and over 25 years of experience in finance, marketing, sales, and general management.

3. Polar is a member of the American Beverage Association (“ABA”) and the International Bottled Water Association (“IBWA”). The ABA is a trade association that represents beverage producers, distributors, franchise companies and support industries. IBWA is a trade association that represents the interests of the bottled water industry.

#### **Polar**

4. Polar is a 4<sup>th</sup> generation family-owned company and the largest independent beverage company in the United States. Polar produces and distributes many well-known carbonated soft drink and bottled water brands, including Polar, Adirondack, Waist Watcher, 7Up, A&W, Sunkist and many others throughout much of the eastern United States. Adirondack produces and distributes bottled water products out of Scotia, New York.

5. Polar is more than a \$300 million business, with sales in New York State of approximately \$75 million. Polar’s New York State business consists of retail sales in various size containers including 12 oz. cans, 1, 2 and 3 liter bottles and 16.9, 20 and 24 oz. bottles, among others.

#### **Polar’s Product Distribution System**

6. Polar distributes products to retailers through both a direct store delivery system (“DSD”) and a bulk or warehouse system that utilizes wholesalers, distributors, and retail customer-owned warehouses. In the DSD system, Polar controls the inventory and distributes its products directly to retailer store locations from Polar operated warehouse locations. 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 higher cost vs. the warehouse system.

7. When distributing its product through wholesalers, distributors and retail customer-owned warehouses, these outlets service many states and some carry thousands of items. Items in these warehouses are not segregated by state, but instead shipped from the central warehouses to retail outlets in multiple states based on demand and inventory needs of individual retail outlets. The primary advantages of this system are its environmental and cost efficiency. The primary disadvantage is a loss of ownership control at the warehouse delivery point.

### **The Amended Bottle Bill's Requirements**

8. The recent amendment to the New York State Returnable Container Act, or "Bottle Bill," made a number of major changes that are relevant to this litigation.

9. 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 sugar has been added." Under this definition, all of Polar's non-carbonated bottled water products are "water" and are subject to the Bottle Bill's requirements.

10. 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.

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

**Impact of the New York-Exclusive UPC Requirement**

12. The New York-exclusive UPC requirement will severely harm Polar.

13. First, Polar will incur significant additional costs by needing to create over 1,000 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 \$3.7 million. This cost is prohibitive to Polar and may result in the cessation of a large portion of its New York business resulting in the loss of up to 100 jobs in the state.

14. Second, many of Polar's customers—wholesalers, distributors, and large retailers—will be unable or unwilling to accommodate both the Polar 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, Polar will be forced to discontinue many of the products sold through these customers, reducing sales in New York and surrounding states by over 30%.

15. If a customer is able to handle dual inventories of Polar 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.

16. If the New York-exclusive UPC provision takes effect, Polar estimates that it will lose approximately \$35 million of its business in New York due to its own decision to stop

selling many existing items and because of the inability of its customers to handle dual UPC codes for Polar products handled through their warehouses.

**Impact of the June 1, 2009 Compliance Date**

17. The amended Bottle Bill takes effect, with respect to Polar, on June 1, 2009.

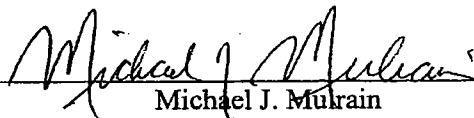
18. In order to comply with the Bottle Bill's requirements before June 1, 2009, Polar must (1) design new labels for its bottled water products sold in New York; (2) apply to the New York Commissioner of Taxation for registration as a Deposit Initiator under the law; (3) implement a new labeling process for its bottled water products offered for sale solely in New York; (4) implement an entirely new warehouse and distribution system that ensures that New York-labeled bottles are segregated from all other products and offered for sale exclusively in New York.

19. Polar cannot complete all of these steps by June 1, 2009. Accordingly, if the Bottle Bill takes effect as scheduled on June 1, 2009, Polar will be temporarily forced to cease the sale of some of its 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 millions of dollars in sales and the loss of jobs to New York residents.

20. Polar estimates that the earliest date by which it could be prepared to fully comply with the law 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 18, 2009

  
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Michael J. Mulrain