

**Pepsi-Cola Bottling Co. of N.Y., Inc. v New York  
Pepsi-Cola Distribs. Assn., Inc.**

2018 NY Slip Op 33022(U)

November 21, 2018

Supreme Court, New York County

Docket Number: 652209/2018

Judge: Andrea Masley

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL PART 48

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PEPSI-COLA BOTTLING COMPANY OF NEW  
YORK, INC.,

Index No.: 652209/2018

Petitioner,

-against-

Motion Seq. No. 004

NEW YORK PEPSI-COLA DISTRIBUTORS  
ASSOCIATION, INC., et al.,

Respondents.

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Masley, J.:

Respondents, the truck drivers who distribute all Pepsi products in New York City, seek to raise the commission rates for certain beverage packages of different sizes and units. Since May, 2018, Pepsi deliveries have continued in New York City pursuant to a TRO on consent. (NYSCEF Doc. No. 14).

Petitioner Pepsi-Cola Bottling Company of New York, Inc. (PCNY) moves, (1) pursuant to CPLR 2221 (d) (2), for leave to reargue this court's prior order on motion sequence number 002, denying PCNY's motion to quash the Arbitration Subpoena issued by respondents New York Pepsi-Cola Distributors Association, Inc. (Association), A.J.A. Beverage Distributors, Inc., Bailey Bev., Inc., Bay View Beverage Co., B J Dist., Inc., B.W. Beverage Corp., For the Kids Beverages, Inc., Gabriel Beverage Distributors, Inc., Jencon Beverage Distributor Corp., Kap Beverage Distributors Inc., Kenro Distributor, Inc., KV/K Distributor Inc., Letta Beverage Distributor, Inc., LTL Distributors, Inc., Prince Beverage Distributors Inc., Tower Distributor Inc., Tribeca Beverage, Inc., Brooklyn Heights Beverage Distributors Inc., Golden Rose Beverage Inc., Avenue Bev., Inc., KAM Distributors Inc., M Squared Beverage Corp., Pelham Bay Beverage Inc., TM Beverage Distributor, Inc., LPL Beverage Distributor, Inc., 4J'S Beverage, Inc., G&M Beverage, Inc., Malex Beverage, Inc., East Hills Beverage Distributor, Inc., G.V.M.

Beverage Distributor, Inc., GJL Beverage, Inc., Red Beverage Corp., Landy-Distributor Corp., Wade Beverage Distributor, Inc., T.M.J. Beverage Corp., TJC Beverage, Inc., Seaside Beverage, Corp., M&M Beverage, Inc., Wyckoff Beverage Distributor, Inc., Kathico Distributors, Inc., Rebecca Beverages, Inc., Cambridge Beverage Distributors, Inc., Cambridge Beverage Distributors, Inc., Next Level Beverage Distributors, Inc., Ditmars Distributors, Inc., and ABC Corp. 1-70's (collectively, Individual Distributors) and granting the Association's cross motion to compel PCNY's compliance with the Arbitration Subpoena; (2) pursuant to CPLR 2304 quashing the Arbitration Subpoena; (3) pursuant to CPLR 3103 granting PCNY a protective order; and (4) denying the Association's original cross motion to compel compliance with the Arbitration Subpoena.

PCNY is engaged in the sales and distribution of products, including soft drinks, to outlets located in New York City and Westchester. (NYSCEF Doc. No. 77 at 2.) To distribute these products, PCNY enters into an agreement (Agreement) with the Individual Distributors. The Agreement specifies the geographic areas in which the Individual Distributors will distribute the products. To the extent that further negotiations are required, the Individual Distributors authorize the Association to represent them. (NYSCEF Doc. No. 77 at 14.)

Because PCNY and the Individual Distributors allegedly failed to agree on the amount of commissions to be paid to the Individual Distributors for the sale of "uncovered packages" under the Agreement, the Individual Distributors and the Association filed a Demand for Arbitration against PCNY on May 11, 2018. (NYSCEF Doc. No. 93 at 4.) The relevant provision of the Agreement provides that, "the commission to be paid the Distributor shall be mutually agreed upon by the parties. Upon refusal or failure to enter into such agreement, the matter shall be subject to

arbitration..." (NYSCEF Doc. No. 42 at ¶ 13.) Accordingly, the Association seeks an arbitration award (1) fixing the Individual Distributors' commissions at 18% of the wholesale price of uncovered packages and (2) fixing an additional 50% commission with respect to the sales of uncovered packages subject to two-tier pricing arrangements.<sup>1</sup> (NYSCEF Doc. No. 93 at 4.)

On July 6, 2018, the Association issued the Arbitration Subpoena, requesting that PCNY produce at the arbitration hearing certain documents and information spanning a period of approximately 20 years. (NYSCEF Doc. No. 77 at 14.) This information concerns three categories: transshipping; data as to price, volume, and upcharging; and reduced promotions and discounts. (NYSCEF Doc. No. 93 at 5.) As to transshipping, the Association argues that many customers in the Independent Distributors' exclusive territories are able to purchase Pepsi products directly or indirectly from high volume vendors serviced by PCNY who pay substantially lower prices than the wholesale prices that the Independent Distributors are required by PCNY to charge. The prevalence of transshipping, according to the Association, is of great import when determining the commission rates that are appropriate for the Independent Distributors. (NYSCEF Doc. No. 93 at 13.) Therefore, the Association seeks in request 1, the number of cases of beverages purchased from PCNY in 2017 and 2018 and the price paid per case in 2017 and 2018 for 25 non-party high volume vendors. (NYSCEF Doc. No. 93 at 5.) Additionally, in request 2, the Association seeks any communication or efforts by PCNY to inhibit these high volume vendors from selling

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<sup>1</sup> The Association maintains that two-tier pricing is a practice of charging certain customers a higher price than the prevailing wholesale price on products as a result of those customers receiving a higher level of service from the Individual Distributors. (NYSCEF Doc. No. 93 at 5.)

the beverages in New York County, Brooklyn, Queens, and the Bronx. (NYSCEF Doc. No. 77 at 4.)

As to data concerning price, volume and upcharching, the Association maintains that the arbitrator must be informed about the change in volume and price of the products distributed over the recent years and the economics of two-tier pricing arrangements. (NYSCEF Doc. No. 93 at 5.) Accordingly, the Association seeks in requests 3 to 8 records from the last 20 years concerning: the total number of cases of each covered package sold to the Individual Distributors from PCNY; the wholesale price of each covered package; the number of cases of each uncovered package sold to the Independent Distributors; the wholesale price of each uncovered package, the total number of cases of each covered package and uncovered package for which an upcharge was paid; and the dollar amount of the upcharge paid for each covered and uncovered package. (NYSCEF Doc. No. 77 at 5.)

As to reduced promotions and discounts, the Association argues that PCNY has cut promotions and discounts without increasing wholesale prices. Allegedly, the Independent Distributors' sales volume has suffered as a result and their commission revenue has stagnated due to relatively insignificant increases in wholesale prices. (NYSCEF Doc. No. 93 at 5.) The Association maintains that promotions and discounts provided to vendors are also of great import for determining commissions that are appropriate. Therefore, the Association seeks in requests 9 and 10 documents from the last 20 years showing: the total dollar amount of all discounts, promotions, and rebates provided by PCNY to (1) customers of the Independent Distributors in New York County, Brooklyn, Queens the Bronx and (2) direct customers of PCNY in New York County, Brooklyn, Queens and the Bronx. (NYSCEF Doc. No. 77 at 5.) The

Association also seeks the total dollar amount of all discounts, promotions, and rebates provided by nonparty PepsiCo Inc. to (1) customers of the Independent Distributors in New York County, Brooklyn, Queens, the Bronx, and (2) direct customers of PCNY in New York County, Brooklyn, Queens and the Bronx. (*Id.*)

On July 13, 2018, PCNY moved for a protective order and to quash the Arbitration Subpoena pursuant to CPLR 7502, 2304, and 3103. The Association opposed and cross-moved to compel compliance with the Arbitration Subpoena. This court heard oral argument on August 22, 2018, at which time the parties indicated that the arbitrator declined to bifurcate the hearings into two parts, one concerning interpretation of the Agreement and whether the parties had actually agreed on commissions and another concerning setting the commissions if necessary. (NYSCEF Doc. No. 92 at 16.) Allegedly, the arbitrator indicated to the parties that he wanted to “hear everything at once.” (*Id.*) The court rendered a decision on the record. Specifically, the court granted the Association’s cross motion to compel PCNY’s compliance with the Arbitration Subpoena. However, the court limited the scope of the requests. For requests 1 and 2, the court limited the nonparty high volume vendors from 25 to 6 and limited the documents to be produced from the past three years. (NYSCEF Doc. No. 92.) For requests 3 to 10, the court directed PCNY to produce responsive documents only from the past five years. (*Id.*)

PCNY contends that this court overlooked the fact that the Arbitration Subpoena seeks confidential trade secrets between PCNY and the Individual Distributors or non-party businesses. (NYSCEF Doc. No. 77 at 1.) These alleged trade secrets are sales, volume, and pricing arrangements, as well as discount or promotion allowances granted by PCNY and PepsiCo to the Individual Distributors’ nonparty customers and PCNY’s

nonparty customers. (*Id.*) These alleged trade secrets, according to PCNY, would be of value to the Association or Individual Distributors who may use the trade secrets to gain unlawful advantages in future negotiations or engage in unlawful competition with PCNY. They further argue to disclose the sales, volume, and pricing data would serve no purpose because the arbitrator is familiar with the soft drink industry and prohibited from changing the terms and conditions of the Agreement. (*Id.*; NYSCEF Doc. No. 43.)

Additionally, PCNY contends that this court mistakenly relied on the assertion that the information demanded in the Arbitration Subpoena is subject to disclosure or necessary for resolution of the underlying arbitration as to whether the parties failed to agree on commission rates to new beverage container sizes and or package configurations since July 1984. (NYSCEF Doc. No. 77 at 1.) Specifically, PCNY maintains that the court mistakenly believed that information demanded in the Arbitration Subpoena was necessary for the arbitration. (*Id.* at 9.) However, PCNY contends that there is no requirement for disclosure of either parties' finances with respect to the calculation of the rate of commissions or for any other purpose. (*Id.* at 14.) In ordering PCNY to comply with requests 1 and 2, the court allegedly "overlooked the relevant terms of the parties' Agreement" because the Agreement prevents the arbitrator from rewriting the Agreement in this proceeding or arbitration. (*Id.* at 16.) Specifically, the Agreement provides,

"[a]ny and all disputes or disagreements between [PCNY] and the Distributor concerning the interpretation of application of the provisions of this Agreement, shall be determined in arbitration.... In no event shall the Arbitrator have the power to alter or amend the terms of this Agreement."

(NYSCEF Doc. No. 43.)

PCNY argues that ordering the production of confidential purchase price and

sales records of business entities who are not parties to the Agreement, as well as PCNY's records related to the conduct of these third-party operations for the purpose of assisting the arbitrator in determining a commission rate, based on the damages the Individual Distributors incurred, would amount to an impermissible assessment of damages against PCNY. (NYSCEF Doc. No. 77 at 17.)

In opposition, the Association argues that nowhere in PCNY's original motion to quash or during oral argument did PCNY contend that the information sought in the Arbitration Subpoena consists of trade secrets. (NYSCEF Doc. No. 93 at 10.) Additionally, the Association argues that PCNY did not previously raise its present argument concerning the impermissible assessment of damages. (NYSCEF Doc. No. 93 at 10.) The Association further contends that the court did not overlook that the Arbitration Subpoena seeks confidential information because the court inquired at oral argument as to whether the parties had a confidentiality agreement concerning the materials to be produced. (*Id.*)

CPLR 2221 (d) (2) provides that "[a] motion for leave to reargue . . . shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion." "Reargument does not provide a party an opportunity to advance arguments different from those tendered on the original application." (*Rubinstein v Goldman*, 225 AD2d 328, 328 [1st Dept 1996] [internal quotation marks and citation omitted].)

Additionally, it is "well settled that a motion to quash a subpoena duces tecum should be granted only where the materials sought are utterly irrelevant to any proper inquiry. Moreover, the burden of establishing that the requested documents and



records are utterly irrelevant is on the person being subpoenaed." (*Velez v Hunts Point Multi-Serv. Ctr., Inc.*, 29 AD3d 104, 112 [1st Dept 2006] [citations omitted].)

"Confidential customer lists and sales data may, under some circumstances, constitute trade secrets and be subject to limited protection against disclosure. Where disclosure is essential to ascertaining the truth the privilege must give way." (*Minerals & Chemicals Philipp Corp. v Panamerican Commodities, S.A.*, 15 AD2d 432, 434 [1st Dept 1962].) "[D]ocuments claimed to constitute trade secrets are nevertheless discoverable" where directly relevant. (*Citibank, N.A. v Recycling Carroll Gardens, Inc.*, 116 AD2d 494, 495 [1st Dept 1986].)

Insofar as PCNY argues that the arbitrator cannot determine the amount of commissions because the Agreement provides that "[i]n no event shall the Arbitrator have the power to alter or amend the terms of this Agreement", PCNY advances a contract interpretation contention. However, the Agreement also states, quite plainly, that, "disputes . . . between [PCNY] and the Distributor concerning the interpretation of application of the provisions of this Agreement, shall be determined in arbitration." (NYSCEF Doc. No. 43.) In the event that the arbitrator decides to set commissions, the information requested in the Arbitration Subpoena is not utterly irrelevant. Rather, it is directly relevant for the arbitrator to consider requests 1 through 12 because that information goes to setting appropriate commissions that account for the economics of selling uncovered packages.

Although PCNY claims that the ordered disclosure goes to an impermissible assessment of damages under the Agreement, this mischaracterization is rejected. The ordered disclosure was not directed for the arbitrator to assess damages as to any of the parties, but to provide the arbitrator with context of the economic ramifications of

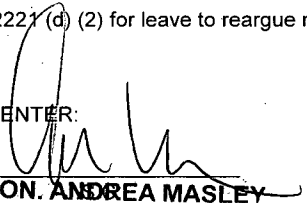
tiered priced and to set the commission. In any event, PCNY's argument that the ordered disclosure goes to an impermissible assessment of damages is an argument not tendered on the original application and, thus, will not be considered on PCNY's improper second attempt to limit the same discovery requests. (*Rubinstein*, 244 AD2d at 328.)

Lastly, trade secrets do not render information undiscoverable. The remedy is for the parties to enter a confidentiality agreement providing for use of the information for the arbitration only. Parties have many options in constructing such an agreement. For example, they can include financial penalties for violation of the agreement or designate highly secret documents for attorneys' eyes only.

Accordingly, it is hereby,

ORDERED that petitioner Pepsi-Cola Bottling Company of New York, Inc.'s motion pursuant to CPLR 2221 (d) (2) for leave to reargue motion sequence number 002 is denied.

Dated: 11/21/18

ENTER:   
HON. ANDREA MASLEY