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January 8, 2018

Barry Snyder
CEO and Founder
Optimum Water Solutions
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Dear Mr. Snyder:

I'm writing in regard to marketing materials produced by your company, Optimum Water Solutions, which make patently false claims about bottled water and the International Bottled Water Association (IBWA). We strongly object to these claims, and we demand that you immediately cease and desist making these false and misleading statements in your marketing materials (flyers, website, and videos).

Optimum Water Solutions (OWS) – flyer (attached) says:

1. *"According to the International Bottled Water Association, 30% of all bottled water is just tap water."*

This is completely false. IBWA has never made such a statement and, furthermore, it is incorrect. Bottled water made using water from a public water system source is not "just tap water." When a public water system is used as a source for making purified bottled water, several processes are employed to ensure that it meets comprehensive U.S. Food and Drug Administration (FDA) regulations. These treatments can include ozonation, filtration, reverse osmosis, distillation, or deionization. The finished water product is then placed in a bottle under sanitary conditions and sold to the consumer, and the physical quality of this water is not the same as water that comes out of the tap.

2. False and misleading claims about total dissolved solids (TDS), both in terms of their function in water and their impact on the safety, healthfulness, and quality of water.

OWS's flyer deceptively refers to TDS as "contaminants," which is a decidedly pejorative term. OWS never mentions that TDS are, in fact, an innocuous collection of minerals found naturally in water. Moreover, you have a chart comparing the amount of TDS in OWS with the amount of TDS in several other water sources. The clear implication of this chart and accompanying statements is to signify that TDS are representative of contamination and poor water quality. These statements and implications are deceptive to consumers and should cease immediately.

TDS are not an indicator of water quality or contamination. The World Health Organization (WHO) defines TDS as “the inorganic salts and small amounts of organic matter present in a solution in water. The principal constituents are usually calcium, magnesium, sodium, and potassium cations and carbonate, hydrogencarbonate, chloride, sulfate, and nitrate anions.”¹ The WHO has not proposed a health-based guideline value for TDS because there are no data that show any adverse health effects associated with the ingestion of TDS.² Moreover, we are not aware of any valid scientific studies demonstrating any health benefits associated with drinking water with low amounts of TDS.

Instead, the reality is that TDS are merely an indication of aesthetic characteristics that may affect taste. The WHO report on TDS considers water with TDS of less than 300 mg/liter to have an “excellent” taste. It is common industry practice to add minerals to some bottled waters for the flavor that they contribute.³ In the United States, bottled water is permitted by FDA to contain up to 500 mg/liter of TDS.⁴ Accordingly, for OWS to imply that TDS are “contaminants” is false and misleading and completely lacks substantiation.

Indicative of the lack of health or safety implications of TDS, mineral water is *required* by FDA to contain at least 250 mg/liter of TDS and is exempted from the 500 mg/liter limit on TDS for bottled water.⁵ Federal regulations state that the exemption is “aesthetically based” and “do[es] not relate to a health concern.”⁶ Mineral water containing above 1,500 mg/liter of TDS must be labeled as “high mineral content” because of its distinct taste but not because of concerns about “contaminants.”⁷ Accordingly, FDA regulations establish that TDS are not a “contaminant” but rather an indicator of aesthetic considerations, such as taste.

Furthermore, when promulgating the bottled water regulations, FDA considered requiring TDS content on the label of all bottled waters.⁸ TDS content-labeling was considered because it would allow consumers to purchase bottled water corresponding to their tastes. However, FDA decided against requiring a mandatory declaration of TDS levels because of a concern that “many consumers may not understand the relevance of specific TDS.”⁹ FDA also stated that it would not object if manufacturers include information concerning TDS content on their labels “*as long as the information is truthful and not misleading.*”¹⁰

¹ World Health Organization. *Total Dissolved Solids in Drinking-Water: Background Document for Development of WHO Guidelines for Drinking-Water Quality*. 2003. Available at http://www.who.int/water_sanitation_health/dwq/chemicals/tds.pdf.

² *Id.*

³ 60 Fed. Reg. 57076, 57084-85 (Nov. 13, 1995).

⁴ 21 C.F.R. § 165.110(b)(4)(i)(A).

⁵ 21 C.F.R. §§ 165.110(a)(2)(iii), 165.110(b)(4)(i)(A), Note 1.

⁶ 21 C.F.R. § 165.110(b)(4)(i)(A), Note 1.

⁷ 21 C.F.R. § 165.110(a)(3)(i); 60 Fed. Reg. at 57100.

⁸ 58 Fed. Reg. 393, 397 (Jan. 5, 1993).

⁹ 60 Fed. Reg. at 57101-57102.

¹⁰ *Id.* at 57102.

OWS's marketing materials are doing exactly that which FDA sought to prevent: Misleading consumers about the function of TDS. By calling TDS "contaminants," OWS is implying that TDS are a safety, health, and quality concern. All evidence about TDS is to the contrary, and OWS is acting deceptively in stating and implying otherwise.

Your company's marketing materials and website make express and implied claims promoting the asserted superior quality and safety of OWS compared with other types of water. These claims consist of several false and misleading statements. In fact, there are no significant and important quality and safety differences between OWS and these other types of water.

3. "tests performed by the Environmental Working Group on leading brands of bottled water turned up a variety of contaminants, including cancer-linked chemicals three times higher than California's health standard."

This statement mentions a 2008 Environmental Working Group (EWG) study that has been discredited as biased and misleading. The results of the EWG study were based on the faulty premise that if any substance is present in a bottled water product — even if it doesn't exceed the established regulatory limit or no standard has been set — then it is a health concern. The report did not show any correlation between the levels of substances found in the bottled water brands tested and any potential adverse health effects. Moreover, the EWG report provides results from a market basket testing program that the EWG conducted on 10 brands of bottled water in nine states and the District of Columbia. That is certainly not a representative sample of bottled water products — which the EWG report acknowledged.

The testing results showed only two bottled water brands didn't meet a California state standard for one regulated substance. There are many hundreds of brands sold in the United States that were not involved in this study. In addition, while bottled water products should always comply with all established regulatory standards, the California requirement for this substance is eight times lower than the FDA standard of quality for bottled water and the U.S. Environmental Protection Agency (EPA) maximum contaminant level for tap water.

In the report, the EWG frequently mischaracterizes substances found in the tested bottled water products and discusses them out of context with accepted scientific determinations. The report is based on the faulty premise that if any substance is present in a bottled water product, even if it does not exceed the established regulatory limit or no standard has been set, then it's a health concern. For example, the EWG was critical of the bottled water brands found to contain fluoride. However, fluoride can prevent tooth decay and the American Dental Association has stated the following: "Whether you drink fluoridated water from the tap or buy it in a bottle, you're doing the right thing for your oral health." Moreover, the levels of fluoride found in the bottled water tested by the EWG were all in compliance with the applicable FDA standards.

The EWG repeatedly fails to draw any correlation between levels of substances found in the bottled water brands tested and the actual levels at which health effects would be evident. In another example, what the EWG calls “fertilizer pollution” is actually organic components that are a natural constituent in all water. Moreover, none of these substances was found to exceed any state or federal standard. The EWG also criticized the tested bottled water for alleged “bacterial contamination,” with the agency mistakenly and erroneously alleging that the presence of HPC bacteria is a contaminant. Again, the levels of HPC found in the bottled water didn’t exceed any state or federal standard. In fact, HPC is commonly found at these same levels in many foods including fruits, meats, produce, and dairy products and has no adverse health consequences.

OWS video (https://www.youtube.com/watch?time_continue=96&v=5qAM7fJo9os) says:

1. *“Bottled water is not clean ... because the bottled water cooler is an open system that has unlimited exposure to contaminants.”*

This statement is not true. Bottled water coolers are designed to minimize water’s exposure to the elements. With advised proper maintenance and cleaning, there is a very limited chance of cooler water becoming contaminated.

2. *“Bottled water takes a serious toll on the planet.”*

This is false. In fact, bottled water has the smallest environmental footprint of all packaged beverages. All bottled water containers are 100 percent recyclable, and, as an industry, we support strong community recycling initiatives and recognize that a continued focus on increased recycling is important for everyone. Home and Office Delivery (HOD) bottled water containers used in water coolers are made of either polycarbonate (PC) plastic or polyethylene terephthalate (PET) plastic and both are 100 percent recyclable. These returnable 3-and 5-gallon HOD bottled water containers are cleaned and sanitized between uses and can be reused 30 to 50 times before being recycled.

3. Bottled water *“prices keep going up.”*

This statement is not true. According to BMC, the per-gallon price of bottled water, on average, was \$1.11 in 2016 (latest figures available). This compares to \$1.21 in 2015, \$1.20 in 2014, and \$1.21 in 2013. The cost has actually been constant, except for a *decrease* in 2016, when it decreased from previous years. As a popular retail food product, bottled water is available at many differing price points. BMC also notes that research shows consumers most often tend to buy bottled water in bulk quantities from supermarkets or large discount retailers, where they can purchase it in cost-saving volume.

4. *“algae and slime... so often found in bottled water coolers.”*

Again, per point #1 in this section, with advised proper maintenance and cleaning, there is a very remote chance of cooler water becoming contaminated, including algae and slime.

You've probably heard by now that in 2016 bottled water outsold carbonated soft drinks (by volume) to become the No.1 packaged beverage in the United States. Americans are making great efforts to live a better lifestyle by choosing healthier foods and beverages, and drinking water – tap, bottled, or filtered – should be encouraged. With the high rates of obesity, diabetes, heart disease, and lead-contaminated tap water in the United States, bottled water provides our on-the-go society a safe, healthy, convenient beverage choice. Discouraging people from choosing this healthy drink option is not in the public interest.

In the United States, false, misleading, and unsubstantiated statements and claims can constitute unfair and deceptive acts or practices in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, and they are subject to enforcement by the Federal Trade Commission (FTC). (There are similar laws in most other countries.) Such claims are also actionable violations of the "false advertising" provisions of Section 43(a)(1)(A) of the Lanham Act, 15 U.S.C. § 1125(a). Under 15 U.S.C. §§ 1116-17, a successful false advertising plaintiff may obtain injunctive relief and also may recover a defendant's profits, damages sustained by the plaintiff, and costs of the action, as well as exemplary damages and attorneys' fees in appropriate cases.

On the basis of the concerns raised in this letter, IBWA demands that Optimum Water Solutions immediately cease and desist from making false, misleading, and disparaging statements about bottled water products based on TDS content, and the quality and safety of bottled water. We look forward to your prompt response so that we may avoid additional action to protect the bottled water industry and the consuming public. I would be happy to speak with you or someone from your company directly to discuss this matter.

Sincerely,

A handwritten signature in black ink that reads "Joe Doss". The signature is written in a cursive, flowing style with a large initial "J".

Joe Doss
President and General Counsel