ANALYSIS OF AGREEMENT CONTAINING CONSENT ORDER TO AID PUBLIC COMMENT

In the Matter of PepsiCo, Inc. , FTC File No. 091-0133

I. Introduction

The Federal Trade Commission ("Commission") has accepted, subject to final approval, an Agreement Containing Consent Order from Respondent PepsiCo, Inc. ("PepsiCo"), to address concerns in connection with PepsiCo's acquisitions of two of its bottlers and the subsequent exclusive license from Dr Pepper Snapple Group, Inc. ("DPSG"), to bottle, distribute and sell the Dr Pepper, Crush, and Schweppes carbonated soft drink brands of DPSG in certain territories. The Consent Agreement requires, among other things, that PepsiCo limit the persons within the company who have access to commercially sensitive confidential information that DPSG will provide to PepsiCo to enable PepsiCo to carry out the distribution functions contemplated by the license.

The DPSG - PepsiCo license agreement followed PepsiCo's announced proposed acquisitions of its two largest bottler-distributors, Pepsi Bottling Group, Inc. ("PBG"), and PepsiAmericas, Inc. ("PAS"). These two bottler-distributors had been licensed by PepsiCo and by DPSG to bottle and distribute many of their carbonated soft drink brands. Following the acquisitions, PepsiCo will take on the bottling and distribution functions previously performed by PBG and PAS.

The Complaint alleges that, as a result of PepsiCo's acquisition of PBG and PAS, PepsiCo will have access to DPSG's commercially sensitive confidential marketing and brand plans. Without adequate safeguards, PepsiCo could misuse that information, leading to anticompetitive conduct that would make DPSG a less effective competitor or would facilitate coordination in the industry. To remedy this problem, the proposed Consent Agreement allows only PepsiCo employees who perform traditional carbonated soft drink "bottler functions" access to the DPSG commercially sensitive information. It prohibits PepsiCo employees involved in traditional "concentrate-related functions" from seeing that information.

II. Respondent PepsiCo, Inc.

PepsiCo is a corporation organized, existing, and doing business under and by virtue of the laws of the State of North Carolina, with its office and principal place of business located at 700 Anderson Hill Road, Purchase, New York 10577. PepsiCo in 2009 had total worldwide revenues from the sale of all products of about $43 billion. PepsiCo's United States sales in 2009 of carbonated soft drink concentrate totaled about $3 billion. United States sales of all of PepsiCo's carbonated soft drink brands are over $20 billion.

PepsiCo is a food and beverage company that includes PepsiCo Americas Beverages (a beverage arm), Frito-Lay (a snack food arm), and Quaker Foods (a cereal arm). Among other products, PepsiCo produces the concentrate for the PepsiCo carbonated soft drink beverage brands that are distributed by its bottlers. Some of those brands are Pepsi-Cola, Diet Pepsi, Mountain Dew, Diet Mountain Dew, Sierra Mist, Slice, and Mug Root Beer.

III. Licensor Dr Pepper Snapple Group, Inc.

DPSG is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 5301 Legacy Drive, Plano, Texas 75024. Among other things, DPSG produces the concentrate for the DPSG carbonated soft drink brands that are distributed by its bottlers. Some of those brands are Dr Pepper, Diet Dr Pepper, Crush, Schweppes, Canada Dry, Vernor's, A&W Root Beer, 7-UP, Hires Root Beer, IBC, RC Cola, Diet Rite, Welch's Grape Soda, Sunkist, and Squirt. DPSG in 2009 had total revenues of about $6 billion. DPSG's United States sales in 2009 of carbonated soft drink concentrate totaled about $1.5 billion.

IV. The Bottlers

A. Pepsi Bottling Group, Inc.

PBG is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at One Pepsi Way, Somers, New York 10589. PBG is the nation's largest bottler and distributor of PepsiCo beverages and accounts for about 56% of PepsiCo's total U.S. bottler-distributed volume of carbonated soft drink beverages. PBG's United States sales in 2009 of carbonated soft drinks totaled about $6 billion. PBG is the bottler-distributor for many PepsiCo and DPSG carbonated soft drink brands. The geographic areas or territories in which PBG is licensed to distribute PepsiCo brand carbonated soft drinks include all or a portion of 41 states and the District of Columbia.

B. PepsiAmericas, Inc.

PAS is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 4000 RBC Plaza, 60 South Sixth Street, Minneapolis, Minnesota 55402. PAS is the nation's second largest bottler and distributor of PepsiCo beverages. PAS's United States sales in 2009 of carbonated soft drinks totaled about $2.5 billion. PAS accounts for about 19% of PepsiCo's total U.S. bottler-distributed volume of carbonated soft drinks. PAS is the bottler-distributor for many PepsiCo and DPSG carbonated soft drink brands. The principal geographic areas or territories in which PAS is licensed to distribute PepsiCo brand carbonated soft drinks include all or a portion of 19 states, primarily in the Midwest.

V. The Two Transactions

A. The Bottler Acquisitions

On August 3, 2009, PepsiCo entered into agreements with PBG and PAS, the two largest independent bottlers and distributors of its carbonated soft drink brands, to acquire all of their remaining outstanding voting securities. The total value of the acquired shares for both bottlers would be approximately $7.8 billion. At the time of the agreements, PepsiCo owned about 40% of PBG and about 43% of PAS. Together, PBG and PAS have been responsible for about 75% of all United States bottler-distributed sales of PepsiCo carbonated soft drink brands and about 20% of all United States bottler-distributed sales of DPSG carbonated soft drink brands.

B. The DPSG-PepsiCo License Agreement

Following the agreements to acquire PBG and PAS, PepsiCo sought a license to continue to bottle and distribute the DPSG brands that the bottling companies had distributed. (The DPSG licenses held by PBG and PAS were terminated by DPSG as a result of the proposed acquisitions.) In the DPSG-PepsiCo license agreement, dated December 7, 2009, PepsiCo agreed to bottle and distribute DPSG's Dr Pepper, Crush, and Schweppes carbonated soft drink brands in the former PBG and PAS territories, where those bottlers had been producing and distributing those products. PepsiCo agreed to pay DPSG $900 million for a non-exclusive license to produce[1] and an exclusive, twenty-year[2] license to distribute and sell those brands.

Under the license agreement, PepsiCo has agreed, among other things, to (a) distribute the Dr Pepper brand in all classes of trade based on the Pepsi brands; (b) grow the Dr Pepper brand based on the sales of other carbonated soft drink brands; (c) promote the DPSG beverages and provide sales support for such promotions, based on PepsiCo's promotions of its other soft drink beverages, and (d) in connection with price-off promotions and media advertising, promote and advertise the Dr Pepper brand based on rates of promotion and advertising of the PepsiCo brands.

VI. The Proposed Complaint

The Commission's Complaint alleges that PepsiCo and DPSG are direct competitors in the highly concentrated and difficult to enter markets for (a) branded concentrate and (b) branded and direct-store-door delivered carbonated soft drinks. The concentrate markets are both national and local, and the branded carbonated soft drink markets are local. Total United

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[1]The production right is not exclusive to allow DPSG to produce carbonated soft drinks in the former PBG and PAS territories for sale by DPSG outside those territories.

[2]The license agreement is for an initial term of twenty (20) years, with automatic renewal for additional twenty (20) year periods, unless terminated pursuant its terms.

States sales of concentrate are about $9 billion, and total United States sales of carbonated soft drinks, measured at retail, are about $70 billion.

By acquiring PBG and PAS, PepsiCo will be bottling and distributing both its own products and those of its competitor DPSG. Concentrate manufacturers like DPSG share commercially sensitive information with bottlers so that bottlers can effectively carry out their responsibilities; DPSG currently provides this sort of information to PBG and PAS. As DPSG's bottler, PepsiCo will need this type of information.

At the same time, Pepsico remains a competitor of DPSG. PepsiCo could use the information in ways that undermine competition. The Complaint alleges that PepsiCo's access to DPSG's confidential information could eliminate competition between PepsiCo and DPSG, increase the likelihood that PepsiCo may unilaterally exercise market power, and facilitate coordinated interaction in the industry. In turn, that conduct could lead to higher prices for consumers.

VII. The Proposed Consent Order

To remedy the alleged competitive concern associated with access to the DPSG commercially sensitive confidential information, the consent decree prevents that information from reaching PepsiCo employees who could use it to either harm DPSG or to facilitate collusion. PepsiCo must set up a firewall to prevent persons responsible for "concentrate-related functions" – the kinds of functions in which PepsiCo engaged as a competitor of DPSG when both had their brands distributed by PBG and PAS – from access to the DPSG information. Persons at PepsiCo who are assigned to perform traditional "bottler functions" – the kinds of functions that PBG and PAS historically have performed for DPSG – will be permitted access to that information.

The proposed Consent Agreement also provides for the appointment of a monitor to assure PepsiCo's compliance with the Consent Agreement. The monitor will have a fiduciary responsibility to the Commission. The monitor will be appointed for a five (5) year term, but the Commission may extend or modify the term as appropriate.

The order, like the DPSG-Pepsi license agreement, will have a term of twenty (20) years.

VIII. Opportunity for Public Comment

The Consent Agreement has been placed on the public record for thirty (30) days for receipt of comments from interested persons. Comments received during this period will become part of the public record. After thirty days, the Commission will again review the proposed Consent Agreement, as well as the comments received, and will decide whether it should withdraw from the Consent Agreement or make final the Decision and Order.

By accepting the Consent Agreement subject to final approval, the Commission anticipates that the competitive problem alleged in the Complaint will be resolved. The purpose of this analysis is to invite and facilitate public comment concerning the Consent Agreement. It is not intended to constitute an official interpretation of the proposed Consent Agreement, nor is it intended to modify the terms of the Decision and Order in any way.